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ALLAHABAD SERIES

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(2020)1ILR A1

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE
THE HON'BLE JAYANT BANERJI, J.

Civil Revision No. 523 of 2012

Om Prakash Lakhina ...Revisionist
Versus
Administrator of Specified Undertaking of U.T. I. & Ors.
...Opposite Parties

Counsel for the Revisionist:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh

Counsel for the Opposite Parties:
Sri Prabodh Gaur, Sri S.K. Rai

A. Code of civil Procedure, 1908 - Section 115 -challenge to- rejection of suit under order 7 rule 11-suit can be dismissed if the same is barred by limitation from a bare reading of plaint-plaintiffs-respondents had discovered the commission of fraud by the defendant-revisionist prior to lodging FIR-date on which the cause of action arose, is misplaced and is not consonance with the provision of section 17 of Limitation Act. (Para 10 to 28)

Civil Revision allowed. (E-6)

List of cases cited: -

1. Mahabir Kishore & Ors. Vs. St. of M. P., MANU/SC/0051/1990

2. Kamlesh Babu & ors. Vs. Lajpat Rai Sharma & Ors. 2008 (3) AWC 2903 (SC)

3. Raghwendra Saran Singh Vs. Ram Prashnna Singh MANU/SC/0367/2019

4. Satya Prakash Sharma Vs. Arif Khan & ors. MANU/UP/3074/2009

5. Panna Lal Jain Vs. Jain Bank of India Ltd. AIR 1938 Lahore 368

6. Manindra Land & Building Corporation Ltd. Vs. Bhutnath Banerjee & ors. AIR 1964 SC 1336

(Delivered by Hon'ble Jayant Banerji, J.)

1. Heard Shri Ajay Kumar Singh, learned counsel for the revisionist and Shri Prabodh Gaur, learned counsel for the plaintiff-respondents.

2. This revision has been filed by the defendant challenging the order dated 28.7.2012 passed by the Additional District Judge, Court No. 10, Varanasi in Civil Suit No. 1007 of 2008 (Administrators of Specified Undertaking of Unit Trust of India and another Vs. Om Prakash Lakhina and others) whereby the issue no. 1 which was to the effect whether the suit being barred by limitation is liable to be rejected under Order 7 Rule 11 CPC, was answered in the negative.

3. The aforesaid original suit was filed by the plaintiff-respondent seeking relief, *inter alia*, of a direction to the defendants to pay to the plaintiffs jointly and severally an amount of Rs. 43,25,346/- as particularly set out in Exhibit 'D' at the foot of the plaint along with interest at the rate of 12 percent per annum from 11.11.2015 till the date of filing of the suit.

4. It is alleged in the suit that fraud had been perpetrated by the other defendants in collusion with the defendant-revisionist who was then the Branch Manager of Unit Trust of India, Varanasi and large sums of money had been deposited by issuance of at par cheques in the name of the defendant no. 3 which were credited to the bank accounts

of defendant no. 3. The amounts were stated to have been credited on 23.10.2000 and thereafter. It is stated that the entries of the cheques were not made in the utilization register at the time of the issuance of cheques. Other allegations are made against all the defendants. It is stated that a four member team of UTI, New Delhi, which conducted preliminary verification/ reconciliation of at par account in May 2002, collected the hard copy of paid data from 1 June 2000 to 30 June 2001 from defendant no. 1 which contained the signature of the defendant no. 1 on every page. It is stated that in the reconciliation statement made on 30.6.2001, the defendant no. 1 had deliberately and intentionally done wrong calculation by putting some fictitious figures to arrive at the bank figure. Misappropriation of an amount of Rs. 3.36 crores is alleged. It is stated in paragraph no. 38 that the defendant no. 1 had also prepared the false reconciliation statement, misrepresented fact and committed criminal omission of vital facts and information due to which the UTI had initiated criminal proceedings against the defendant nos. 1 and 2. In paragraph no. 39 of the plaint, it has been stated that an FIR dated 31.7.2002 had been filed against the defendants and that the defendant nos. 1 and 2 have been served with a charge-sheet. It is further stated that the CBI had arrested the defendant no. 1 on 24.7.2003 and he remained in police/judicial custody for a period of three months. It is further stated that on 30.11.2004, the Enquiry Officer had submitted his report which clearly implicated the defendant nos. 1 and 2 for defrauding the UTI of the aforesaid amount. The order of dismissal was passed against the defendant nos. 1 and 2 on 11.11.2005. In the appeal filed by the defendant no. 1, the Appellate Authority upheld the dismissal of the defendant no. 1 by means of an order dated 9.10.2006. It is stated in paragraph no. 40 that the plaintiff-respondents sent a legal notice dated 17.10.2007 demanding an amount of Rs. 37,09,400/- from the defendant no. 1 and 2 but they failed to return the said amount. In paragraph no. 50 of the plaint it has been stated that the cause of action in respect of the suit accrued on the final dismissal order dated 11.11.2005 being passed against the defendant nos. 1 and 2 and when they failed to respond to the demand notice dated 17.10.2007 and hence the present suit is not barred by the law of limitation.

5. By means of the impugned order, the court below observed that in paragraph no. 50 of the plaint the cause of action has been stated to be arisen for the first time on 11.11.2005 when the defendant nos. 1 and 2 were dismissed and they did not file any reply to the demand notice dated 17.10.2007 and that accordingly the suit was not barred by the Limitation Act, 1963. The court below observed that the defendants had argued that the cause of action actually arose on that very day when the defendant no.1 was dismissed from service and that date was 11.11.2005 and therefore, it was necessary in view of section 3 of the Limitation Act, 1963 for the suit to be lodged within a period of three years from 11.11.2005 which was not done by the plaintiff and the suit was lodged on 28.08.2008. The Court below further stated that no direct relationship of the dismissal of the defendant no.1 exists in respect of the matter in question, though after his dismissal on the basis of the departmental inquiry it came to knowledge that in the above matter, the defendant no.1 had connived in the embezzlement and in this regard he was sent a demand

notice so that the embezzled amount can be recovered but in view of non-receipt of an appropriate reply to the aforesaid demand notice, the plaintiff Bank was constrained to institute the suit for recovering the amount which has been instituted within the prescribed limitation of three years under section 3 of the Limitation Act, 1963 and thus it is not proved that the suit was barred by limitation. Accordingly, issue no.1 was decided at the preliminary stage in the negative.

6. The contention of the learned counsel for the defendant-revisionist is that a bare perusal of the plaint reveals that the suit is barred by limitation. He contends that a four member team of UTI, New Delhi had conducted a preliminary verification/reconciliation of at par account in May 2002, as is mentioned in paragraph no. 15 of the plaint. Learned counsel further referred to the paragraph no. 39 of the plaint to contend that an FIR dated 31.7.2002 had been filed against the defendants and as per own statement of the plaintiff-respondent, the defendant no. 1 was arrested by the CBI on 24.7.2003 and the Inquiry Officer had submitted his report on 30.11.2004. Thus, the suit that was filed on 28.8.2008 was well beyond the limitation prescribed in view of the facts of the case. It is contended that the plaintiffs have wrongly mentioned in paragraph no. 50 of the plaint that the cause of action accrued on the final dismissal order dated 11.11.2005 being passed against the defendant-revisionist. This date, it is contended, has been purposely referred to in the plaint only to bring the suit within limitation.

7. Learned counsel for the revisionist has referred to the impugned order and stated that the court below has misquoted the counsel for the defendant-revisionist that the cause of action actually arose when the defendant-revisionist was dismissed from service and that date was 11.11.2005. The learned counsel has referred to Ground No.(i) in the memorandum of revision in this regard. It has been further stated that the court below has misdirected itself in not referring to the contents of the application filed by the defendant-revisionist under Order 7 Rule 11 CPC and has referred to only two dates mentioned in paragraph no. 50 of the plaint but has wrongly ascertained the date when the cause of action arose. It is contended that even if it is assumed without admitting that the learned counsel for the revisionist had submitted that the cause of action arose when the revisionist was dismissed on 11.11.2005, the court below was bound, in view of the provisions of Section 3 of the Limitation Act, to independently assess the averments in the plaint for purpose of ascertaining that the suit was within limitation.

8. Learned counsel for the revisionist, in support of his contentions, has referred to the judgements of the Supreme Court in the case of **Mahabir Kishore and others Vs. State of Madhya Pradesh** reported in **MANU/SC/0051/1990, Kamlesh Babu and others Vs. Lajpat Rai Sharma and others** reported in ***2008 (3) AWC 2903 (SC), Raghwendra Saran Singh VS. Ram Prashnna Singh*** reported in **MANU/SC/0367/2019** and the judgement of this Court in the matter of **Satya Prakash Sharma Vs. Arif Khan and others** reported in **MANU/UP/3074/2009.** Learned counsel has referred to the provisions of Section 17 of the Limitation Act, 1963 and Section 72 of the Indian

Contract Act in support of his contention. It is contended that the matter for which the suit was filed pertains to some mistake allegedly committed by the defendant-revisionist and as such that would come within the provision of Section 17(1)(c) of the Limitation Act. It is stated that the fraud was discovered by the plaintiff and thereafter they lodged an FIR on 31.7.2002 and charge-sheet was filed by the Enquiry Officer on 24.6.2003.

9. Countering the aforesaid submissions made by the learned counsel for the defendant-revisionist, Shri Prabodh Gaur, learned counsel for the plaintiff-respondents stated that the issue no. 1 framed by the court below pursuant to an application under Order 7 Rule 11 CPC was not an issue that could be considered on the basis of a reading of the plaint alone. Learned counsel has contended that the matter would come under the provisions of Section 17(1)(a) of the Limitation Act. He contends that the point of time from which period of limitation begins to run is a question of fact which can be decided after evidence. He has referred to paragraph nos. 34 and 35 of the plaint to state that the defendants had admitted their guilt and liability before the authority concerned. He states that the process of generating cheques that were encashed was a complex process and therefore fraud cannot be detected easily. It is contended that the plaintiff is not natural person who can derive the knowledge instantly. It could only rely on due process which, in the facts and circumstances of the case, is the disciplinary enquiry which concluded by imposing the penalty of dismissal on the defendant-respondent on 11.11.2005. It is stated that the fraud was discovered after affording full opportunity given to the defendants during the enquiry proceedings, on conclusion of which it can be said that the discovery of fraud took place. Moreover, it is stated that the defendants will not suffer any prejudice in case the suit continues.

10. Learned counsel for the parties have uniformly submitted that Article 113 of the Schedule to the Limitation Act, 1963 would be applicable in the facts of the case.

Section 17 of the Limitation Act is as follows:

"17. Effect of fraud or mistake.-- (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,--

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him,

the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to

recover or enforce any charge against, or set aside any transaction affecting, any property which--

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be."

11. A perusal of the entire plaint reveals that there is a guarded disclosure of dates pertaining to disciplinary proceedings initiated against the defendant-revisionist. In paragraph no. 17, it is stated that the Assistant Manager of UTI, Varanasi had stated during his examination after he had taken charge of at par account reconciliation of UTI, Varanasi from July 2001 onwards that he had noticed serious discrepancies. It is not stated that when did that examination of the Assistant Manager had taken place. In paragraph no.26 of the plaint, it is stated that in the first week of January 2002, it came to notice that several cheques were missing from the office. One Shri Kiran Vohra, the then Manager of UTI, Varanasi, during his visit to New Delhi in the last week of January 2002 and first week of February 2002, reported the matter of missing cheques to the Zonal Manager and Deputy Zonal Manager. On 25.2.2002 some important evidence was lost. In para 27 it is stated that the aforesaid facts conclusively establishes that the defendant no. 1 had deliberately concealed the loss of missing cheques from the zonal office.

12. In paragraph no. 35 of the plaint it has been stated that the defendant no. 2 had admitted his involvement in the fraudulent withdrawal and that due to heavy losses in the share market, he indulged in the fraudulent encashment of at par cheques. He is also alleged to have stated that the defendant no.1 the then Branch Manager was also involved in this matter. However, no date has been mentioned in the plaint that when the defendant no. 2 had admitted his involvement. In paragraph no. 37 it has been stated that the investigation revealed that the defendant no. 1 deliberately tampered the paid file, misplaced/destroyed the paid cheques and fund commitment register and produced bogus reconciliation statement before the statutory auditor and deliberately not provided the necessary records and papers up to June 2001 either to the auditors or to the officers who had taken over the charge of at par reconciliation after July 2001. Again in this paragraph, no dates have been mentioned and no specifics have

been stated that when did the investigation conclude.

13. In paragraph no. 39 of the plaint it is alleged that an FIR dated 31.7.2002 has been filed against the defendants and that the plaintiffs had served a charge-sheets on the defendant no. 1 and 2. The defendant no. 1 was arrested by CBI on 24.7.2003. It is stated that on 30.11.2004 the Enquiry Officer submitted his report which clearly implicated the defendant nos. 1 and 2 for defrauding the UTI for the aforesaid amounts. It is not mentioned in this paragraph that when did the plaintiffs serve the charge-sheet on the defendant nos. 1 and 2.

14. However, from perusal of para 39, a fact that emerges is that the plaintiffs had discovered the alleged fraud which led to the lodging of an FIR dated 31.7.2002 against the defendants.

15. The period of limitation of the suit aforesaid which is based on the alleged fraud of the defendant would not begin to run until the plaintiff discovered the fraud or the mistake or could, with reasonable diligence, have discovered it. The lodging of the FIR on 31.7.2002 is an acknowledgment by the plaintiff of having discovered the fraud. In the Wharton's Law Lexicon (16th Edition), the word '**Discover**' is defined as follows:

"**Discover,** means simply to find out, and applies to the discovery of an error in law and an error in fact. ....."

16. In the Concise Oxford English Dictionary (South Asia Edition, 12th Edition), the word '**Discover**' has been defined as follows:

"**discover-** v. **1** find unexpectedly or during a search. become aware of. **2** be the first to find or observe (a place, substance, or scientific phenomenon)....."

17. A perusal of the plaint reveals that the plaintiffs had become aware or rather, they found out that the alleged fraud did take place prior to the lodging of the FIR dated 31.07.2002. There are exhaustive references in the plaint that the investigations were done at various levels into the alleged fraud, which led to lodging of the FIR. Therefore, the FIR dated 31.07.2002 had been filed against the defendants on discovery of the fraud. Moreover, in paragraph no.39 of the plaint, it has been mentioned that the defendant-revisionist was arrested by the CBI on 24.07.2003. It has further been stated in that paragraph that the Enquiry Officer had submitted his report on 30.11.2004. Therefore, in respect of the aforesaid suit, the time from which the period of limitation would begin to run is 31.07.2002 that is the date of the FIR.

18. Article 113 appears in Part X of the First Division of the Schedule of the Limitation Act, 1963 is as follows:

PART X-SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD

Description of Suit	Period of limitation	Time from which period begins to run
113. Any suit for which	Three years	When the right to sue accrues

no period of limitation is provided elsewhere in this Schedule.

19. The time from which the period begins to run would be when the right to sue accrues and this period would have to be seen with reference to Section 17 of the Limitation Act, that is to say, for purpose of this case, the point of time when the fraud was discovered by the plaintiffs that led to the lodging of the FIR dated 31.7.2002. Therefore, 31.7.2002 would be the date on which the right to sue accrued to the plaintiffs.

20. The bar of limitation appears in Section 3 of the Limitation Act, 1963 provides that although limitation has not been set up as a defence, subject to the provisions of Sections 4 to 24 (inclusive), every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed. Thus, the courts are enjoined to dismiss the suit if it is made after the prescribed period even though limitation is not set up as a defence. The court below has recorded a submission allegedly made by the learned counsel for the plaintiff-respondent that the cause of action in filing the suit would accrue on 11.11.2005. The learned counsel for the defendant-revisionist has emphatically stated that no such submission was made by the learned counsel for the plaintiff-respondents and has referred to Ground No.(i) made in the memorandum of revision and has contended that it was for the court below to have independently applied its mind with regard to the time from which the prescribed period of limitation would begin to run.

21. The contention of the learned counsel for the defendant-revisionist appears to be correct. When Section 3 of the Limitation Act itself provides for dismissal of suit instituted after the prescribed period although limitation has not been set up as a defence, the submission of the learned counsel for the defendant-revisionist before the court below, if at all made, would be, at the most, a submission made by a counsel on a point of law regarding the period of limitation, and the same would not be binding on the defendant-revisionist.

22. In the case of **Panna Lal Jain Vs. Jain Bank of India Ltd**. reported in **AIR 1938 Lahore 368,** the Court considered the case of appellant judgment debtor where his counsel had waived the objection regarding limitation. After considering the relevant provisions of the Limitation Act (as it then stood), while noticing the contention of the counsel for the respondent that the appellant's counsel having waived the objection as to the limitation and therefore, the appellant therein was estopped from raising the objection, the Court held that there is obviously no estoppel and counsel's admissions on a point of law are not binding.

23. The contention of the learned counsel for the plaintiff-respondents that the issue no. 1 framed by the court below was not an issue which could be considered on the basis of a reading of the plaint alone, is not correct. The starting point of limitation has to be found out by the Court itself as that is the mandate of Section 3 of the Limitation Act, and that entails careful perusal of the plaint given the fact that the matter was considered under Order 7 Rule 11(d) of CPC. The Supreme Court in the case of **Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee & Ors. reported in AIR 1964 SC 1336** held as follows:

"(9) Section 3 of the Limitation Act enjoins a Court to dismiss any suit

instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate Court comes to an erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter. "

24. The erroneous decision of the court below on the issue of limitation has led it to assume jurisdiction which it does not have in view of the facts of the present case. Hence this court in exercise of its revisional powers can interfere in that conclusions as held by the Supreme Court in the case of **Manindra** (supra).

25. The judgement in the matter of **Raghwendra Sharan Singh** (supra) provides that a suit can be dismissed under the provisions of Order 7 Rule 11 of the CPC, if the same is barred by limitation and can be deducible from a bare reading of the plaint. As observed above, a bare reading of the plaint itself reveals that the plaintiff-respondents had discovered the commission of fraud by the defendant-revisionist prior to the lodging of the FIR dated 30.07.2002.

26. Of course, there may be instances where on a bare reading of the plaint it cannot be found out whether a suit, appeal, or application are liable to be dismissed and, a consideration of the entire pleadings and evidence may be required for that purpose. However, the present case is not such a case. Here the starting point of limitation is evident from a bare reading of the plaint.

27. Moreover, just because the defendant-revisionist has allegedly admitted his guilt and liability before the authorities concerned, without there being any reference in the plaint with regard to the date on which the guilt or liability was admitted by the defendant-revisionist, it cannot be said that the suit is within limitation. Reliance by the learned counsel for the plaintiff-respondents on the date of the imposition of the penalty of dismissal on the defendant-revisionist on 11.11.2005, as being the date on which the cause of action for the suit arose, is misplaced and is not consonance with the provisions of Section 17 of the Limitation Act as has been discussed hereinabove, particularly in view of the finding recorded above that the plaintiff-respondents had discovered the fraud prior to the lodging of the FIR dated 30.07.2002.

28. In view of the facts and circumstances stated hereinabove, the revision succeeds and is allowed. Accordingly, the impugned order dated 28.7.2012 passed by the court below is set aside and the issue no. 1 is decided in the affirmative. The plaint is, therefore, rejected. No order as to costs.

(2020)1ILR A8

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.01.2020

BEFORE
THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 79 of 1997

Sita Ram @ Guni & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
J.N. Chaudhary, Amit Chaudhary

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code - Sections 366, 376 - Appeal against conviction.

The law is settled that on sole testimony of the prosecutrix, conviction can be based and there is no need for any corroborative material provided the testimony of the prosecutrix is worthy of credence. (para 55)

There are two places where the rape is alleged to have been committed. First the Kothri situated in the village of prosecutrix where she was kept for three days and was subjected to rape for all three days. Second is the house at Gonda where the prosecutrix was kept for 15 days in a room locked from outside. (para 59)
Here in this case, the statement of prosecutrix is highly improbable and inconsistent in view of the fact that while she was kept at Gonda for 15 days in a house inside one room which was locked from outside and accused persons only used to come in night, during day time she had ample opportunity to raise alarm and it appears quite improbable that inmates of the house which included several ladies and children did not hear her alarm for a period of 15 days. There is material improvement in the testimony of the prosecutrix from her statement under Section 161 Cr.P.C. to Section 164 Cr.P.C. (para 56)

So far as the second place of occurrence i.e. house at Gonda where the prosecutrix is said to have been kept and raped for fifteen days, again no investigation regarding this place has been done. The medical examination of the prosexutrix does not corroborates the prosecution story. This lack on the part of Investigating Agency in not producing corroborative material and independent witnesses of fact who in their statement under Section 161 Cr.P.C. (para 60)

Since the rape in this case could not be proved beyond reasonable doubt. (para 61)

Appeal is allowed. (E-2)

List of cases cited: -

1. MD Iqbal & anr. Vs. St. of Jhar. 2013 (14) SCC 481

2. Puran Chand Vs. St. of H.P. 2014 (5) SCC 689

3. St. of U.P. Vs. Chhotey Lal reported in 2011 (2) SCC 550

4. St. of H.P. Vs. Mango Ram 2007 7 SCC 224

5. St. of Mah. Vs. Chandraprakash Kewalchand Jain 1990 1 SCC 550

6. St. of Punj. Vs. Gurmit Singh & ors. (1996) 2 SCC 384

7. Vijay @ Chinee Vs. St. of M.P. (2010) 8 SCC 191

8. St. of H.P. Vs. Shree Kant Shekari (2004) 8 SCC 153

9. Devinder Singh & ors Vs. St. of H.P. 2003 AIR (SC) 3365

10. Deepak Vs. St. of Har. 2015 (4) SCC 762

11. Moti Lal Vs. St. of M.P. 2008 (11) SCC 20

12. St. of Raj. Vs. Om Prakash 2007 AIR (SC) 2257

13. St. of U.P. Vs. M.K. Anthony AIR 1985 (SC) 48

14. St. of Mah. & anr. Vs. Madhurkar Narayan Mardikar 1991 1 SCC

15. St. of Punj. Vs. Gurmit Singh & ors. 1996 AIR (SC) 1393

16. Puran Chand Vs. St. of H.P. (2014) 5 SCC 689

17. St. of H.P.Vs. Prem Singh reported in (2009) 1 SCC 420

18. St. of Mah. Vs. Madhukar Narain (1991) 1 SCC 57

19. Deepak Vs. St. of Har. (2015) 4 SCC 762

20. St. of H.P. Vs. Mango Ram (2000) 7 SCC 224

21. Vijay Raikwar Vs. St. of M.P. (2019) 4 SCC 210

22. AIR 1985 SUPC 48 St. of U.P. Vs. M.K. Antony

23. State of Rajasthan Vs. Om Prakash AIR 2007 SC 2257

24. Vijay @ Chinee Vs. St. of M.P. (2010) 8 SCC 191

25. St. of H.P. Vs. Shri Kant Shikari (2004) 8 SCC 153

26. Devinder Singh Vs. St. of H.P. 2003 SC 3365

27. Deepak Vs. St. of Har. (2015) 4 SCC 762

28. Moti Lal Vs. St. of M.P. (2008) 11 SCC 20

29. Mohd. Ali @ Guddu Vs. St. of U.P. (2015) 7 SCC 272

30. Hem Raj Vs. St. of Har., (2014) 2 SCC 395

31. Dola Vs. St. of Odisha 2018 SCC Online SC 1224

32. Sham Singh Vs. St. of Har. 2018 SCC Online SC 1042

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Shri Amit Chaudhary, learned counsel for the appellants, Shri Shiv Nath Tilhari, learned AGA for the State and perused the record.

2. During pendency of this appeal, the appellant no.1-Sita Ram had died therefore, in respect of appellant no.1, the appeal was abated vide order dated 04.04.2017.

3. This criminal appeal has been filed against the judgment and order dated 13.02.1997 passed in Session Trial No.196 of 1995 in Crime No.97 of 1994 whereby Special Judge, Unnao vide aforesaid judgment has convicted and sentenced each of the appellants under Sections 366, 376 IPC for ten years rigorous imprisonment in each sections. The sentences were directed to run concurrently.

4. In brief, prosecution case is that informant Shiv Shankar, brother of the prosecutrix gave a written report dated 14.3.1994 at Police Station Maurawan, District Unnao alleging that her sister Siya Dulari went to ease herself in the night of 25.2.1994 at around 9:30 p.m. then the appellants Sita Ram and Ramesh Yadav with an intent to sell her had taken her away which has been seen by Billeshwar, Shiv Pyare, and Rudrapal Singh of the village. He further stated that his father had already given an information regarding missing of his sister on 27.2.1994 at Police Station Maurawan. Lastly, it has been stated in the written report, that sister of the informant while going out from the house has taken away Rs.9000/-, golden ring and other jewellery with her. The tilak ceremony of the prosecutrix was fixed on 03.03.1994, and marriage was fixed on 14.03.1994. Upon a written report, Chik FIR was registered which is Exhibit Ka-9. The Investigating Officer took up the investigation and recorded the statements of the prosecution witnesses under Section 161 Cr.P.C. A

spot inspection was done, site plan was prepared after conducting the inspection, which is Exhibit Ka-6. On 15.03.1994 during investigation, appellant Ramesh Yadav was arrested and his statement was taken and on that basis appellant no.1 was arrested and the prosecutrix was recovered at 10:30 a.m. at Charbagh Railway Station. The prosecutrix was medically examined on 16.03.1994 by P.W.4. Thereafter, charge sheet was filed. The prosecution has produced five witnesses:- P.W.1 Shiv Shankar, is the informant and brother of the prosecutrix ; P.W.2 is the prosecutrix; P.W.3 Mahavir, is father of the prosecutrix ; P.W. 4 is Dr. Kusum Dubey who has medically examined the prosecutrix; and P.W. 5 is Pramod Kumar Tiwari, Investigating Officer.

5. The case was committed to the court of Sessions by the Court of Munsiff Magistrate, Unnao vide order dated 17.2.1995. Thereafter charges were framed against the accused persons and the same were read out and explained to the accused persons to which they pleaded not guilty.

6. After examining witnesses, statements under Section 313 Cr.P.C. of appellants were taken in which their defence was of total denial, and of false implication due to enemity.

7. P.W.1 in his statement before the Court has stated that accused appellants Sita Ram and Ramesh Yadav were residents of his village. He further stated that accused persons with an intent to sell the prosecutrix had taken her away on 25.2.1994 when she at around 9:30 p.m. had gone outside to ease herself, at that time, her age was 15-16 years while the accused persons fled with her. A missing report was lodged by his father on 27.2.1994. On 13.3.1994 Billeshwar, Shiv Pyare and Rudra Pal Singh told him that they have seen the accused persons along with the prosecutrix and who have taken her away. He has proved the FIR as Exhibit Ka-1. On 15.03.1994, the accused appellant no.2 Ramesh Yadav was arrested by the police who told that accused Sita Ram and prosecutrix will go to Lucknow. Then appellant no. 2 along with police personnel, the informant and his Uncle Lallu Prasad, came to Charbagh Railway Station, Lucknow and there at Platform No.1, he found accused appellant no.1 Sitaram and Siya Dulari sitting. In the cross examination by the defence, he has stated that prosecutrix was studying in Class-V around 13-14 years back. He has denied the suggestion that when Siya Dulari, prosecutrix fled with the accused persons at that time her age was 22 years.

8. P.W.-2, the prosecutrix Siya Dulari in her statement has stated that at the time of occurrence, she was not married however, marriage was fixed. She has stated she was 15-16 years old. She further stated that 2½ years back when she went to ease herself in the night at around 9:30 p.m. then Sita Ram and Ramesh Yadav were hiding behind Jamun tree and while she was preparing to return they caught hold of her. Sita Ram caught her hands and hold her mouth, Ramesh Yadav hold her feet and when she tried to raise alarm Sita Ram threatened her with a country made pistol and said do not shout otherwise they will shoot her. Thereafter, she was locked in the kothri of tubewell. In the morning she was taken by the accused persons in the field of mustard and Rabi thereafter Ramesh Yadav went to his home and Sita Ram raped her twice. After sometime, Ramesh Yadav came and again raped her against her consent.

During day time, they kept her in the open mustard field and in the night they used to lock her in the kothri. This went for three days and she was subjected to rape 7-8 times in three days by both of the accused persons. Thereafter, on third day, Sita Ram and Ramesh took her to Lucknow on a cycle and when she used to cry she was shown pistol, therefore, she kept mum. From Lucknow, they took her to Gonda by bus and there in Satai ka purwa, she was locked in a room inside a house, which was locked from outside. They used to come in the night and raped her for 15 days continuously. On 14.03.1994, Ramesh Yadav returned home. On 15.03.1994, she came to Charbagh Railway Station, Lucknow. Sita Ram asked Ramesh Yadav to go to the village and try to find out the news in the village and told him to come at Charbagh Railway Station, Lucknow and he will wait. In the cross examination, she has stated that 13-14 years back she has passed out Class V. The alleged kothri of tubewell in which she was kept belongs to one of the villager which was empty. There was no window in the kothari only a door was there. It was situated at a distance of 10-12 fields away from the village. The accused persons remained with her in kothari for three days. All the three persons came to Lucknow on a cycle. She further stated that in the bus in which she was sitting few persons were there. However, 1-2 policemen were also there. She tried to raise alarm, because of accused persons she could not do so. Later on, she says that there were 15-16 persons in the bus. In the bus Ramesh Yadav and Sita Ram were armed with country made pistol which they were carrying in open. She was kept in Gonda in a house where there were ladies and children but her room was locked. She raised alarm which was not heard by anybody for a period of 15 days. She has denied suggestion that before the occurrence, she has written so many letters to Sita Ram which showed her affair with him. She has further denied the suggestion that she took with her Rs.9000/- cash, golden earring along with other jewellery. She has further denied the suggestion that she was 22 years of age at the time of incident. Suggestion that she on her own accord went away from her home has also been denied. She has also denied suggestion that she was having an affair with Sita Ram. Lastly, she has also denied that she got a beating by her parents because of her relation ship with Sita Ram.

9. P.W.3 Mahavir, father of the prosecutrix stated in his Examination-in-chief that on the date of occurrence, his daughter went away from house and did not returned. He tried to find out in his relatives but she could not be traced out. Regarding incident, he had given a missing report which has been shown to him and he has proved as Exhibit Ka-3. In the cross, he has stated that 13-14 years back his daughter used to study in class V. He has re-affirmed his statement under Section 161 Cr.P.C. given to the Investigating Officer that her daughter while going away, took Rs.9000/- cash, golden earing and other jewellery along with her. He has further stated that 10-12 years back kothari of tubewell had fallen down/caved in. Upon a suggestion that whether his daughter/prosecutrix ran away on her own accord, he stated that he could not tell this fact.

10. P.W.4 Dr. Kusum Dubey, who conducted medical examination of the prosecutrix has stated that there were no signs of external or internal injury on the person of the prosecutrix, hymen was old

and torn. P.W. 4 had proved the medical examination report of the prosecutrix which is Exhibit Ka-4. In her opinion, the age of the prosecutrix according to ossification test was above 18 years. No live or dead spermatozoa was found in the pathology report and no definite opinion of rape has been given by her.

11. P.W. 5 Shri Pramod Kumar Tiwari, the Investigating Officer, in his examination-in-chief has stated that FIR was lodged in his absence. He got information on 14.03.1994 itself and on the same day, he went to Gulal Khera village and took the statement of complainant Shiv Shankar, mother of the prosecutrix Smt. Rampati, uncle of complainant Lallu Prasad and witnesses Billeshwar, Shiv Pyare and Krishna Pal, thereafter conducted the examination of the spot on the same day and prepared the site plan in his writing. After seeing the site plan, he has proved it which is Exhibit Ka-6. He further stated that on 15.03.1994, during investigation accused Ramesh Yadav was arrested. His statement was recorded on the basis of his statement, accused Sita Ram was arrested from Charbagh Railway Station, Lucknow at 10:30 a.m. who was with the prosecutrix. Fard report was prepared by him and on which prosecutrix Sita Ram and Ramesh Yadav had signed and has proved Fard which is Exhibit Ka-2. On the spot, he took the statement of the prosecutrix and accused Sita Ram and on the basis of statement of prosecutrix, section 376 IPC was added. After concluding the investigation, he has submitted charge sheet before the lower court and has proved it which is Exhibit Ka-8. He has further proved the chik report prepared by Head Moharrir, Shri Purushottam Narain Tandon, who was posted with him, Chik report is Exhibit Ka-9. In his cross examination he has stated that father, mother and uncle of the prosecutrix in their statements under section 161 Cr.P..C. had informed him that prosecutrix had gone somewhere after taking Rs.9000/- cash, golden ring and other jewellery. He had also taken the statement of Krishna Pal Singh, Shiv pyare and Billeshwar who told him that on 25.02.1994 at about 10:00 p.m. Sita Ram, Ramesh Yadav and prosecutrix were going somewhere. He lastly stated that at the time of arrest, no fire arm was recovered from Sita Ram. He denied the suggestion that he has arrested the prosecutrix Siya dulari from District Gonda and Sita Ram and Ramesh Yadav from their village.

12. Learned counsel for the appellant has made following submissions :

1. Appellant **Ramesh** was not seen by anybody going along with the prosecutrix and co-accused Sita Rram on 25,02.1997;

The allegation levelled was that appellant Ramesh was seen by two persons of the village namely Billeshwar and Shiv Pyare accompanying the prosecutrix and co accused Sita Ram on 25.02.1994. Despite the fact that statements of both the witnesses were recorded under Section 161 Cr.P.C. by the Investigating Officer, none was produced in the Court. The truth is that none had seen the appellant Ramesh going along with the prosecutrix and co-accused Sita Ram. As witnesses Bileshwar and Shiv Pyare were not ready to support the false prosecution story against appellant Ramesh, they were deliberately not produced before the trial Court.

Appellant Ramesh has been implicated only for the reason that he was a friend of accused Sita Ram and the

complainant party suspected that he had a hand in the elopement of the prosecutrix with accused Sita Ram.

2. The prosecutrix went with co-accused Sita Ram out of her own free will

(i). The father of the prosecutrix Mahabir examined as P.W.3 had reported at the police station regarding the missing of his daughter and in his report he had alleged that the prosecutrix had taken away valuables from the home including Rs.9000/- cash, gold ear-ring, a pair of Payal and kamar peti the statement of witness Mahabir is evidence of the fact that the prosecutrix was not abducted by anyone rather she had eloped with co-accused Sita Ram out of her own free will in a planed manner.

(ii). Admittedly, the prosecutrix was kept in a "kothri' for three days in a village which did not have any door. She also alleged that during day time she was kept in the Rabi field while in the night she was confined in the Kothri. The fact that still she did not make any attempt to escape is a pointer to the fact of her willingness to stay with appellant Sita Ram.

(iii). Admittedly, the prosecutrix was later on kept in a room in a house which had other persons living in it as well and still the prosecutrix did not make any attempt to seek help from others also goes to show that she was not confined there against her will.

(iv). The prosecutrix was taken on a cycle to Lucknow during day time and from Lucknow she was taken by bus to Gonda. It was stated by the prosecutrix in her statement that in the bus there were 15-20 persons including policemen also. The fact that the prosecutrix did not seek anybody's help in the bus also goes to show her willingness to accompany the accused Sita Ram.

3. The testimony of the prosecutrix is not reliable.

It has been submitted that from the facts narrated above, it is evident that the testimony of the prosecutrix that she was raped by the accused persons is not believable and the conviction based on her testimony cannot be sustained.

4. Medical opinion does not support the story of forced sex/rape on prosecutrix.

(i) The doctor opined that the age of the prosecutrix was more than 18 years ;

(ii) no dead or living spermatozoa was found in the vaginal smear ;

(iii) no opinion about rape could be given.

The medical opinion of the doctor virtually rules out the story of rape in the light of the fact that the prosecutrix had alleged that during rape she used to struggle and therefore, absence of any injury on the external or internal part of the body does not support the prosecution story of forced sex by the accused.

13. Further contention of learned counsel for appellant is that the Hon'ble Supreme Court has held in catena of decisions that if the statement of the prosecutrix is of sterling quality and inspires confidence then corroboration from other evidence need not be sought, but where the statement of the prosecutrix is shaky and does not inspire confidence then corroboration should be sought from other evidence collected during investigation.

14. It is next contended by learned counsel for the appellant that the prosecutrix was recovered along with appellant no.1 (at the time of arrest of appellant no.1) Sita Ram from Charbagh

Railway Station. Admittedly, at the time of recovery, prosecutrix was sitting at the railway platform along with accused appellant Sita Ram. Needless to say that a railway platform is a crowded place and there is no evidence of the fact that the prosecutrix appears to have been confined at the place of sitting by the appellant no.1 Sita Ram or any force was applied as no fire-arm was recovered which goes to show that she was not sitting there against her wishes. He further submitted that according to prosecution story, both accused persons had katta with them which they used to threaten the prosecutrix but as admitted by the Investigating Officer no fire arm was recovered from both the accused persons.

15. Per contra, Shri Shiv Nath Tilhari, learned AGA submits that before entering into the detail arguments, he would like to submit that main argument on behalf of State is that it is a matter of committing gang rape and a lady/prosecutrix cannot be a consenting party to several persons simultaneously.

16. In support, he has placed reliance on catena of decisions which are as follows :

(i). **MD Iqbal and another vs. State of Jharkhand 2013 (14) SCC 481;** in this case it has been submitted that in view of provisions of Section 114-A of Indian Evidence Act, 1872 there is a presumption as to the absence of consent in case of gang rape and it will be presumed that the prosecutrix did not give consent.

(ii). **Puran Chand vs. State of Himachal Pradesh 2014 (5) SCC 689.** He submitted that a girl would not put herself to disrepute and would not go to support her parents to lodge false FIR of rape due to enmity as there is no delay in lodging the FIR.

(iii). **State of U.P. vs. Chhotey Lal reported in 2011 (2) SCC 550;** the Honb'le Court has held in para 30 which is reproduced as under :

"30. The learned counsel for the respondent submitted that no alarm was raised by the prosecutrix at the bus-stand or the other places where she was taken and that creates serious doubt about the truthfulness of her evidence. This argument of the learend counsel overlooks the situation in which the prosecutrix was placed. She had been kidnapped by two adult males, one of them, A-1, wielded a firearm and threatened her and she was taken away from her village. In the circumstances, she made sensible decision not to raise any alarm. Any alarm at unknown place might have endangered her life. The absence of an alarm by her at the public place cannot lead to an inference that she had willingly accompanied A-1 and A-2. The circumstances made her a submissive victim and that does not mean that she was inclined and willing to have intercourse with A-1. She had no free act of the mind during her stay with A-1 as she was under constant fear."

(iv). He further placed reliance in the case of **State of Himachal Pradesh vs. Mango Ram 2007 7 SCC 224 ;**

(v). **State of Maharastra vs. Chandraprakash Kewalchand Jain 1990 1 SCC 550;**

(vi). **State of Punjab vs. Gurmit Singh and others (1996) 2 SCC 384;**

(vii). **Vijay @ Chinee vs. State of Madhya Pradesh (2010) 8 SCC 191;**

(viii). **State of Himachal Pradesh vs. Shree Kant Shekari (2004) 8 SCC 153."**

17. Next submission of learned AGA is that absence of injuries on private parts cannot be a ground to held that the appellant cannot be convicted. He has also placed reliance on the judgments reported in **Devinder Singh and ors vs. State of Himachal Pradesh 2003 AIR (SC) 3365; and Deepak vs. State of Haryana 2015 (4) SCC 762;**

18. Further reliance has been placed on **Moti Lal vs. State of Madhya Pradesh 2008 (11) SCC 20** and has submitted that corroboration is not required from any other evidence including the evidence of Doctor to examine the victim of rape and does not find any sign of rape.

19. Next submission of learned AGA is that while appreciating the evidence of a witness, minor discrepancies on trival matters which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety. In support he has relied on the judgments reported in **State of Rajasthan vs. Om Prakash 2007 AIR (SC) 2257 and State of U.P. vs. M.K. Anthony AIR 1985 (SC) 48.**

20. Learned AGA has also submitted that even in case of immoral character of prosecutrix, it does not give any right to the accused persons to commit rape on the prosecutrix against her consent. In support, he has relied on **State of Maharastra and another vs. Madhurkar Narayan Mardikar 1991 1 SCC 57;** where it has been held that even a women of easy virtue is entitled to privacy. He further relied on **State of Punjab vs. Gurmit Singh and others 1996 AIR (SC) 1393.** Lastly, it has been submitted by learned AGA that Investigating Agency not conducting investigation properly or was negligent cannot be a mere ground to discredit the testimony of the prosecutrix and has submitted that non recovery of weapon of assault (Katta/country made pistol) will not come to the aid of the accused appellant.

21. Having considered the rival contentions advanced by learned counsel for the parties, this Court carefully proceeds to examine the evidence of prosecution witnesses.

22. Considering the evidence of prosecution witnesses, it appears that missing report though was lodged by father of prosecutrix P.W.3 however, FIR has been lodged by brother of prosecutrix who is P.W.1. P.W.1 has stated in his examination in chief that Billeshwar, Krishna Pal and Rudrapal Singh of his village saw the prosecutrix with the appellants Sita Ram and Ramesh. He has further stated that prosecutrix was recovered along with Sita Ram while both of them were sitting at Platform No.1 at Charbagh Railway Station, Lucknow. In his cross examination, he has stated that when the prosecutrix eloped she was 22 years of age. He denied the suggestion that the prosecutrix eloped with Sita Ram on her own accord. He further denied the suggestion that prosecutrix can write letters.

23. P.W.2 prosecutrix Siya Dulari while giving statement under section 161 Cr.P.C. has not levelled any allegation against appellant no. 2 Ramesh. She has clearly stated that appellant no. 2 Ramesh

has done no wrong to her. However, while giving statement under section 164 Cr.P.C. before the Court, she made substantial improvement and levelled the allegation of committing rape against appellant no. 2 Ramesh also for the first time. In her statement under section 164 Cr.P.C. she has stated that she was kept in Gonda for 15-16 days and both the accused appellants took her to Lucknow and appellants Ramesh and Sita Ram both were arrested from Charbagh railway station.

24. This statement of prosecutrix given under section 164 Cr.P.C. that both accused were arrested at Charbagh, again changed in the Court while deposing as P.W.2 before the trial court and stated that on 14.03.1994 Ramesh went home and she came along with appellant no. 1 Sita Ram at Charbagh Railway Station where she was found sitting along with Sita Ram only by the police and thereafter Sita Ram was arrested thus contradicted her earlier two statements. In her cross examination, she has stated that while she was sitting in the bus either at Qaiserbagh or Charbagh they were one or two police personnels also, she tried to raise alarm but could not succeed as both the accused persons were armed openly with country made pistols. She further stated that she was kept in Gonda for 15 days and in that house several ladies and children were residing but she was not allowed to meet anybody since the door of the room was locked. She cried but no one heard. She has denied the suggestion that she can write letters. She further denied the suggestion that before occurrence, she wrote several letters to Sita Ram. She denied that she had written love letters to Sita Ram and said that she has never written to Sita Ram, that she could not sleep all night and used to weep. She has further denied the suggestion that she eloped with Sita Ram along with Rs.9000/- golden ear rings, kamar peti and a pair of payal. She has further denied the suggestion that she on her own accord went from her house. She further denied suggestion that she was in love with Sita Ram since long. She further denied that due to this relation ship with Sita Ram, she was beaten several times by her parents. She has also denied the suggestion that after going away from home, she was not kept in Kothri rather directly taken to Lucknow. The evidence of prosecutrix P.W.2 right from the stage of statements recorded under section 161 Cr.P.C. to 164 Cr.P.C. and in deposition before the Court suffers from material improvement. Under Section 161 Cr.P.C. she has not levelled any allegation of rape against appellant no. 2 whereas for the first time in her statement under Section 164 Cr.P.C. she has also roped appellant no.2 and alleged that rape has been committed by him also. In her statement under section 164 Cr.P.C. the prosecutrix has further stated that she came to Lucknow along with appellant nos.1 and 2 both whereas while testifying before the Court below as P.W. 2 she said that Ramesh came back home on 14.3.1994 and she along with Sita Ram came to the Railway Station where Sita Ram was caught whereas in the statement under Section 164 Cr.P.C. she stated that Sita Ram and Ramesh both were caught at Charbagh Railway Station, Lucknow. The inconsistency in the statements of prosecutrix goes to the root of the matter, there is substantial improvement at several stages and material contradictions which cannot be said to be minor contradictions.

25. P.W.3 while deposing before the Court has re-confirmed his statement under section 161 Cr.P.C. and supported

the story as stated by him in his missing report. He has not levelled any allegation against the appellant No.2. In his cross examination, he has reiterated and confirmed his earlier stand given in the missing report that the prosecutrix took away Rs.9000/- cash, golden ear rings, kamar peti and one pair of payal along with her. He has not supported the version of prosecutrix that the aforesaid cash and ornaments were kept by her at some place in the house. He has further stated in his cross that 10-12 years back, kothri near a tubewell had fallen down/caved in. He has further stated that he does not know whether his daughter/prosecutrix was of a good character. Upon being asked as to whether prosecutrix had gone on her own accord he has fairly stated that he could not tell this fact.

26. P.W.4 Dr. Kusum Dubey who medically examined the prosecutrix has stated that she has not found any mark of injury on the person of the prosecutrix. In the internal examination, no mark of injury was found on her private parts. Her hymen was old and torn and has stated that she performed one finger test in her vagina. Lastly, she has stated that she could not give any definite opinion about rape on the prosecutrix.

27. P.W.5 in his cross examination, has stated that complainant, his father, mother and uncle in their statements have told him that prosecutrix has gone somewhere along with Rs.9000/- cash, golden ear rings, kamar peti and a pair of payal. He has also stated that he took the statement of Kishan Pal singh, Shiv Pyare and Billeshwar who told him that at 10 o'clock in the night on 25.2.1994 Sita Ram, Ramesh and prosecutrix Siya Dulare were going somewhere. He further stated that at the time when Sita Ram was arrested no fire arm was recovered. He denied the suggestion that Siya Dulare-prosecutrix was recovered from district Gonda and Sita Ram and Ramesh have been arrested from their village.

28. So far as the argument of learned AGA regarding delay in lodging the FIR is concerned, there is no need to go in detail as this ground has not been raised by learned counsel for the appellant. The case law cited by him are distinguishable on facts because in the case of **MD. Iqbal and others (Supra)** the statement of prosecutrix was duly corroborated with medical evidence **(Para 14)** and was found worthy of credence. Hence, the conviction of the accused was upheld by the Supreme Court.

29. In **Puran Chand vs. State of Himachal Pradesh (2014) 5 SCC 689,** it was held that since offence of rape was proved and prosecution version was relied on in view of supporting circumstantial evidence and Section 114-A of Indian Evidence Act was held to be applicable impliedly. In this case the offence of rape has not been proved therefore, there is no occasion of application of Section 114-A of Evidence Act to draw the presumption as to the absence of consent.

30. In **Hem Singh vs. State of U.P. (Supra)** a minor girl was taken from lawful guardianship of her brother. Her testimony was intact and found trust worthy and the

31. In **State of Himachal Pradesh vs. Prem Singh reported in (2009) 1 SCC 420** offence of rape was not established.

32. In **Mukesh vs. State of Chattisgarh, (Supra)**, the prosecution

version was supported by P.W. 3, P.W.11 and 12 as well as injury on the fore head of the prosecutrix and further there was ample corroborative material and testimony of the prosecutrix was found to be trust worthy which is not in the present case.

33. In **State of Maharastra vs. Madhukar Narain (1991) 1 SCC 57,** it was a matter of departmental enquiry and High Court erred in embarking upon re-appreciation of the evidence against the decision in disciplinary proceedings.

34. In **Vijay @ Chinee vs. State of Madhya Pradesh, (Supra)** it was held that statement of the prosecutrix was found to be worthy of credence and reliable, which required no corroboration and there was statement of doctor P.W.3 who opined that the hymen of the prosecutrix was found to be completely torn and fresh blood was oozing out hence presumption of Section 114-A of Indian Evidence Act was taken that she did not gave her consent. In this case, the testimony of the prosecutrix requires further material in view of inconsistency in her statement.

35. In **State of Himachal Pradesh vs. Shree Shekari (Supra)** it was a case of minor girl of 14 years old which was made pregnant by her own teacher. The testimony of the victim was found worthy of credence and prosecution was successful in explaining the delay and the Hon'ble Supreme Court in para 21 held as under :-

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice."

36. In **State of Maharastra vs. Chandraprakash Kewalchand Jain (Supra),** the evidence of prosecutrix was found worthy of credence. The clothes of the prosecutrix were found to be stained with human blood and semen. The semen group found on her clothes tallied with that of accused.

37. In **Deepak vs. State of Haryana (2015) 4 SCC 762,** the victim was a minor girl. Sexual intercourse was admitted by the accused and rape was proved and therefore, statutory presumption was drawn by the court and also it was duly corroborated with the medical evidence.

38. **In State of Himachal Pradesh vs. Mango Ram (2000) 7 SCC 224** the victim was again a minor girl. Rape was proved. The evidence of prosecutrix was corroborated by medical and other evidences also.

39. In **State of Punjab vs. Gurmit Singh and others, (Supra)** the statement of prosecutrix was found to be intact and was well supported by medical evidence and ample corroboration was available on record to lend further credence to the testimony of the prosecutrix.

40. In **MD Iqbal and another vs. State of Jharkhand (Supra)** the statement of prosecutrix was corroborated by medical evidence and offence of rape was proved hence, the trial court rightly draw presumption that victim did not consent and this was upheld by the Hon'ble Supreme Court.

41. In **Vijay Raikwar vs. State of Madhya Pradesh (2019) 4 SCC 210** in this case chain of circumstance was complete and the accused could not give any explanation with regard to the incriminating evidence against him.

42. In **AIR 1985 SUPC 48 State of U.P. vs. M.K. Antony,** the accused murdered his wife and children and made extra judicial confession to his friend. Evidence of friend was found reliable and trustworthy and conviction of accused on that basis was held proper.

43. In **State of Rajasthan vs. Om Prakash AIR 2007 SC 2257** the accused was convicted under Section 302 IPC on the evidence of solitary witness. The unnatural conduct of the accused had strengthened the prosecution case. Irrelevant details which do in anyway corrode the credibility of a witness cannot be levelled as omissions or contradictions.

44. In **Vijay @ Chinee vs. State of Madhya Pradesh (2010) 8 SCC 191**; in this case offence of rape was proved. There was no dispute regarding place of occurrence and incident that occurred. Defence failed to establish that it was a case of consent. Medical examination of accused and prosecutrix was conducted next day. The accused persons were not known to prosecutrix therefore, it was held not to be a case of consent.

45. In **State of Himachal Pradesh vs. Shri Kant Shikari (2004) 8 SCC 153** the victim was a minor girl raped by her own teacher. Testimony of the victim was found to be trustworthy. It was held that if the Court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence direct or circumstantial which would lend assurance to her testimony.

46. In **Devinder Singh vs. State of Himachal Pradesh 2003 SC 3365** the evidence of the prosecturix was not found trustworthy and the accused were acquitted.

47. In **Deepak vs. State of Haryana (2015) 4 SCC 762** the prosecutrix was minor. The testimony of prosecutrix was intact and corroborated with medical evidence that rape was committed by accused with the prosecutrix. The accused did not disputed the sexual intercourse and he failed to give any satisfactory explanation under 313 Cr.P.C. nor was able to adduce evidence to rebut the presumption contained under Section 114-A of Evidence Act, 1872.

48. In **Moti Lal vs. State of Madhya Pradesh (2008) 11 SCC 20;** it was held that if prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy.

49. Therefore, aforesaid judgments relied on by learned AGA do not support his case for the reasons that testimony of the victim/prosecutrix suffers from material inconsistency, substantial improvement and contradiction which go to the root of the matter and therefore, the

corroborative material or some material short of corroboration is needed which is not available and no evidence in that regard has been led. The testimony of the prosecutrix does not inspire confidence.

50. The Hon'ble Supreme Court in **Mohd. Ali @ Guddu vs. State of Uttar Pradesh (2015) 7 SCC 272** has held as under :-

"Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned Trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be appropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testiony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon."

51. In **Hem Raj v. State of Haryana, (2014) 2 SCC 395** it has been held that :-

"10. Faced with such a situation, we were anxious to find out whether there can be any clinching medical evidence suggesting rape, but, unfortunately, the prosecuton has failed to examine Dr.Anjali Shah, who had examined the prosecutrix. The MLR was produced in the Court by P.W.6 J.B. Bhardwaj, Medical Record Technician. This is a serious lapse on the part of the prosecution. We are aware that lapses on the part of the prosecution should not lead to unmerited acquittals. This is, however subject to the rider that in such a situation the evidence on record must be clinching so that the lapses of the prosecution could be condoned. Such is not the case here. The MLR does suggest that the hymen of the prosecutrix was torn. It is also true that the prosecutrix has brought on record FSL report which shows that human semen was detected on the salwar of the prosecutrix and on the underwear of the accused. However, it is difficult to infer from this that the prosecutrix was raped by the appellant. The prosecutrix herself has vacillated on this aspect. It was pointed out that no injuries were found on the prosecutrix. We do not attach much importance to this aspect because presence of injures is not a must to prove commission of rape. But the prosecutrix's evidence is so infirm that it deserves to be rejected. Her brother has come out with a case that the appellant tried to rape the prosecutrix. He did not say that the appellant raped the

prosecutrix. Taking an overall view of the matter, we find it difficult to sustain the prosecution case that the prosecutrix was raped by the appellant. This is a case where the appellant must be given benefit of doubt. "

52. In **Dola vs. State of Odisha 2018 SCC Online SC 1224** it has been held that in para 31 which is reproduced as under :-

31. In our considered opinion, the Trial Court as well as the High Court have convicted the appellants without considering the aforementioned factors in their proper perspective. The testimony of the victim is full of inconsistencies and does not find support from any other evidence whatsoever. Moreover, the evidence of the informant/victim is inconsistent and self-destructive at different places. It is noticeable that the medical record and the Doctor's evidence do not specify whether there were any signs of forcible sexual intercourse. It seems that the First Information Report was lodged with false allegations to extract revenge from the appellants, who had uncovered the theft of forest produce by the informant and her husband. The High Court has, in our considered opinion, brushed aside the various inconsistencies pointed out by us only on the ground that the victim could not have deposed falsely before the Court. The High Court has proceeded on the basis of assumptions, conjectures and surmises, inasmuch as such assumptions are not corroborated by any reliable evidence. The medical evidence does not support the case of the prosecution relating to the offence of rape. Having regard to the totality of the material on record and on facts and circumstances of this case, it is not possible for this Court to agree with the concurrent conclusions reached by the courts below. At best, it may be said that the accused have committed the offence of hurt, for which they have already undergone a sufficient duration of imprisonment, inasmuch as they have been stated to have undergone two years of imprisonment. Accordingly, the appeal is allowed. The judgments of the Trial Court as well as the High Court are set aside. The appellants are acquitted of the charges levelled against them. They should be released forthwith, if they are not required in any other case."

53. In **Sham Singh vs. State of Haryana 2018 SCC Online SC 1042, it has been held in paras 26 and 27:**

"26. The evidence of the victim/prosecutrix and the Aunt P.W.10 are unreliable, untrustworthy inasmuch as they are not credible witnesses. Their evidence bristles with contradictions and is full of improbabilities. We cannot resist ourselves to place on record that the prosecution has tried to rope in the appellant merely on assumption, surmises and conjectures. The story of the prosecution is built on the materials placed on record, which seems to be neither the truth, nor wholly the truth. The findings of the court below, though concurrent, do not desire the merit of acceptance or approval in our hands with regard to the glaring infirmities and illegalities vitiating them, and the patent errors apparent on the face of record resulting in serious and grave miscarriage of justice to the appellant.

27. We find that the trial court and the High Court have convicted the accused merely on conjectures and surmises. The Courts have come to the conclusion based on assumptions and not

on legally acceptable evidence, but such assumptions were not well founded, inasmuch as such assumptions are not corroborated by any reliable evidence. Medical evidence does not support the case of the prosecution relating to offence of rape."

54. In view of the above, law laid down by the Hon'ble Supreme Court law can be summarized as under :

"An accused can be convicted under section 376 IPC on the basis of sole testimony of the prosecutrix, if such testimony is worthy of credence and inspires confidence and is of sterling quality then corroboration from other evidence is not required. But where the statement of prosecutrix suffers from material inconsistency, contradiction and does not inspire confidence, then some other material may be even short of corroboration from other evidence collected during investigation is necessary."

55. After going through evidence of the prosecution witnesses, it appears that complainant, his father, mother and uncle as well as Investigating Officer all have stated that prosecutrix went away with Rs.9000/-, golden ear rings, kamar peti and one pair of payal has gone somewhere. Only the prosecutrix has denied this fact. Statement of the prosecutrix at every stage has improved and changed and has contradicted her earlier statement. The testimony of prosecutrix suffers from material inconsistency. The law in this regard is settled that on sole testimony of the prosecutrix, conviction can be based and there is no need for any corroborative material provided the testimony of the prosecutrix is worthy of credence.

56. Here in this case, the statement of prosecutrix is highly improbable and inconsistent in view of the fact that while she was kept at Gonda for 15 days in a house inside one room which was locked from outside and accused persons only used to come in night, during day time she had ample opportunity to raise alarm and it appears quite improbable that inmates of the house which included several ladies and children did not hear her alarm for a period of 15 days. There is material improvement in the testimony of the prosecutrix from her statement under Section 161 Cr.P.C. to Section 164 Cr.P.C. and then in Court as P.W.2. At one place, she has not levelled any allegation against appellant no.2 whereas in her statement under section 164 Cr.P.C. for the first time, she has alleged commission of offence by him. In her statement under Section 164 Cr.P.C. she has stated that both the appellants took her from Gonda to Lucknow and at Charbagh Railway Station, Lucknow. Both of them were arrested whereas in deposition before the Court, she says that appellant no. 2 on 14.3.1994 came back to his house and only the appellant no. 1 brought her to Lucknow was arrested by the police at Charbagh Railway Station Lucknow.

57. The statement of father of the prosecutrix P.W.3 that the alleged Kothri in which she was kept for three days in the same village had already fallen down 10-12 years back coupled with the fact that the Investigating Officer has not even visited/prepared the site plan of the said Kothri neither any investigation regarding the kothri or the house at Gonda where the prosecutrix was allegedly kept for 15 days has been done. No statement of the inmates of the house at Gonda has been taken by Investigating Officer and also the

most important and independent witnesses namely Billeshwar, Krishna Pal, and Shiv Pyare who saw the prosecutrix in the company of appellants on 25.02.1994 have not been produced before the court rather they have been withheld by the prosecution are enough to demand some more material than the sole testimony of the prosecutrix to convict appellant no.2.

58. In the present case, the failure of Investigating Agency not to examine independent witness before the court who saw the prosecutrix in the company of appellants in the night of 25.2.1994 namely Billeshwar, Shiv Pyare and Rudra Pal Singh, not investigating the inmates of the house at Gonda where the prosecutrix was allegedly kept for 15 days and raped by both the appellants, not conducting any investigation of kothri which according to evidence of P.W.3 had already fallen down/caved in 10-12 years back and not conducting investigation of house at Gonda non preparation of site plan of the house at Gonda and that of kothri, non recovery of fire arm from either of the accused persons and improbable story set up by the prosecutrix that the accused persons were carrying arms in open, in a bus where police personnel were also there, does not inspire confidence in prosecution case.

59. There are two places where the rape is alleged to have been committed. First the Kothri situated in the village of prosecutrix where she was kept for three days and was subjected to rape for all three days. Second is the house at Gonda where the prosecutrix was kept for 15 days in a room locked from outside. P.W.3 in his statement has said that Kothri in the village had already fallen down 10-12 years back coupled with the fact that Investigating Officer has not visited there, not made any investigation of Kothri, has not mentioned this into the site plan, not making any recovery from there makes this first place of occurrence doubtful.

60. So far as the second place of occurrence i.e. house at Gonda where the prosecutrix is said to have been kept and raped for fifteen days, again no investigation regarding this place has been done. The Investigating Officer has not even visited this place. The inmates (ladies and children) have not been examined, no site plan of this place has been made, nothing has been recovered and therefore, this second place also becomes doubtful. The medical examination of the prosexutrix does not corroborates the prosecution story. This lack on the part of Investigating Agency in not producing corroborative material and independent witnesses of fact who in their statement under Section 161 Cr.P.C. had stated that they saw the prosecutrix in the night on 25.2.1994 with the appellants at Nautanki (operatic theatre performance in northern India) as they had also come to see the theatre performance, causes serious doubts about the truthfulness of the prosecution case in view of the law laid down by the Hon'ble Supreme Court in the cases of **Mohd. Ali @ Guddu vs. State of Uttar Pradesh (Supra) ; Hem Raj vs. State of Haryana (Supra); Dola vs. State of Odisha (Supra); Sham Singh vs. State of Haryana (Supra).** Thus, for the reasons stated above, I am of the opinion that prosecution has failed to prove the offence of rape against appellant No.2 beyond reasonable doubt.

61. Since the rape in this case could not be proved beyond reasonable doubt therefore, there is no occasion to draw presumption under Section 114-A of the

Indian Evidence Act regarding absence of consent of the prosecutrix.

62. To prove the charge under section 366 IPC prosecution has to prove that prosecutrix was abducted and further the abduction was for the purposes mentioned under section 366 IPC. The testimony of the prosecutrix suffers from improvement, improbability and not trustworthy. Prosecutrix was major and according to statements of P.W.1, P.W.3 and P.W.5 she went away along with Rs.9000/- cash, golden earrings kamar peti and other jewellery although her marriage was fixed shortly, this shows that she willingly went away. Prosecutrix was seen by the independent witnesses with the appellants at Nautaknki (operatic theatre performance) in the night of 25.02.1994 also shows that the prosecutrix went away willingly. The fact that these independent witnesses namely Billeshwar, Shiv Pyare and Rudra Pal Singh have not been produced by the prosecution before the Court has further weakened the case of prosecution. For these reasons, I am of the view that the prosecution has also failed to prove the charge under Section 366 IPC. Therefore, the finding recorded by the learned Trial Court in this regard is erroneous and is hereby reversed.

63. Thus, in view of the aforesaid discussions, the findings recorded by the trial court on the basis of testimony of the prosecutrix cannot be affirmed and the same is reversed.

64. In view of such evidence led by prosecution, the discussions made hereinabove, it will not be proper to convict the accused appellant hence, the judgment and order dated 13.02.1997 passed by the trial court is set aside.

65. Accordingly, the appeal is **allowed.**

The accused appellant is directed to be released from jail, if not wanted in any other case.

(2020)1ILR A25

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.01.2020

BEFORE
THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE ALOK MATHUR, J.

Criminal Appeal No. 448 of 1981

Ram Asrey & Ors. ...Appellants

Versus

State ...Respondent

Counsel for the Appellants:
Nagendra Mohan, Chandra Bhushan, J.N. Singh, K.K. Tewari, Mmmanish Bajpai

Counsel for the Respondent:
G.A., Sharad Dixit

Criminal Law - Indian Penal Code - Section 302/24 IPC - Section 323 read with section 34 - Appeal against conviction.

The presence of mother of deceased at the crime scene cannot be doubted as she is injured witness and it was not unnatural for her to accompany her adult son to fields for easing himself. (para 20)

It is clear that the accused-appellants assaulted the deceased by inflicting 'lathi' blows and knife injury resulting into death of deceased victim. The medical evidence on record also shows that the deceased had incurred thirteen injuries in all. Despite the fact that mother of the deceased is an interested witness and her evidence has been carefully examined which convincingly points towards the guilt of the accused. Mother of deceased had witnessed

the entire incident from the start to the end and has given detailed evidence about the incident. (para 26)

The testimony of mother of deceased is corroborated by the testimony of PW1 (informant) in all material particulars with regard to identity of the accused, time of occurrence, nature of weapons, taking the deceased from the scene of crime to the Police Station and lodging of the first information report. Thus, evidence of mother of deceased cannot be rejected only on the ground that she being mother of the deceased is an interested witness. (para27)

Appeal is rejected. (E-2)

List of cases cited: -

1. Manjit Singh Vs. St. of Punj., (2019) 8 SCC 529

2. Balraje @ Trimbak Vs. St. of Mah., (2010) 6 SCC 673

3. Abdul Sayeed Vs. St. of M.P., (2010) 10 SCC 259

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

1. Head Sri Nagendra Mohan, learned counsel for the appellants as well as Mrs. Smiti Sahay, learned Government Advocate for respondent-State.

2. This criminal appeal has been filed by the convicted appellants under Section 374(2) Cr.P.C. against the judgment and order dated 20/06/1981 passed by the 1st Additional Sessions Judge, Kheri in S.T No. 387 of 1980. The trial court convicted the appellant's for the offences punishable under sections 302/24 IPC and also appellants no.1 & 2 under section 323 read with section 34 IPC and appellant no.3 under section 323 IPC sentencing them to 2 months rigorous imprisonment and imprisonment for life.

3. Out of three convicted appellants, appellant no. 1 -Ram Asrey and appellant no. 2 - Hardwari Lal have died during pendency of this appeal, thus this appeal stands abated in respect to appellant nos. 1 and 2 and the appeal survives only in respect of appellant no. 3 - Shiv Shanker.

4. The case of the prosecution in brief is that Krishna Kant Shukla (deceased victim) was a lecturer in Lucknow University and belong to village Kalwa Moti PS Maigal Ganj in Kheri district. There had been a lot of litigation about landed property between Krishna Kant Shukla and Ram Asrey, and his sons (the accused) including proceedings under section 107/117 CRPC between them. Krishna Kant resided at Lucknow and visited his village infrequently mainly on account of enmity between Krishna Kant and Ram Asray and his sons. Father of Krishna Kant, Duryodhan, had died about one and half years earlier, and his Shraadh ceremony was to be performed on 18/09/1979. Krishna Kant came to his village Kalwamoti on 17/09/1979 in the evening. In the morning of 18/09/1979, Krishna Kant went out towards the fields to ease himself in the Khain adjoining the chak road, to the west of the Har of the village. The mother of Krishna Kant, Smt Bitoli Devi PW 4 also accompanied him, but stopped near the flour Mill, and kept a vigil in the direction where her son had gone to ease himself. She saw Ram Asray, accused armed with Kanta, Hardwari with Lathi, and Shiv Shanker with knife moving on the service road towards Krishna Kant. PW4 on seeing the accused walking towards his son, raised an alarm and rushed towards her son. The accused's started assaulting Krishna Kant, and when his mother PW4 tried to save him and she was assaulted by Hardwari with Lathi

from which she received injuries on the head and she started bleeding and fell down. The accused fled towards the west and in the meanwhile Sri Prakash Shukla PW1 was a cousin of the deceased also reached the spot and accompanied the injured Krishna Kant and his mother on a bullock cart to PS maingalganj but Krishna Kant succumbed to injuries on the way near Aurangabad. They then took the dead body to PS Maingalganj where the FIR was written at 1 PM on the same day.

5. Sri Mahendra Kumar Shukla, PW-9 (Investigating Officer) had held inquest upon the dead body of Krishna Kant at the premises of P.S. Maigal Ganj, shortly after the registration of the case on 18.09.1979 and had prepared Inquest Report, Challan Lash, Khaka Lash and letter to Chief Medical Officer, Sitapur for postmortem examination. The Investigating officer - PW-9 had taken in custody a Dhoti, a Banian and a Janeo (all blood stained) from the dead body and sealed them. He had also taken off a gold ring, a silver ring, a plastic ring from the fingers of the dead body and a 'Tabiz' from the neck of the dead body and had given these things in supurdagi of Smt. Bitoli Devi - PW-4. He sealed the dead body and had sent the same through Constable Atma Ram - PW-2 to the District Hospital, Sitapur for postmortem examination at 3.00PM on 18.08.1979.

6. The I.O. - PW-9 had taken statements of Sri Prakash, complainant - PW-1, Smt. Bitoli - PW-4 and of certain others, at P.S. Maigal Ganj. He had deposited the sealed bundle of blood stained clothes at the Malkhana of P.S. - Maigal Ganj and had made G.D. entry in this regard. Thereafter he accompanied Shri Prakash Shukla, complainant PW-1 and reached the scene of occurrence in village - Kalwa Moti. He inspected the site of occurrence which lay in north-west corner of the field of Pahari Singh, on the outskirts of the village and prepared Site Plan. He found blood at the place of incident and marked the same by letter 'A' in the spot map. He had also taken samples of blood stained and simple soil and placed them in separate containers and sealed the same. He had also taken possession of the 'Lota' of the deceased victim which had been handed over to him by the complainant - PW-1 and thereafter gave the same in supurdagi of the complainant.

7. The I.O. - PW-9 also undertook search of the house of accused persons to apprehend them. However, they were not available.

The Doctor L.B. Shukla, PW-3, who examined the deceased Krishna Kant at the relevant time was posed as Medical Officer, Sadar Hospital, Sitapur, stated in this testimony that he had conducted postmortem on 19.09.1979 at 9.30AM, he submitted the postmortem report and found thirteen ante mortem injuries on the deceased. The details of injuries are given below :

1. Lacerated wound 9cm x 1/2cm x bone deep on the right side head 10cm above right ear.

2. Lacerated wound 5cn x 11/2cm x bone deed on the left side 9cm above left eye brow.

3. Lacerated wound 31/2cm x 1/2cm x bone deep on left side heard 7cm above outer corner of left eye brow.

4. Lacerated wound 7cm x 2cm x bone deep onleft side head, 7cm above the left eye brow, 1cm lateral to injury no. 3.

5. Lacerated would 8cm x 2cm x bone deep on left side head 3cm above ear and 3 1/3cm behind injury no. 5.

6. Lacerated wound 10cm x 3cm x bone deep on left side head 3cm above ear and 3 1/2 cm behind injury no. 5.

7. Lacerated wound 7cm x 1/2cm x bone deep on the back of head in occipital region 5cm behing left ear, and 2cm below injury no. 6.

8. Lacerated wound 3cm x 11/2cm x bone deep on the left side face, 1/2cm behind lower eye lid. Maxilla bone on left side fractured.

9. Contusion 10cm x 4cm on the left shoulder tip and adjacent portion of left upper arm.

10. Lacerated wound 1cm x 1cm x bone coming out of the wound on the back of right forearm, 12cm below elbow. Both bones fractured underneath the injury.

11. Lacerated wound 1 cm x 1cm x bone deep on the back of right forearm, 41/2 cm above wrist.

12. Contusion 5cm x 3cm on the right forearm on back just adjacent and below injury no. 10. Ulna bone fractured.

13. Incised wound 10cm x 5cm x cavity deep on left side abdomen, 10cm away from umbillicus at 3 O'clock position. Loops of small and large intestines coming out of the wound.

8. In the opinion of PW-3, death had occurred about one day prior to the postmortem examination. He further opined that death was caused due to coma as a result of head injury. In his deposition PW-3 stated injury no. 13 was sufficient in ordinary course of nature to cause death which was caused by knife.

9. PW-6 Dr. Sohan lal Gupta was examined who deposed that on 18.09.1979 while he was posed in Jangbahadur Hospital, at about 5.00 examined Smt. Bitoli - PW-4, who had three injuries on her body which are described as follows :

(1) Lacerated wound 1cmx1cmx1/2cm on this side of forehead 9cm above the left eyebrow blooding original.

(2) Lacerated wounds 1/2cmx1/2cm on he left side of scalp 5cm above the left ear.

(3) Contusion red colour 2cmx2cm on the middle of scalp.

(4) all the injuries are simple lacerated by the one (S/C) weapon duration (sic) 1/2 day.

10. The Trial Court relying on the account of two eye witnesses namely Shri Prakash Shukla - PW-1 and mother of the deceased Bitoli - PW-4, held the accused to be guilty, as discussed by it in the impugned judgment and order.

11. The Trial Court after taking into consideration aforesaid facts, has observed as under :

"To sum up, it is held that the prosecution has succeeded in establishing beyond reasonable and probable doubt, that the present accused persons, namely Ram Asrey, Hardwari Lal and Sheo Shankar Lal had made the fatal assault upon Krishan Kant (deceased victim) in the relevant morning (18.9.79) on out skirts of village Kalwa Moti P.S. Maigal Ganj in this District. All the present accused persons are, therefore, found guilty of the charge u/s 302 IPC read with section 34 IPC, as brought against them.

Hardwari Lal accused has also been charge for the offence u/s 307 IPC for making an attempt upon the life of Smt.

Bitoli PW-4 on the relevant occasion by giving LATHI blows on her head. Ram Asrey and Sheo Shankar Lal accused persons have on this score been charged u/s 307 IPC read with Section 34 IPC.

No doubt, as has already been found above, Hardwari Lal accused had inflicted Lathi blows on the head of Smt. Bitili PW-4 on the relevant occasion of the instant occurrence. The medical evidence on record (vide injury report Ext.Ka12., and the testimony of Dr. Sohan lal Gupta PW6) show that upon her medical examination only simple injuries had been found upn the body of S,t. Biroli PW-4 The prosecution has failed to show that Hardwari Lal accused has caused injuries Smt. Bitoli PW 4, which were dangerous to life. The charge under Section 307 IPC is, thus, not made out against the accused persons. In this view of the matters, Hardwari Lal accused is found to have committeed offence u/s 323 IPC for causing simple hurt to Smt. Bitoli PW4 on the relevant occasion, and the remaining accused persons namely, Ram Asrey and Sheo Shankar lal are found guilty of the offence u/s 323 IPC read with Section 34 IPC, on this score."

12. Sri Nagendra Mohan, learned counsel for the appellants has straneously urged that the testimony of PW-4 Smt. Bitoli, mother of the deceased is not trustworthy and reliable and her testimony cannot be made the basis of conviction on the accused. He has submitted that it was not probable or natural for a mother to accompany her son who is aged about 42-43 years while going to ease himself in the fields. He also submitted that it was also unreasonable for a person to go to the fields despite of the fact that they had toilet inside the house. To counter the prosecution version he states that in fact the deceased was murdered around midnight and the injuries received by PW-4 was on account of hitting her head with the 'cot'.

13. The second submission made by learned counsel for the appellants was that PW-1 Sriprakash Shukla PW-1 who is also the informant was a chance witness and his presence at the scene of crime is improbable and his evidence therefore is not worthy of any credence and therefore, cannot be made basis of conviction of the accused.

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

15. The issue raised by the counsel for the appellant - Hardwari Lal which needs consideration is regarding the presence of PW-1 and PW-4 at the place of incident and also with regard to credibility of their evidence, which have lead to the conviction of the accused - appellants.

16. The PW-4 Bitoli, mother of the deceased in her examination-in-chief has clearly stated that time of occurrence was around 7.30am and has stated that the accused were inimical to the deceased on the basis of certain property dispute and most specifically with regard to the property left by one Raja Ram who is father of Ram Dulari, first wife of her husband Duryodhan.

17. PW-4 has narrated the entire occurrence in detail stating that she has accompanied the deceased when he had gone on the date of occurrence for easing himself to a spot near the flour mill (ata chakki) of Khema Singh which is about 200 steps from the field of Pahari Singh.

She stated that 8-10 minutes later deceased Krishna Kant sat for easing himself in the north-west corner of the field, then all the accused started assaulting her son, seeing this she rushed towards west and headed towards her son (deceased Krishna Kant) and raised alarm. Hearing her shouts Upendra Misra, Sri Prakash Shukla who were passing through the "chak road" also rushed towards the scene. The accused persons had surrounded the deceased and when she rushed to rescue the deceased, accused Hardwari assaulted her with 'lathi' due to which she fell down on the ground and sustained injuries. PW-4 has further stated that deceased Krishna Kant had fallen on the ground in injured condition and the accused kept on assaulting him, accused Shiv Shankar with knife cut open the abdomen of the deceased and after that the all the accused persons rushed away from the scene.

18. The other ocular witnesses namely Shri Prakash Shukla, informant and Manohar Lal - Pw-8 rushed towards the scene on hearing the alarm raised by PW-4 Bitoli. PW-4 was injured in the occurrence on being assaulted with 'lathi'. PW-4 was medically examined by Dr. Sohan lal Gupta on 18.09.1979, at about 5.00, while he was posed in Jangbahadur Hospital. PW-4 was found to have sustained two lacerated wounds on head and one contusion, all the injuries sustained by her have been opined to be simple in nature and around 1-1/2 day old.

19. Even her cross examination PW-4 adhered to the deposition made by her in examination in chief and no discrepancy could be elicited so as to doubt her testimony.

20. From the discussion made above, the presence of PW-4 Bitoli at the crime scene cannot be doubted as she is injured witness and it was not unnatural for her to accompany her adult son to fields for easing himself. It has been brought on record as per testimonies of various witnesses as well as PW-4 herself that the accused persons were on inimical terms with deceased Krishna Kant and the accused persons on several occasion had threatened to kill the deceased when ever they used to pass in front of the house of PW-4 and in this regard PW-4 has also lodged a complaint at the concerned Police Station.

21. Hon'ble Apex Court in **Manjit Singh Vs. State of Punjab, (2019) 8 SCC 529,** while discussing the issue of reliability of testimony of injured witness, has held in para 13.2 of the Judgment as under :

"13.2. Likewise, the submission about want of independent witnesses in support of prosecution case is also baseless. There is no rule that in every criminal case, the testimony of an injured eye witness needs corroboration from the so-called independent witness(es). When the statement of injured eyewitness is found trustworthy and reliable, the conviction on that basis could always be recorded, of course, having regard to all the facts and surrounding factors. In the present case, the reliable evidence of the injured eyewitnesses cannot be discarded merely for the reason that no independent witness was examined."

22. The Supreme Court in **Balraje @ Trimbak Vs. State of Maharashtra, (2010) 6 SCC 673,** in para 30 of the judgment has observed as under :

"30. In law, testimony of an injured witness is given importance. When

the eyewitness are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope inn innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."

23. Apex Court, in **Abdul Sayeed Vs. State of Madhya Pradesh, (2010) 10 SCC 259,** while dealing with the issue of evidence of injured witness, has held in paras 28, 29 and 30 as follows :

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P., Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P. and Balraje v. State of Maharashtra.]

29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under :

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it was proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishna v. State of Haryana). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to

the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless thee are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

24. Looking to the facts and circumstances of the present case, the act of PW-4 in accompanying her adult son while he was going out to ease himself, is not unnatural and on the contrary has been sufficiently explained and there is no reason to doubt her testimony as even in her cross examination she has consistently adhered to the version narrated by her all through out her examination in chief.

25. According to PW-1 on 18.09.1979 i.e. the date of incident, while he was going to Baba Kishan Das Temple and on the way he met Manohar Lal and Upendra Mishra at the intersection, where he heard screams of the deceased and his mother Bitoli - PW-4 which were coming from the west direction. He saw the accused-appellants assaulting the deceased (Krishna Kant) and his mother Bitoli was trying to save him. Hardwari (one of the accused) struck PW-4 with lathi and as a result of which she fell down. In the meanwhile, PW-1 reached near the place of incident and at that point of time Ram Asrey - another accused, while showing his 'kanta' said that if any one came near them, he would also be killed. After struggle between the accused-appellants and the deceased, the accused Shiv Shankar cut away the stomach of the deceased and ran away. In the meanwhile, number of persons gathered on the spot and the deceased was taken to the hospital in Aurangabad but about one mile from the hospital, the deceased passed away. PW-1 claims himself to the the witness of the crime in question. It has also come on record that PW-1 had taken the deceased to Police Station and shortly after occurrence first information report regarding the incident in question was lodged. All the aforesaid facts lead credence to the ocular testimony of PW-1.

26. Taking into consideration all the facts and circumstances as stated above, it is clear that the accused-appellants namely Ram Asrey, Hardwari Lal and Shiv Shanker Lal assaulted the deceased - Krishna Kant on 18.09.1979 by inflicting 'lathi' blows and knife injury resulting into death of Krishna Kant (deceased victim). The medical evidence on record also shows that the deceased had incurred thirteen injuries in all and in the opinion of PW-3, death took place due to coma as a result of head injury and also the injury no. 13 was sufficient in ordinary course of nature to cause death which was caused by knife. Despite the fact that mother of the deceased is an interested witness and her evidence has been carefully examined which convincingly points towards the guilt of the accused. PW-4 (mother of the deceased) had witnesses the entire incident from the start to the end and has given detailed evidence about the incident. During the incident PW-4 was also injured and her medical report has also been placed on record which shows that she sustained three injuries out of which two were lacerated woulds and one contusion, which were caused by Hardwari Lal one of the accused.

27. The testimony of PW-4 is corroborated by the testimony of PW-1

(informant) in all material particulars with regard to identity of the accused, time of occurrence, nature of weapons, taking the deceased from the scene of crime to the Police Station and lodging of the first information report. Thus, evidence of PW-4 Bitoli cannot be rejected only on the ground that she being mother of the deceased is an interested witness.

28. No other point was argued by learned counsel for the appellant.

29. In view of above, we find no cogent reason to take a view other than the view taken by the Trial Court, thus, no interference in the impugned judgment and order is required, same is hereby affirmed.

30. The appeal is **dismissed.**

31. Appellant no. 3 - Shiv Shanker is on bail pursuant to the order of this Court. His bail bonds are cancelled and surety is discharged. He is directed to surrender before the trial Court within month from the date of this order. The learned trial Court shall remand him to jail for serving out the remainder part of the sentences. On failure of appellant no. 3 - Shiv Shanker to appear before the trial Court within the stipulated period, the learned trial Court shall take appropriate steps against the appellant no. 3 - Shiv Shanker, in accordance with law.

32. Office is directed to transmit the lower Court record to the concerned Court forthwith.

(2020)1ILR A33

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2019

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

Criminal Appeal No. 474 of 2002

Ram Chander & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Apul Mishra, Sri Rahul Saxena, Sri Raghuvansh Misra, Sri Sushil Kumar Pandey

Counsel for the Respondent:
A.G.A.

A. Indian Penal Code, 1860 - Section 34 - object of common intention-joint liability-As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and

concert with which the attack was made, from the nature of injury caused by one or some of them. (Para 49)

B. Code of Criminal Procedure, 1973 - Section 374(2), Indian Penal Code, 1860 - Sections 147, 148, 302/149 - challenge to- life imprisonment passed by trial court-high court upheld the conviction of the accused. (Para 60, 61 & 62)

Deceased had received the lease land in Gaon Sabha land-accused was claiming in the lease land-village head had decided the matter in the evening of the past night of the incident that deceased will leave three and half bigha land in favour of accused-next day accused called the deceased for measurement and on that place five persons – accused taking different weapons reached with common intention and murdered the deceased. (Para 3)

Criminal appeal dismissed. (E-6)

List of cases cited: -

1. Prabhu Dayal Vs. St. of Raj. (2018) 3 SCC (Cr.) 518

2. St. of Karnataka Vs. Suvarnamma (2015) 1 SCC (Crl.) 663

3. Vijai Pal Vs. St. (Govt. of NCT Delhi) (2015) 2 SCC (Cr.) 733

4. St. of U.P. Vs. Krishna Master and ors. (2010) 12 SCC (324)

5. St. of Karn. Vs. Suvarnamma & anr., 2015 (1) SCC 323

6. Pal Singh Vs. St. of U.P. (1979) 4 SCC 345

7. St. of U.P. Vs. M.K. Anthony, (1985) 1 SCC 505

8. Waman & Ors. Vs. St. of Mah., (2011) Criminal Law Journal 4827

9. Sadayappan @ Ganesan Vs. St., represented by Inspector of Police, 2019 SCC 610

10. Ramesh Singh @ Photti Vs. St. of A.P. (2004) 11 SCC 305

11. Asif Khan Vs. St. of Mah. & Anr. (2019) 5 SCC 210

12. Balwantbhai B. Patel Vs. St. of Gujarat & Anr.

13. Bishu Sarkar & Ors Vs. St. of W. B., AIR 2017 SC 1729

14. Gaya Yadav & Ors. Vs. St. of Bih. & Ors., AIR 2003 SC 1759

15. D.V. Shanmugham & Anr. Vs. St. of A.P., AIR 1997 SC 2583

16. Sushil Vs. St. of U.P., 1994 Law Suit Supreme Court 995

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard Sri Apul Mishra alongwith Sri Rahul Mishra and Sri Raghuvansh Misra, learned counsel for the appellants and Sri Ajit Ray, learned A.G.A. for the respondent and perused the material on record.

2. This appeal has been filed against the judgement and order dated 29.01.2002 passed in Session Trial No.568 of 1996 (State vs. Ram Bahadur and 3 others), Police Station Beesalpur, District Pilibhit by which learned Additional Session Judge, Pilibhit has convicted the appellants-accused Ram Chander, Ram Shankar, Ram Bharosey and Ram Bahadur and sentenced appellant Ram Chander to undergo two years rigorous imprisonment under Section 148, appellants Ram Shankar, Ram Bharosey and Ram Bahadur have been sentenced to undergo one year rigorous imprisonment under Section 147 I.P.C. and all the appellants have been sentenced to undergo life imprisonment and fine of Rs.2000 under Section 302 read with Section 149 I.P.C. in default of fine to undergo further a period of 6 months additional imprisonment.

3. In brief facts of the prosecution case are that Gaon Sabha land was allotted on lease to the deceased Beni Ram, brother of the informant in which one Sunder Lal (since died during trial) was claiming his land. Munendra Pal Singh village head (Pradhan) resident of village Bharuwa settled the dispute between them a day before the incident and it was decided that Beni Ram will leave three and half bigha land in favour of Sunder Lal. On 22.11.1991 at 11:00 A.M. Ram Bahadur, Sunder Lal of the village came to the house of deceased Beni Ram having spade in hand and asked for measurement as decided yesterday, on which Beni Ram (deceased), Shyam Bihari (informant) and Smt. Ram Rati wife of Beni Ram proceeded for measurement taking *gattha* of wood (log) and rope. When they reached at 1:00 p.m. on the field, Ram Chander having a spear in hand, Ram Shankar and Rama Bharosey met there. Sunder Lal, Ram Bahadur, Ram Chander, Ram Shankar and Ram Bharosey tied both legs of Beni Ram with towel. Ram Bahadur pressed legs of Beni Ram, Ram Bharosey, Ram Shankar caught hold his both hands, Sunder Lal by spade and Ram Chander by spear started jabbing to Beni Ram stating to kill him, Sunder Lal cut the neck of Beni Ram, Ram Chander gave spear blow on the stomach. Informant and Smt. Ram Rati wife of Beni Ram alarmed. On their alarm Subedar Khan resident of the same village and Ram Singh of village Bharuwa arrived. All of them tried to save Beni Ram but accused threatened to them of dire consequences. After killing Beni Ram, assailants went away towards village through the bank of river.

4. On the oral information of Shyam Bihari (P.W.1) Case Crime No.258 of 1991, under Sections 147, 148, 302 I.P.C. was registered on 22.11.1991 at 15:30 p.m. under chik F.I.R. Ext.Ka-1 and G.D. Entry No.32 Ext.Ka-2 was also prepared on same day at 15:30 P.M. Investigation of the case was handed over to S.I. Gyan Singh (P.W.5). Investigating Officer reached the place of incident, prepared inquest memo (Ext.Ka-4) and relevant documents Ext.Ka-5 to Ext.Ka-11 i.e. address of the deceased, letter to R.I., letter to C.M.O., letter to C.M.O., police form-13, police form 379 and specimen seal respectively and dispatched the dead body for post-mortem.

5. Dr. A.K. Sharma (P.W.3) conducted post-mortem on 23.11.1991 at 3:30 P.M. and prepared report Ex.Ka-2, according to which following injuries were found on the body of the deceased Beni Ram:

1. Incised wound 14 c.m. x 7 c.m. cavity deep at the front of abdomen 5 c.m. below the umbilicus, intestine coming out.

2. Incised wound 9 c.m. x 5 c.m. below trachea the left ear and running below mandible, left carotid artery jagutar vein cut.

3. Incised wound 4 c.m. x 3 c.m. x muscle deep right side of the neck, 3 c.m. below the left angle at mandible on deep dissection carotid artery cut.

4. Incised wound 1 c.m. x 0.5 c.m. bone deep on the right side of neck, 1 c.m. above injury no.3.

5. Incised wound 3 c.m. x 1 c.m. bone deep on the back of right shoulder scapula.

6. Incised wound 5 c.m. x 1 c.m. bone deep on the back of right shoulder 1 c.m. above injury no.5 cardio process of right scapula cut.

7. Incised wound 1 c.m. x 5.7 c.m. x chest cavity deep over the angle of right scapula.

8. Abrasion 3 c.m. x 1 c.m. on the inner end of right collar bone.

9. Abrasion 7 c.m. x 1 c.m. over the left side of neck 5 c.m. above the middle left collar bone.

In his opinion cause of death was shock & haemorrhage due to ante-mortem injuries and death of the deceased was near about one day old.

6. After dispatching the dead body for post-mortem Investigating Officer inspected the place of incident and prepared spot map Ext.Ka-12. He also took into possession rope, log (lattha), blood stained and plain earth (sand), spade along with handle, old towel and prepared memo Ext.Ka-13. After completing the investigation submitted charge sheet Ext.Ka-3 under Sections 147, 148, 302 I.P.C. against the accused-appellants before the C.J.M., Pilibhit, who committed accused for trial to the court of Sessions Judge where Case Crime No.258/1991 was registered as Session Trial No.568 of 1996 (State vs. Ram Bahadur and others). The Sessions Judge transferred it to the court of Special Judge (E.C. Act), Pilibhit for trial. The trial court framed charge under 147 and 302/149 I.P.C. against the accused-appellants Ram Bahadur, Ram Shankar, Ram Bharosey and under Section 148, 302/149 I.P.C. against accused-appellants Sunder Lal and Ram Chander. The accused denied the charge and claimed trial.

Accused Sunder Lal died during trial and case against him was dismissed as abated vide order dated 10.04.2001.

7. Prosecution to prove its case has produced six witnesses. P.W.1 Shyam Bihari informant, P.W.2 Smt. Ram Rati are witnesses of fact while P.W.3 Dr. A.K. Sharma conducted post-mortem, P.W.4 Mohd. Anees second Investigation Officer, P.W.5 Gyan Singh first Investigating Officer and P.W.6 Constable Narendra Pal Singh are formal witnesses. The accused-appellants in their examination under Section 313 Cr.P.C., have stated that the witnesses have deposed against them due to enmity and denied the prosecution case, but they led no evidence in their defence.

8. Trial court after hearing learned counsel for the parties and perusal of records has passed the impugned judgement and order. Hence, this appeal.

9. Learned counsel for the appellant No.2 Ram Bharosey, appellant No.3 Ram Bahadur and appellant No.4 Ram Shanker, Sri Apul Mishra has submitted that appellants are not connected with the offence. The role has been alleged of catching hold, if one spade stunt is given then the person will fall down and there will be no occasion to catch hold, therefore, participation of the appellants is doubtful. He further submitted that if the whole story of prosecution as stated by P.W.1 Shyam Bihari is accepted that the appellants grappled the deceased, then it was not their intent to commit murder covered under Section 34 of I.P.C. In support of his contention he relied on the following judgements of Hon'ble Supreme Court:

1. Balwantbhai B. Patel vs. State of Gujarat and another, (2009) 10 SCC 584.

2. Bishu Sarkar and others vs. State of West Bengal, AIR 2017 SC 1729.

3. Gaya Yadav and others vs. State of Bihar and others, AIR 2003 SC 1759.

4. D.V. Shanmugham and another vs. State of A.P. AIR 1997 SC 2583.

5. Sushil vs. State of U.P., 1994 Law Suit Supreme Court 995.

10. Learned counsel for the appellant no.1 Ram Chander, Sri Rahul Mishra assisted by Sri Raghuvans Mishra has submitted that P.W.1 Shyam Bihari has specifically stated that he reached the place of incident at 1:00 P.M. going from the police station whereas per chik report Ext.Ka-1 first information report has been registered at 3:30 P.M. Shyam Bihari has also stated that he met *daroga* and put his thumb impression on the paper when he came police station along with the dead body. He has also stated that he reached police station along with the dead body at 10:00 P.M. in the night while P.W.2 Smt. Ram Rati has stated that the dead body reached police station at 6:00 P.M. and Shyam Bihari was also along with her. Both witnesses also stated that their statements might have been recorded on the same day, from which it becomes clear that first information report is anti-timed. It is also submitted that on the point of lodging F.I.R. and reaching of the informant to the police station question could have been put to the scribe of the chik and G.D. but scribe of chik and G.D. has not been produced by the prosecution so he has been deprived of the opportunity of cross-examination also. He has also submitted that according to prosecution a spear injury was caused to the deceased in the stomach. Injury by spear will be punctured one but according to post-mortem report injury no.1 has been found to be stomach injury cavity deep incised wound of 14 c.m. x 7 c.m. Thus, the injury alleged to have been caused by spear does not match with the medical report.

11. His next submission is that according to P.W.1 Shyam Bihari the incident took place 20 steps away from the west side of the river and its natural sense will be that incident took place towards west side of the river while P.W.5 Investigating Officer Gyan Singh has stated that the dead body was at a distance of 20 steps in the east from the river, as such from the prosecution evidence place of occurrence is also not established. He further submitted that Smt. Ram Rati has stated that in the incident her forefinger of right hand was cut off but there is no medical report to support her statement and Investigating Officer has stated that if finger of Smt. Ram Rati was cut off then she must have told him and he would have got her medically examined thus Investigating Officer does not support her statement, which makes her presence at the spot doubtful.

12. Next submission is that P.W.1 Shyam Bihari has stated that he was residing along with his son in Sitarganj and he was residing separate with his deceased brother. What was occasion to come on the day of incident has not been explained. Therefore, his presence at the time of incident is doubtful.

13. Lastly he has submitted that P.W.1 Shyam Bihari informant is brother, Smt. Ram Rati is wife of the deceased, both are highly interested witnesses. P.W.1 Shyam Bihari states that he does not know about share and side of the deceased land. He also states that as soon as the accused reached on the field, the accused grappled with his brother while P.W.2 Smt. Ram Rati states that reaching the field marking for partition were made, talks took place between them, near about half an hour period was spent in the field and when her husband sat to smoke *chilam,* incident took place. Thus, inference will be either

P.W.1 Shyam Bihari or P.W.2 Smt. Ram Rati is telling a lie or both of them are telling a lie. Learned counsel prayed that prosecution has failed to prove the charge beyond reasonable doubt against the appellants. The impugned judgement and order is not sustainable. Accordingly, judgement and order is liable to be set aside and appellants are liable to be acquitted.

14. On the other hand Sri Ajit Ray, learned A.G.A. for the respondent submits that on the basis of oral information of the informant Shyam Bihari, F.I.R. Ext.Ka-1 was registered at 3:30 P.M. and in Ext.Ka-1 itself time of the incident has been mentioned 1:00 P.M., not a single question has been put by the defence from the witness P.W.6 Narendra Pal Singh regarding the time of registration of the case. The informant P.W.1 Shyam Bihari, P.W.2 Smt. Ram Rati are rustic persons and their statements in the trial court have been recorded near about after lapse of 6 years from the date of incident. According to ***Prabhu Dayal v/s State of Rajasthan (2018) 3 SCC (Cr.) 518*** rustic witnesses can develop a tendency to exaggerate and this does not make that the entire testimony of such witnesses is falsehood. Minor contradiction in the testimony of witnesses are not fatal to the prosecution case. In ***State of Karnataka v/s Suvarnamma (2015) 1 SCC (Crl.) 663,*** Hon'ble Supreme Court has held that in regard to exact time of an incident or the time of duration of an occurrence, usually people make their estimates by guess work on the spur of the moment at the time of interrogation. It depends on the time sense of individuals which varies from person to person. A witness is liable to be overawed by the court atmosphere and piercing cross-examination by the counsel and out of nervousness mix up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment the witnesses nowdays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. So, on the basis of the statement of informant Shyam Bihari and P.W.2 Smt. Ram Rati, it cannot be said that the F.I.R. is anti-timed. Placing reliance on ***Vijai Pal v/s State (Govt. of NCT Delhi) (2015) 2 SCC (Cr.) 733,*** he has submitted that value of medical evidence is only corroborative and testimony of Shyam Bihari and Smt. Ram Rati with regard to causing spear injury in stomach by Ram Chander is intact and their statements in this regard are reliable. He also submitted that P.W.1 Shyam Bihari and P.W.2 Smt. Ram Rati have stated that after taking meal they had gone to the field which is corroborated by medical evidence as in post-mortem report Doctor has also found that 2-3 hours before the incident deceased could have taken meal. Shyam Bihari has stated that he lived separately with the deceased in the village and he also lived at Sitarganj along with his son. In his cross-examination nothing has been elicited from which it can be inferred that on the date of incident he was not present on the spot and in the village, where the incident took place. The spot map Ext.ka-12 has been proved by the Investigating Officer P.W.5 Sub-Inspector Gyan Singh, who had taken the blood stained and plain sands from the place of incident and it has been sent to Forensic Science Laboratory, Agra. According to expert report human blood has been found on it from which the place of occurrence is established. Shyam Bihari

has stated that place of incident is 20 steps away from the west side of the river. On the basis of his statement it cannot be inferred that the place of incident is changed. He has further submitted that the witnesses have stated that in murder of Jagdish, case was registered against the deceased. He has also stated that a gangster case was also registered against the deceased brother and another case under Section 25 Arms Act was also registered against him which indicates that the witness is not concealing the facts but speaking truly, thus he is reliable and trustworthy witness. Lastly he has submitted that so far as discrepancy regarding incident taking place on reaching the place of incident and after sometime reaching the place of incident is concerned due to the lapse of time and witnesses being rustic one, this discrepancy has taken place but P.W.2 Smt. Ram Rati has stated that on reaching the spot places were dug for marking in which half an hour was spent and when her husband sat for smoking *chilam* the incident was caused. She has also stated that from the house in reaching the spot it took half an hour. The estimated time has been told by the witness which also corroborate the time of incident to be 1:00 P.M. mentioned in the F.I.R. Ext.Ka-1. He submitted that from the evidences produced by the prosecution charges are fully proved against the appellants. The trial court has rightly convicted and sentenced the appellants-accused. No interference is required by this Court and appeal is liable to be rejected.

15. In cross-examination P.W.1 Shyam Bihari has stated that he reached the spot at 1:00 P.M. going from the police station, while as per F.I.R. Ext.Ka-1, the report of the incident has been made on 22.11.1991 at 15:30 P.M. In cross-examination Shyam Bihari has also stated that dead body reached the police station at 10:00 P.M. P.W.2 Smt. Ram Rati has stated that dead body came to the police station at 6:00 P.M. As such there is a discrepancy between statements of Shyam Bihari and Smt. Ram Rati with regard to reaching the dead body at the police station.

16. P.W.1 Shyam Bihari has stated that by dictating he lodged the report and after hearing it, he had put his thumb impression. From his statement it is very much clear that when he went to the police station for lodging report at that very time after dictating and hearing the report he put his thumb impression on the report.

17. He has also stated that he is illiterate and he by profession is a farmer. P.W.2 Smt. Ram Rati has also stated that she is illiterate. As per F.I.R. Ext.Ka-1 informant Shyam Bihari is by caste Dhobi (washerman). It is the case of the prosecution that Gaon Sabha land was allotted on lease to the deceased Beni Ram which indicates that the witnesses belong to a poor strata of the society and both are rustic witnesses.

18. In ***State of U.P. vs. Krishna Master and others (2010) 12 SCC (324),*** the Hon'ble Supreme Court has held that "the basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly

when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness."

19. In ***State of Karnataka v/s Suvarnamma and another, 2015 (1) SCC 323,*** the Hon'ble Supreme Court in para 12.2 of the judgement has referred the case of Bharwada Bhoginbhai Hirjibhai v/s State of Gujarat, 1983 SCC 728 as follows:

5. .....We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned Counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprised. The [pic]mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

20. In the instant case the incident has occurred on 22.11.1991 and statement of P.W.1 Shyam Bihari was recorded on 23.10.1997 and statement of P.W.2 Smt. Ram Rati was started on 23.10.1997 and completed on 03.03.1998 i.e. the statements of both witnesses were recorded near about after a lapse of six years.

21. In the first information report, Ext.Ka-1 the time of incident has been mentioned 1:00 P.M. and time of giving information to the police station is mentioned as 15:30 P.M. The witness has stated very clearly that he reached the police station and at the police station he had no talk with the *daroga*. This much talk too did not take place that you reach on the spot. Further he has stated that after lodging report he had gone at the spot and he reached on the spot from the police station at about 1:00 P.M. in the afternoon. It appears that due to his testimony being recorded after a lapse of six years from the date of incident and witness is also a rustic witness overawed by the court atmosphere and piercing cross-examination made by counsel and out of nervousness mixing up facts, getting confused regarding sequence of events or fill up details from imagination on the spur of the moment as held by Hon'ble Supreme Court in *Bharwada Bhoginbhai Hirjibhai v/s State of Gujarat, (supra),* he has stated that he reached on the spot at 1:00 P.M. going from the police station.

22. Informant Shyam Bihari has further stated that he had talk with *darogaji* at the police station at the time when he made thumb impression on the paper. He has also stated that when he came along with the dead body at the police station then he had met *darogaji*. He has clearly stated that after lodging report he had gone on the spot. From his whole statement it is clear that after lodging the report, informant Shyam Bihari returned to the spot thereafter dead body of the deceased was taken to the police station. It appears that due to statement being recorded after six years from the date of incident and informant being rustic one out of nervousness mixing the fact with regard to putting thumb impression has stated that he put his thumb impression on papers when he met *darogaji* on coming along with dead body. Considering his whole statement it can't be inferred that he lodged the report when dead body reached the police station. Thus, on the basis of statements of P.W.1 Shyam Bihari that he reached the place of incident at 1:00 P.M. going from the police station and statement of Smt. Ram Rati as well as his statement with regard to time of reaching dead body at the police station, time of lodging F.I.R. 15:30 P.M. mentioned in Ext.Ka-1 and informant's putting thumb impression on paper when he met daroga along with dead body, it can't be inferred that F.I.R. was lodged when dead body reached the police station.

23. In view of the above discussion, we do not find any substance in the contention of learned counsel for the appellants that F.I.R. is anti timed.

24. P.W.1 Shyam Bihari in his cross-examination has stated that the incident has taken place at a distance about 20 steps from the west side of the river and as per P.W.5 Gyan Singh Investigating Officer and spot map Ext.Ka-12 distance of the dead body from the river is 22 steps towards east of the river. The veracity of spot map Ext.Ka-12 proved by Investigating Officer P.W.5 Gyan Singh has not been disputed by the defence. In the Ext.Ka-12 dead body has been shown at place marked as "D' which is towards east of the river and distance of the dead body from the east of the river has been shown to be 22 steps. P.W.1 Shyam Bihari has stated that the incident took place at about 20 steps from the west side of the river which cannot be taken as the dead body was 20 steps towards west from the

west side of the river. It is tact of the counsel as to how he puts question to a witness. The witness replies in accordance to the question put to him. Thus, on the basis of statements of P.W.1 Shyam Bihari and P.W.5 Gyan Singh Investigating Officer it can't be inferred that the place of incident is not established. Apart from it, in spot map Ext.Ka-12, it is clearly mentioned that at place marked as "D' dead body was found and at the place marked as "3' blood was found and both places are situated towards east side of the river. On asking by defence in cross-examination Investigation Officer has stated that apart from place D he did not see blood of the deceased. As per recovery memo Ext.Ka-13 Investigating Officer took into his possession blood stained (sand) from the place of incident. He also took into his possession the towel from which legs of deceased alleged to have been tied and a spade shown in the spot map at place F was found. According to scientific report available on record human blood were found on the materials recovered from the place of incident. These facts clearly establish the place of incident towards east of the river. As such prosecution regarding place of incident is consistent, corroborated and reliable.

25. In view of the above, we also find no substance in the contention of learned counsel for the appellants that on the basis of statement of informant P.W.1 Shyam Bihari and P.W.5 Investigating Officer, Gyan Singh, place of incident is not established.

26. As per post-mortem report Ext.Ka-2, seven incised wounds and two abrasions have been found on the person of the deceased, in which injury no.1 is incised wound 14 cm. x 7 cm. cavity deep at the front of abdomen 5 c.m. below the umbilicus, intestine coming out. In Ext.Ka-1 proved by P.W.1 Shyam Bihari, it has been mentioned that Ram Sunder inflicted spear injury on the stomach. P.W.1 Shyam Bihari through his testimony also has supported the prosecution version and has stated that accused Ram Chander caused spear injury in the stomach of deceased Beni Ram. P.W.2 Smt. Ram Rati too supporting the prosecution story has stated that Ram Chander caused spear injury in the stomach of her husband. Statement of both the witnesses regarding inflicting spear injury in the stomach of deceased Beni Ram by appellant-accused Ram Chander has not been impeached. Thus, the statement of P.W.1 Shyam Bihari and P.W.2 Smt. Ram Rati is consistent and corroborative to each other.

27. Learned counsel for the appellant no.1 contends that injury by spear will be punctured wound and injury no.1 alleged to have been caused by spear has been found to be incised wound of 14 c.m. x 7 c.m. So, the alleged spear injury does not match with the medical report.

28. In ***Pal Singh vs. State of U.P. (1979) 4 SCC 345,*** the Hon'ble Apex Court has held as under:

"Lastly, it was submitted that the injuries caused to the deceased are inconsistent with the manner in which the deceased is alleged to have been assaulted. For instance, while the accused were armed with kantas and spears, only one punctured wound was found. We might point out that this is a purely artificial argument. The High Court has rightly pointed out that if the accused assaulted with side portion of the blade of the weapons in a slanting fashion, only

incised wounds would be caused. Thus the injuries sustained by the deceased are not inconsistent with the medical report which finds a number of incised wounds inflicted on the deceased. On the findings of fact arrived at by the High Court, it is clear that the appellants shared the common object to cause the death of the deceased either by participation or by exhortation."

29. In ***Vijai Pal v/s State of (Government of NCT of Delhi) (supra)*** Hon'ble Supreme Court in para 15 of the judgement has held as under :

"There is no dispute that the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner as alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. It is also true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis--vis the injuries appearing on the body of the deceased person and likely use of the weapon and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses. It is also an accepted principle that sufficient weightage should be given to the evidence of the doctor who has conducted the post- mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory. It is also a settled principle that the opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the Court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. That apart, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which are to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to the alternative possibilities cannot be accepted as conclusive."

30. In the instant case testimony of P.W.-1 Shyam Bihari and P.W.-2 Smt. Ram Rati with regard to causing spear injury by Ram Chander is consistent and corroborated to each other. Considering the opinion of Hon'ble Apex Court in ***Pal Singh and others (supra)*** that if accused assaulted with side portion of the blade of the weapons in a slanting fashion only incised wounds would be caused as well as opinion of Hon'ble Supreme Court in ***Vijai Pal v/s State (GNCT of Delhi) (supra)*** referred by learned A.G.A. that value of medical evidence is only corroborative and unless medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever injuries taking place in the manner alleged by eye witnesses, the testimony of eye witnesses

can't be thrown out on the ground of alleged inconsistency between it and medical evidence, in the instant case it can't be gathered that injury no.1 is not possible by spear as stated by witnesses Shyam Bihari and Smt. Ram Rati. Accordingly, we find no substance in the contention of learned counsel for the appellants that spear injury will necessarily be punctured one and injury no.1 is incised injury hence injury injury no.1 alleged to have been caused by spear does not match with the medical report.

31. P.W.2 Smt. Ram Rati has stated that she made efforts to save her husband from injury being caused by accused in which her right hand's forefinger got cut and fell on the ground. In cross-examination she has stated that she had shown the cut finger to the Investigating Officer. The Investigating Officer P.W.5 Gyan Singh has stated that he cannot tell whether finger of Smt. Ram Rati was cut or not. Smt. Ram Rati had not received any injury and her finger was not cut, if it happened, so, then she certainly would have told him and he would have got her medically examined for the same. From statement of P.W.2 Smt. Ram Rati and P.W.5 Gyan Singh, it appears that Smt. Ram Rati has made such a statement first time in court which is not supported by any other evidence, so, to this extent her statement does not appear credible.

32. In first information report, it is mentioned that along with deceased Beni Ram, Smt. Ram Rati had also gone at the place of incident. In spot map Ext.Ka-12 at place-1 shown in a circle presence of wife of the deceased has been mentioned. As per statement of P.W.5 Gyan Singh, the spot map was prepared on the day of incident and from cross-examination nothing has been extracted so that its veracity can be doubted. P.W.2 Smt. Ram Rati has also stated that she had accompanied her husband and in her cross-examination by defence nothing material has been extracted, so that her presence on the spot at the time of incident can be doubted. P.W.1 Shyam Bihari in examination-in-chief as well as in cross-examination has stated that he and his sister-in-law (bhabhi) were present on the spot together. He has also stated that due to fear of accused his bhabhi did not go to the deceased to save him. Thus, with regard to presence of P.W.1 Shyam Bihari and P.W.2 Smt. Ram Rati at the time of incident on the spot, prosecution evidence is consistent, corroborative to each other. P.W.2 Smt. Ram Rati in last day of her cross-examination has stated that when her husband was caught, tied and killed she cried and wept, five persons were there so, she could not dare save him. As such the prosecution evidence of P.W.1 Shyam Bihari and P.W.2 Smt. Ram Rati is consistent and corroborated to each other that due to fear of accused, Smt. Ram Rati did not go to the deceased to save him which in the facts and circumstances of the case appears credible.

She has also stated that she tried to save her husband but accused caught hold her. She has further stated that when her finger was cut blood dropped on the place of incident. Next, she has stated that she did not feel finger was cut off. Again she has stated that finger was fallen there on the spot. She has also stated that as the spade was jabbed on neck, she fell down over her husband and injury was caused in her hand. It is the prosecution case that accused Sunder Lal was jabbing with spade and accused Ram Chander with spear and according to Smt. Ram Rati her

forefinger was cut as the spade was jabbed on the neck she fell over her husband to save him. It does not appear probable that when spade is used in causing injury then in making effort to save victim only forefinger will cut.

33. In ***State of Karnataka v/s Suvarnamma and another, 2015 (1) SCC 323,*** the Hon'ble Supreme Court relying on the case of Bharwada Bhoginbhai Hirjibhai v/s State of Gujarat, 1983 SCC 728 in para 5 of the judgement has quoted sub-para (7) as under:

"A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

34. In ***Prabhu Dayal v/s State of Rajasthan (2018) 3 SCC 517,*** Hon'ble Supreme Court in para 18 of the judgement has held that "it is a common phenomenon that the witnesses are rustic and can develop a tendency to exaggerate. This, however, does not mean that the entire testimony of such witnesses is falsehood. Minor contradictions in the testimony of the witnesses are not fatal to the case of the prosecution. This Court, in State of ***U.P. v/s M.K. Anthony, (1985) 1 SCC 505,*** held that inconsistencies and discrepancies alone do not merit the rejection of the evidence as a whole. It stated as follows:

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer.

Having examined the evidence of this witness, a friend and well-wisher of the family carefully giving due weight to the comments made by the learned counsel for the respondent and the reasons assigned to by the High Court for rejecting his evidence simultaneously keeping in view the appreciation of the evidence of this witness by the trial court, we have no hesitation in holding that the High Court was in error in rejecting the testimony of witness Nair whose evidence appears to us trustworthy and credible."

In para 21 of the judgement Hon'ble Supreme Court has also held that "Moreover, it is not necessary that the entire testimony of a witness be disregarded because one portion of such testimony is false.

35. In the instant case, it appears that Smt. Ram Rati, who is a rustic witness, under apprehension of being disbelieved by the court to be truthful witness as observed by Hon'ble Supreme Court in ***State of Karnataka v/s Suvarnamma and another (supra),*** has tried to fill up details from imagination on the spur of moment and developed a tendency to exaggerate as held by Hon'ble Supreme Court in ***Prabhu Dayal v/s State of Rajasthan (supra)*** in stating that her forefinger was cut off in making an effort to save her husband from the accused persons.

In view of the above although we find that statement of Smt. Ram Rati with regard to cutting her forefinger in saving her husband is not credible but on the basis of her this statement, in view of the above discussion, her presence at the time of incident is not doubtful. Accordingly, we do not find substance in the contention of learned counsel for the appellants that presence of Smt. Ram Rati on the spot is doubtful.

36. In the instant case the F.I.R. and G.D. scribe has not been produced, as P.W.6 Constable Narendra Pal Singh has stated that he was posted at police station Beesalpur along with Head Moharrir no.31 Babu Ram Yadav and he has seen him reading and writing and well acquainted with his handwriting and signature. He has proved F.I.R. Ext.Ka-1 included in the file, in the handwriting and signature of Babu Ram Yadav. He has also proved disclosure of F.I.R. no.258/1981 in the G.D. No.32 at 15:30 P.M. as Ext.Ka-15. Regarding registration of F.I.R. No any question has been put to this witness so that registration of F.I.R. at 15:30 P.M. can be doubted.

37. P.W.1 Shyam Bihari has stated that his report was scribed in the police station on his dictation and after hearing it, he had put his thumb impression and he has proved it as Ext.Ka-1. As per Ext.Ka-1, the incident took place at 1:00 P.M. on 22.11.1991. It is also mentioned in it that report was lodged on 22.11.1991 at 15:30 P.M. We have already discussed in preceding paras of the judgement with regard to F.I.R. being ante time and in para 23 of the judgement has found that F.I.R. is not anti-timed. The prosecution has produced the informant P.W.1 Shyam Bihari and defence was provided opportunity of cross-examination to this witness. In such circumstances, although scribe of the chik F.I.R. and G.D. has not been produced by the prosecution and defence had no opportunity to cross-examine the scribe of the chik F.I.R. and G.D. but as prosecution has produced informant P.W.1 Shyam Bihari, who orally lodged F.I.R. Ext.Ka-1 and to prove chik F.I.R. and G.D. prosecution has also

produced P.W.6 Constable Narendra Pal Singh and no question with regard to registration of F.I.R. has been put to him. In the facts and circumstances it appears that no prejudice has been caused to the defence. Accordingly, we are of the view that although scribe of chik and G.D. has not been produced by prosecution on account of which defence had no opportunity to cross-examine him but no prejudice has been caused to the defence.

38. P.W.1 Shyam Bihari in cross-examination has stated that he was also residing along with his son, separate with his deceased brother. He has also a house in Sitarganj. His son Sohan Lal was residing with him in Sitarganj. He has stated that on the day of incident at about 11:00 A.M. Ram Bahadur and Sunder Lal came at his house to call deceased Beni Ram, at that time Sunder Lal had a spade. He has also stated that Sunder Lal asked from them to measure the field as decided yesterday on which he, deceased Beni Ram and his wife Smt. Ram Rati reached lease field. He and Beni Ram were bare hand and Smt. Ram Rati had a *khurpi*. They reached on the field at about 11:00 A.M. and he has narrated the story of the incident. In the spot map Ext.Ka-12, his presence has been also shown by mark 2 in a circle. From his cross-examination nothing has been extracted by defence from which his presence at the time of incident can be doubted. On going through his testimony, it is also clear that the defence has not tried to clarify from him with regard to opportunity of being present in the village where the incident took place. Apart from it, it is also notable that the witness Shyam Bihari has clearly stated that he was also residing along with his son, separate with the deceased brother. In such a situation, his presence at the time of incident appears natural also. P.W.2 Smt. Ram Rati also has supported the presence of Shyam Bihari at the time of incident.

In view of the above discussion, on the basis of statement of informant Shyam Bihari that he has also a house in Sitarganj and he was residing along with his son separate with the deceased, his presence on the spot can't be doubted. Accordingly, we find no substance in the contention of learned counsel for the appellants that presence of informant Shyam Bihari at the time of incident is doubtful.

39. It is true that P.W.1 Shyam Bihari in his cross-examination has stated that he does not know what share and in which side the accused Sunder Lal had to get in the lease land but in cross-examination itself he has stated that in between field of Beni Ram and accused Sunder Lal field of Siya Ram, Damodar Lal, Ram Gopal and Pancham Rai are adjoining to each other. In cross-examination he has also stated that he did not go in the panchayat. It is case of prosecution that land was allotted to the deceased on lease and prosecution evidence in this regard is intact. Thus, in view of his statement that he did not go in the panchayat, on the basis of statement of informant Shyam Bihari that he does not know what share and which side accused Sunder Lal had to get, no any adverse inference against prosecution can be derived.

40. P.W.1 Shyam Bihari has stated that after reaching the field accused assembled and grappled his brother and fallen down him. P.W.2 Smt. Ram Rati has stated that on reaching the field

marking for partition were made, talks took place between them near about half an hour was spent in the field and when her husband sat to smoke *chilam* incident took place. P.W.5 Investigating Officer Gyan Singh in cross-examination has stated that he did not find *chilam* or spread tobacco on the place of incident. As per recovery memo Ext.Ka-13 a rope of mooz and jute, a spade, a log of wood and an old towel by which both legs of the deceased alleged to have been tied have been recovered by P.W.5 Gyan Singh Investigating Officer but *chilam* and tobacco were not recovered by him. If really it was a fact that deceased Beni Ram putting *chilam* in his mouth as tried to smoke accused persons caused the incident, then certainly *chilam* and tobacco should have been there and found by the I.O. but it was not so. Apart from it her statement itself appears inherently contradictory as she has stated that firstly Ram Bahadur fallen down the deceased, Ram Bahadur and Ram Shankar tied his legs, Ram Bharosey caught the hand, Sunder Lal cut neck by spade and Ram Chander inflicted spear injury in the stomach. If deceased was fallen down, his legs were tied, thereafter incident was caused, in that situation, no question arises of putting *chilam* in mouth to smoke. It appears that Smt. Ram Rati who is a rustic witness and statement has been recorded after lapse of six years from the incident, has given such statement being confused or to fill up details from imagination on the spur of moment on account of fear being being disbelieved as held by Hon'ble Supreme Court in *Bharwada Bhoginbhai Hirjibhai v/s State of Gujarat, 1983 SCC 728* and considered in *State of Karnataka vs. Savarnamma and another (supra).*

41. In Ext.Ka-1 the first information report which has been made just after the incident, it is mentioned that when informant Shyam Bihari, deceased Beni Ram and Smt. Ram Rati reached the field accused Ram Chander, Ram Shankar and Ram Bharosey also met there and accused Sunder Lal, Ram Bahadur, Ram Chander Ram Shankar and Ram Bharosey fallen down his brother Beni Ram and tied legs of his brother Beni Ram, Ram Bahadur pressed legs of his brother, Ram Bharosey and Ram Shankar caught his both hand, Sunder Lal by spade and Ram Chander by spear started jabbing stating to kill him. Sunder Lal cut neck of his brother by spade and Ram Chander gave spear blow on stomach. This version has been supported by P.W.1 Shyam Bihari through his testimony also and from his cross-examination nothing has been extracted, so as to doubt his testimony. It appears that Smt. Ram Rati being a rustic and illiterate lady and her statement also has been recorded after a lapse of six years from the date of incident as held by Hon'ble Supreme Court in ***Prabhu Dayal v/s State of Rajasthan (2018) e SCC 517*** has exaggerated the prosecution story with regard to digging of places for demarcation thereafter sitting the deceased on earth put *chilam* in his mouth and as he tried to smoke the incident was caused and as discussed in para 31 of the judgement in order to save deceased her forefinger was also not cut off but in material particulars of prosecution case, her testimony like allotment of land on lease to her husband, claim by accused Sunder Lal in the lease land, matter being decided by village head Ram Chander @ Munendra in the evening of the past night, coming of accused Sunder Lal to call the deceased, going on the lease land of deceased Beni Ram, informant Shyam Bihari and herself, tying leg of the deceased by accused Ram Bahadur, Ram Shankar catching hand by

Ram Bharosey, causing spade injury on the neck by accused Sunder Lal and spear injury on the stomach by accused Ram Chander is intact. As such on reading her statement as whole core of the case is not shaken and appears to have a ring of truth, as such on the basis of her statement that on reaching the field marking for partition were made, talks took place, her husband sat and as he tried to smoke *chilam*, incident was caused and in saving deceased her forefinger was cut, her whole statement can't be discarded.

42. Considering the facts and circumstances of the case as discussed above, in our opinion, on the basis of statement of P.W.2 Smt. Ram Rati that on reaching the field marking for partition were made talks took place between them and near about half an hour period was spent in the field thereafter her husband sat to smoke *chilam* then incident took place, it cannot be said that witnesses are telling a lie.

43. P.W.1 Shyam Bihari is brother of the deceased Beni Ram and P.W.2 Smt. Ram Rati wife of the deceased, as such both witnesses are related witnesses with the deceased. In the case of ***Waman and others vs. State of Maharashtra, (2011) Criminal Law Journal 4827,*** it has been observed by the Hon'ble Supreme Court that merely because witnesses are related to the complainant and deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of their being relative cannot discredit their evidence. In the other words, the relationship is not a factor to affect the credibility of a witness and courts have to scrutinize their evidence meticulously.

44. In ***Sadayappan @ Ganesan vs. State, represented by Inspector of Police, 2019 SCC 610,*** the Hon'ble Supreme court has held that criminal law jurisprudence makes a clear distinction between a related and interested witness. A witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished.

In the instant case defence has not pointed out how the prosecution witnesses informant P.W.1 Shyam Bihari and P.W.2 Smt. Ram Rati are interested in seeing the accused persons punished.

In view of the above, we find no substance in the contention of learned counsel for the appellants that both the witnesses are highly interested witnesses.

45. Learned counsel for the appellant Sri Apul Mishra has submitted that if one spade stunt is given the person will fall down and there will be no occasion to catch hold, therefore, participation of the appellant is doubtful but we find no force in the contention of learned counsel for the appellant as it is not the prosecution case that spade stunt was given to the deceased thereafter other accused caught hold the hands and press the legs of the deceased.

46. Sri Apul Mishra has also submitted that if prosecution story as stated by P.W.1 Shyam Bihari is accepted that the appellants grappled the deceased, it was not their intent to commit the murder covered under Section 34 of the I.P.C. He has referred five cases in support of his contention, disclosed in para 9 of the judgement.

47. The question before us for consideration is whether appellant no.2

Ram Bharosey and appellant no.4 Ram Shankar, who caught hold hands of the deceased and appellant no.3 Ram Bahadur, who pressed both legs of the deceased shared common intention with co-accused Sunder Lal and Ram Bahadur who caused spade and spear injury to the deceased Beni Ram.

48. Common intention, essentially being a state of mind, so, it is very difficult for prosecution to produce direct evidence to prove such intention, therefore, generally it has to be inferred from the conduct of the accused, manner in which the accused arrived at the scene, they mounted the attack, their determination and concert with which the attack was made and nature of injury caused by one or some of the accused. The persons who are not responsible for the injury can be gathered by subsequent conduct after the attack. To appreciate, whether appellant nos.2, 3 and 4 had common intention in committing the offence or not we would like to refer the following cases.

49. ***Ramesh Singh @ Photti vs. State of A.P. (2004) 11 SCC 305***. In this case Hon'ble Supreme Court in para 12 of the judgement has held as under:

"To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted."

50. In ***Asif Khan vs. State of Maharashtra and another (2019) 5 SCC 210,*** the Hon'ble Supreme Court in para 26 of the judgement has held as under:

"To the same effect is the judgment of this Court in Raju Pandurang Mahale vs. State of Mahrashtra and

Another, (2004) 4 SCC 371. Another judgment, which is relevant for the present case is the case of Murari Thakur and Another Vs. State of Bihar, (2009) 16 SCC 256. In the above case, the main plea of the accused was that he had caught the legs of the deceased whereas third accused cut him with his sharp edged weapon. In paragraph No.7, following was laid down:-

"7. We agree with the view taken by the High Court and the trial court that the accused had committed murder of deceased Bal Krishna Mishra after overpowering him in furtherance of their common intention on 26-8-1998 at 4 p.m. No doubt it was Sunil Kumar, who is not before us, who cut the neck of the deceased but the appellants before us (Murari Thakur and Sudhir Thakur) also participated in the murder. Murari Thakur had caught the legs of the deceased and Sudhir Thakur sat on the back of the deceased at the time of commission of this murder. Hence, Section 34 IPC is clearly applicable in this case."

51. According to prosecution case, Beni Ram had received lease land, accused Sunder Lal was claiming in the lease land. Munendra Pal Singh (village head) had decided the matter in the evening of the past night of the incident that deceased Beni Ram will leave three and half bigha land in favour of accused Sunder Lal. Next day of the decision at about 11:00 A.M. Ram Bahadur and Sunder Lal came to the house of the deceased to call him for measurement of land as decided by the village head at that time Sunder Lal was having a spade. On the call of the accused to measure the land, P.W.1 Shyam Bihari, deceased Beni Ram and his wife Smt. Ram Rati reached the field, where all the accused persons met among whom accused Ram Chander was armed with an spear, accused Sunder Lal was armed with spade. The place of incident is situated on the bank of river a remote area and there was no such occasion for the other accused persons to be present there that too accused Ram Chander being armed with spear. When deceased Beni Ram reached on the spot, he was fallen down by accused, both legs were tied by towel. Accused Ram Bahadur pressed legs of the deceased Beni Ram, Ram Bharosey and Ram Shankar caught hold his both hands. Sunder Lal cut the neck of Beni Ram and Ram Chander gave spear blow on the stomach which is supported by the post-mortem report Ext.Ka.2 proved by P.W.3 Dr. A.K. Sharma. As per post-mortem report as a result of stomach injury intestine of the deceased came out. Over the neck three incised injuries, on right shoulder two incised injuries and one incised injury chest cavity deep over the angle of right scapula have been found. Causing spade injury on the neck and spear injury on the stomach as found in Ext.Ka-2 post-mortem report in the condition of hands being caught by two accused and legs by one accused is possible one. Pressing legs of deceased by one accused, catching hold of both hands by two accused and causing spade and spear injury by two accused indicates that all the accused shared common intention in perpetration of crime. Testimony of P.W.1 Shyam Bihari with regard to going of accused persons through the bank of river is corroborated by spot map Ext.Ka-13 as such prosecution evidence in this regard also is consistent, corroborated and reliable.

52. The facts, circumstances and the observation of five cases referred by learned counsel for the appellants Sri Apul Mishra are follows.

53. In the case of ***Balwantbhai B. Patel vs. State of Gujarat and another,*** it

has been stated that on 30th November 1993, at about 9 p.m., Ghulam Hussain Ansari, Sagir Ahmed Ansari, since deceased, Gyasuddin Ahmed Ansari and Kitabuddin Ansari were sitting at their house in Falia, District Bharuch, when the three accused Thakorbhai Somabhai, Jagdishbhai Nanjibhai Patel and Balwantbhai Patel, the present appellant, arrived at that place in a drunken condition. They abused Sagir Ahmed Ansari and others sitting there and when they objected, Thakorbhai inflicted a knife blow in the abdomen of Sagir Ahmed and another knife blow on the left side of his head. Gyasuddin Ansari and Kitabuddin Ansari intervened so as to rescue Sagir Ahmed whereupon Balwantbhai, the present appellant, caught hold Gyasuddin and Jagdishbhai inflicted a blow on his head with an axe. The appellant thereafter ran away hurling abuses on the other side. Sagir Ahmed died soon after he reached the Civil hospital. The trial court convicted all the accused and judgement of the trial court was confirmed in appeal by the High Court. In the appeal it was contended that the appellants herein had caught hold of Gyasuddin Ahmed Ansari, PW which had enabled Jagdishbhai, the co-accused, to cause a simple injury on him. It was pointed out that the injury report of Gyasuddin Ahmed Ansari was not on record which clearly falsified the prosecution story. It was also submitted that, in any case, the story of catching hold of a witness or of a deceased or an allegation of exhortation made by an accused are invariably used to cast the net wide with respect to the incident. The Supreme Court has held as under:

"There is no evidence to show that Gyasuddin Ansari had received any injury as his injury statement is not on record. The finding, therefore, of the High Court about the appellant's presence appears to be on shaky foundations. We are also not unmindful of the fact that allegations of catching hold of an attack victim or of an exhortation are invariably made when the number of injuries on the injured party do not co-relate to the number of accused or in the alternative in an attempt to rope in as many persons as possible from the other side. We also observe that the appellant has already undergone more than six yesrs of the sentence. For all these reasons, we find that the order of the High Court is not sustainable."

54. In the case of ***Bishu Sarkar and others vs. State of West Bengal, AIR 2017 SC 1729,*** prosecution relied on the testimony of PW 2 Nepal Dey, PW 3 Gopal Dey and PW 5 Kanai Sharma. According to PW2 Nepal Dey, he saw accused Tarit Kundu, Sahadeb Sarkar, Sasthi Sarkar, Bishu Sarkar, Sukumar Ghosh and Paresh Sarkar and all six persons caught hold of the collar of shirt of Raju Bose and assaulted him by fist and blows.....Accused Sukumar Ghosh and Paresh Sarkar gave the order to kill Raju Bose. Then accused Sasthi Sarkar, Bishu Sarkar, Sahadeb Sarkar had remained engaged in catching hold of Raju Bose. Accused Tarit Kundu gave a blow on the back of Raju Bose with the help of a sharp-cutting weapon like "bhojali'. The Hon'ble Supreme Court held as under:

"It is true that PWs 2 and 5 assert that the present appellants had caught hold of Raju Bose. But it is not clear from the record whether such act was so intended to enable accused No.1 to deal the fatal blow. Further, PW 3 is completely silent on this aspect. In the

circumstances we deem it appropriate to grant benefit of doubt to the present appellants and acquit them of the charge under Section 302 read with Section 34 IPC."

55. In the case of ***Gaya Yadav and others vs. State of Bihar and others, AIR 2003 SC 1759,*** accused Gaya Yadav belonged to neighbouring village Kurkut Bigha and came to the deceased Jagannath Singh, Mukhiya of Mau Gram Panchayat in Mau Bazar and requested the deceased for supper for the night in his village on the occasion of "Holika Dahan". The deceased was reluctant to accept the invitation. At this time the accused Karu Yadav, who is also of the village Kurkut Bigha arrived there and both the accused insisted upon Mukhiya for the supper. The deceased succumbed to the request of the accused, P.W.3 Lallan Bihari the informant also accompanied him, as they made their way out of Mau village P.W.3 saw 9-10 persons coming from the opposite direction. P.W.3 thought that these persons might be going somewhere on the occasion of "Holika Dahan". Soon those persons came closer to them and the accused Gaya Yadav and Karu Yadav gave a push to the deceased Mukhiya and thereafter all other accused persons surrounded him. Out of them he could recognize Bhagat Yadav, Mukhiya Yadav, Madeshwar Yadav, Rahish Yadav, Deo Prasad Yadav and Khalitra Yadav. Having seen the accused surrounding the deceased the informant retreated about 10-15 steps backward and thought that the accused persons would leave the deceased Mukhiya but instead accused Khalitrar Yadav and Rahish Yadav caught hold of Mukhiya and accused Gaya Yadav and Bhagat Yadav fired at him from country made pistol. Thereupon, Mukhiya fell down. Thereafter, the accused Mukhiya Yadav who was armed with pausli bent over Mukhiya as if he was cutting the neck of Mukhiya. Simultaneously, all of them were uttering that Mukhiya should not survive. P.W.3 Lallan Bihari, informant during trial deposed that he went back 4 or 6 steps from where he saw that Rahish Yadav and Khalitra Yadav were catching hold the two arms of the deceased and the accused Gaya Yadav and Bhagwat Yadav each fired a shot from the pistol at the deceased who fell down. Thereafter, the accused Mukhiya Yadav began to cut the neck of Mukhiya by pausli. The Hon'ble Supreme Court has held as under:

"So far as A-2 Madheshwar Yadav, A-3 Khalitra Yadav and A-4 Rahish Yadav are concerned, there is no evidence to show that they have shared the common intention to murder the deceased. No overt act has also been attributed to them. Therefore, the prosecution has failed to establish its case against them for the offence under Sections 302/34 I.P.C. beyond reasonable doubts. Their appeal is, accordingly, allowed."

56. In the case of ***D.V. Shanmugham and another vs. State of A.P., AIR 1997 SC 2583,*** it has been stated that some incident had happened between the two groups on 6th May, 1990 in respect of which a complaint was lodged by accused No.1. on account of the same there was ill feeling between the two groups and on the date of occurrence on 22nd September, 1990 at 8:00 P.M. when one Natarajan was coughing on account of his fever the accused No.1 was passing by that road on his scooter. He took this to be act of taunting, and therefore, brought his brother accused No.2 and picked up quarrel and challenged him. Said

Natarajan was a relation of the complainant. Shortly thereafter at 10:00 P.M. the complainant PW1 and the deceased - Mohan were returning from a theatre and when they had reached the house of one V. Murli the five accused persons formed themselves into an unlawful assembly and attacked the complainant and the deceased with deadly weapons. While accused No.1 caught hold of deceased-Mohan accused No.2 stabbed him with a knife on the abdomen and Mohan fell down wounded. When the complainant, PW-1 intervened he was also stabbed with a knife by accused No.2 on his left hand and accused No.1 dealt a blow with a stick on the right hand. PW-1 then raised an alarm and on hearing the cries his relatives including Sekhar who is the other deceased came out of their houses and rushed towards Mohan. The five accused persons then also attacked these people and while accused No.3 caught hold of Sekhar, accused No.2 stabbed him with knife on his abdomen and caused fatal injury. These accused persons more particularly accused Mukhiya and 6 hurled stones which caused injury to the member of the complainant group. Accused No.1 also stabbed one Ravi Kumar with a knife on his left elbow, as a result of which said Ravi Kumar was injured. The injured persons were taken to the hospital for treatment and Mohan died during the midnight on account of shock and haemorrhage as a result of the injuries sustained by him. The Hon'ble Supreme Court held as under:

"We find considerable force in the submission of Mr. Parasaran, the learned senior counsel for the appellants, that prosecution has not explained the grievous injury on the head of accused-appellant No.1 and such non-explanation persuades us to draw an inference that the prosecution has not presented the true version at least so far as the role played by accused appellant No.1 and the witnesses who have been examined and who have ascribed a positive role to the appellant No.1 that he caught hold of Mohan when appellant No.1 stabbed Mohan are not true on material point and their evidence thus has become vulnerable. It has been also held that Mr. Parasaran is right in his submission that the witnesses ascribed the role of catching hold of Mohan by accused No.1 and role of caching hold of Sekhar by accused No.3 and the High Court gave the benefit to accused No.3 since the witnesses had not narrated the same to the police when examination under under Section 161 Cr.P.C. took place and therefore the self same infirmities having crept in when the prosecution witnesses stated about catching hold of Mohan by accused No.1, the said accused No.1 is entitled to the benefit of doubt. In fact as stated earlier Mrs. Amreshwari, the learned senior counsel appearing for the State also fairly stated that possibly it would be difficult to sustain the conviction of accused No.1 when the accused No.3 has got benefit of doubt and has been acquitted and no appeal against the said order of acquittal has been filed by the State. On account of such infirmities the prosecution as indicated above and more particularly when the prosecution has failed to offer any explanation for the grievous injuries sustained by accused No.1 on his head and the High Court has already found that the said injury was caused in course of the incident, we have no hesitation to hold that the accused-appellant No.1 D.V. Shanmugam is entitled to the benefit of doubt and accordingly set aside the conviction and sentence of the said accused- appellant No.1 both under

Section 302/34 IPC as well as under Section 324 I.P.C."

57. In the case of ***Sushil vs. State of U.P., 1994 Law Suit Supreme Court 995,*** it has been stated that a day earlier to the occurrence there was an altercation between the deceased Jai Prakash and the appellants when the appellants had threatened to kill him. On 15th August, 1982 at about 5:45 A.M. the deceased Jai Prakash along with his uncle Hoshiyara PW 2 had gone to the jungle close by to their village to answer the call of nature. At about 6:30 A.M. after they had eased themselves, Hoshiyara cleaned his hands and when the deceased Jai Prakash was cleaning his hands it is at that point of time the accused Sushil, Tapeshwar and Ram Niwas arrived there. The accused/appellant Tapeshwar caught hold the hands of the deceased Jai Prakash, Ram Niwas attacked with a knife in the abdomen and stomach while Sushil gave knife blows on the waist and knee. When Hoshiyara saw this assault on Jai Prakash he raised hue and cry. The witnessess Charan Singh PW 3, Chandermal PW 4 and Dharampal PW 5 rushed there. The three assailants named above ran away from the place of occurrence after assailing Jai Prakash. The Hon'ble Supreme Court has held as under:

"The appellant Tapeshwar was not armed with any weapon nor he is alleged to have made any assault on the deceased. There is no evidence that Tapeshwar was aware of the fact that the co-accused Sushil and Ram Niwas were armed with knives which may be used by them in the crime. The prosecution evidence is also silent on the point whether these two accused took out the knives suddenly with or without the knowledge of Tapeshwar or came with knives openly and visibly and inflicted knife injuries to the victim. In these facts and circumstances, it is difficult to say with certainty as to what extent, if at all, the appellant Tapeshwar shared the common intention with the other two appellants Sushil and Ram Niwas. In view of these facts and circumstances in our opinion the appellant Tapeshwar is entitled for the benefit of doubt."

58. As mentioned in para 51 of the judgement, the facts and circumstances of the instant case differ from the facts and circumstances of the cases referred by learned counsel for the appellants, hence, the cases referred are not helpful for the appellants. In view of the opinion of Hon'ble Supreme Court expressed in ***Ramesh Singh @ Photti v/s State of A.P. and Ashif Khan v/s State of Maharashtra and another (supra),*** the acts and conducts of the appellants no.2, 3 and 4 in the instant case as mentioned in para 51 of the judgement prior to the incident, like going of accused Sunder Lal and Ram Bahadur to call the deceased for measurement as decided in the evening of past night, on reaching the deceased and witnesses meeting of all the accused persons on the place of incident situated in a remote area on the bank of the river, falling down the deceased by the accused persons thereafter tying both legs of the deceased and pressing legs by accused Ram Bahadur catching hold both hands by accused Ram Bharosey and Ram Shankar inflicting spade and spear injuries, seven in number by Sunder Lal and Ram Chander respectively, making no effort by any accused to save the deceased, after the incident going away together of all accused through the bank of river indicates that all accused persons had shared the

common intention in killing the deceased Beni Ram.

59. The accused in their statement under Section 313 Cr.P.C. have stated that witnesses have deposed against them due to enmity but what was the enmity, it has not been explained by them. Since, Sunder Lal (died during trial) was claiming land in the lease land of the deceased, so with regard to him it may be said that witnesses of fact had enmity but so far as appellants are concerned, there is no material on record to draw such an inference. Without any explanation or evidence it cannot be accepted that there was enmity between the deceased and accused persons and witnesses of fact deposed against them due to enmity. Therefore, on the basis of their statement under Section 313 Cr.P.C., it cannot be accepted that accused persons have been falsely implicated and witnesses deposed against them due to enmity and appellant Ram Chander to undergo two years rigorous imprisonment under Section 148 I.P.C.

60. Thus, upon a wholesome consideration of the facts of the case, attending circumstances and the evidence on record, we do not find that the learned trial Judge committed any illegality or legal infirmity in convicting and sentencing appellants Ram Chander, Ram Shankar, Ram Bharosey and Ram Bahadur each to undergo life imprisonment and fine of Rs.2,000/- under Section 302 read with Section 149 I.P.C., in default of fine six 6 months additional imprisonment, appellants Ram Shankar, Ram Bharosey and Ram Bahadur to undergo one year rigorous imprisonment under Section 147 I.P.C. and appellant Ram Chander to undergo two years rigorous imprisonment under Section 148 I.P.C.

61. This appeal lacks merit and is accordingly, **dismissed.**

62. Appellants Ram Chander, Ram Shankar, Ram Bharosey and Ram Bahadur are on bail. Chief Judicial Magistrate, Pilibhit is directed to take them into custody and send them to jail for serving out the remaining sentences.

63. Office is directed to send a copy of this order to the court concerned within a week for compliance. The C.J.M. concerned shall send his report with regard to the accused-respondents within one month thereafter.

64. The lower court record shall be returned to the court concerned.

(2020)1ILR A56

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.01.2020

BEFORE
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 558 of 2019
with
Criminal Appeal No. 564 of 2019

Prem Sheela @ Guddi ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Anjali Singh, Sri K.K. Singh

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

Criminal Law - Indian Penal Code - Sections 498-A, 304-B - Dowry Prohibition Act, 1961 - Section 3/4 - Appeal against conviction.

It is settled principle of law that an accused may be convicted only on the basis of dying declaration if it is true and is reliable because the admissibility of dying declaration is based on the Latin Maxim "Nemo Moriturus Praesumitur mentire" which means that a person will not meet his maker with a lie in his mouth. It is duty of the Court to ensure the fact that whether such dying declaration was made by the deceased or not, and if it is made by him/her, whether the deceased was in free and sound state of mind and was not tutored, influenced or pressurized by any person. If it is proved that the maker of the statement was tutored, influenced, pressurized or was not in a position to make such dying declaration or any reasonable suspicion appears in the manner of recording thereof, such dying declaration cannot be made as sole basis for the conviction of accused. (para 37)

Thus from the perusal of aforesaid statement of witnesses as well as dying declaration it transpires that before the death of deceased there was no torture and harassment to the deceased due to demand of dowry by the appellants. (para 32)

In addition to above, appellants are neither husband nor family members of deceased. They are sister-in-law (nanad), brother-in-law (nandoi) and niece of deceased. They do not reside with deceased. As per prosecution case neither any dowry was demanded nor was given at the time of marriage. Generally it is seen that if husband and his family members are not asking for dowry, their relatives who are not family members of in-laws of deceased, do not demand dowry and if prosecution alleges that they are demanding dowry, it has to be proved by prosecution by reliable evidence. But prosecution, in this case, has failed to prove such fact. (para 31)

Deceased was well educated and was graduate, as stated by Hari Kishan (PW-2) but her signature was not obtained on Ex.Ka-11. Prosecution has not offered any explanation as to why the deceased, who was well educated, did not prefer to put her signature but put her thumb impression only on the last page of dying declaration. (para 53)

Thus, in view of above short coming, serious irregularities, it is clear that the said dying declaration is tutored and doubtful which cannot be treated as reliable. (para 54)

Prosecution has miserably failed to prove its case beyond reasonable doubt. (para 56)

Appeal is allowed. (E-2)

List of cases cited: -

1. Atbir Vs. Government (N.C.T. Of Delhi) (2010) 9 SCC 1

2. St.of Raj. Vs. Wakteng, AIR 2007 SC 2020

3. Lakhan Vs. St. of M.P. JT 2010 (8) SC 363

4. Subhash Vs. St. of Haryana, AIR 2011 SC 349

5. Murugesan Vs. State, (2012) 25 SCC 383

6. Bakhshish Singh Vs. St. of Punj., AIR 1957 SC 904

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

1. Both criminal appeals have been filed against the judgment and order dated 29.11.2018, passed by Additional Session Judge/F.T.C. (Offences against Women), Jaunpur, in S.T. No. 389 of 2013 (State of U.P. Vs. Kusum Devi and others), arising out of Case Crime No. 371 of 2013, under Sections 498-A, 304-B IPC and 3/4 Dowry Prohibition Act (in short 'D.P. Act'), P.S. Chandvak, District Jaunpur whereby appellants, namely, Prem Sheela @ Guddi, Kusum Devi and Brijbhan Gaur have been convicted and sentenced for offence u/s 498-A IPC for 2 years imprisonment and fine of Rs. 5000/-, for offence u/s 304-B IPC for 7 years rigorous imprisonment and u/s 3/4 D.P. Act for one year imprisonment and with fine of Rs. 1000/-. All the sentences have been directed to run concurrently. Since both the appeals have been filed against the same

judgement, hence both are being heard and decided jointly by common judgement.

2. Brief facts, arising out of this appeal, are that deceased Pratiksha Gaur was married to Hari Kishan (PW-2), s/o Banarasi, R/o Village Kanaura, P.S. Chandvak, District Jaunpur, in December 2007 in mass wedding ceremony. Appellant Brijbhan Gaur is brother-in-law of Hari Kishan (PW-2), appellant Kusum Devi is his sister (wife of appellant Brijbhan), appellant Prem Sheela @ Guddi is his niece (daughter of Kusum Devi) and one Subhash (since acquitted) is real brother of Hari Kishan (PW-2). Asha Devi (PW-1), mother of deceased Pratiksha, lodged a written information (F.I.R.) (Ex.ka1) on 9.6.2013 at about 9:50 p.m. at P.S. Chandvak, District Jaunpur that aforesaid appellants and Subhash (since acquitted) used to torture the deceased Pratiksha for want of dowry. On 8.6.2013 at about 7:30 p.m., appellants and Subhash (since acquitted) poured kerosene oil on deceased Pratiksha and set her ablaze, whereby serious burn injuries were caused to deceased; information of the said incident was given to Asha Devi (PW-1) by Hari Kishan (PW-2), upon such information she (PW-1) rushed to place of occurrence and learnt that her daughter was in hospital. Thereafter, she rushed to the hospital and found that the deceased was struggling for her life in District Hospital, Jaunpur. The information, given by Asha Devi (PW-1) was entered by police in General Diary (Ex.Ka 9) and on the basis whereof, Case Crime No. 371 of 2013 was registered by Const. Vinod Saroj (PW-8), under Sections 498-A, 307 IPC and 3/4 D.P. Act, against the appellants as well as against Subhash (since acquitted). Investigation was entrusted to S.I. Mata Prasad (in short 'Ist I.O.') who rushed to the place of occurrence and after its inspection, prepared site plan (Ex.Ka 10), seized kerosene oil with plastic jerrycan, match box and prepared seizure memo (Ex.Ka 3).

3. Ram Kailash Saroj (PW-7), *Naib Tehsildar* (Local Executive Magistrate), upon oral direction of Sub-Divisional Magistrate, Sadar Jaunpur, reached the District Hospital, Jaunpur where deceased was admitted and her treatment was going on. He recorded the statement (Ex.Ka 11) i.e. dying declaration of deceased on 9.6.2013 in the intervening night of 9.6.2013 at about 12:10 a.m. (night) which reads as under:

मृत्यु कालिक बयान दिनांक 09.06.13

प्रमाणित किया जाता है प्रतीक्षा उम्र लगभग 24 लते ध्व हरीकिशन गौड़ कनौरा डोभी बयान देने की स्थिति में है एवं होशो हवास मे है।

12.10 ।ण्डण् ह0 अपठनीय

(Dr.Prabhat)

आकस्मिक चिकित्साधिकारी

अ0श0उ0 नाथ सिंह जिला चिकित्सालय

जौनपुर

प्रारम्भ 0–10 A.M.

मै प्रतीक्षा आयु लगभग 24 वर्ष पत्नी हरीकिशन गौड़ निवासी ग्राम कनौरा डोभी थाना चन्दवक ईश्वर की शपथ लेती हूँ जो कहूँगी सच कहूँगी। सच के सिवाय कुछ न कहूँगी।

प्र01 – आप कैसे जल गई ?

उ0 – मेरी शादी सन् 2007 में 12 दिसम्बर को हरी किशन उर्फ संतोष के साथ राज कालेज में आयोजित सामूहिक विवाह समारोह में हुई थी। मै पढना चाहती थी मेरी ननद श्रीमती कुसुम व ननदोई बृजभान जो मेरे ससुराल में ही रहते है मुझे प्पढने नही देने के लिए तरह–तरह

की बाते करके मेरे परिवार से अलग करवा दिये तथा मुझे मेरी ननद कुसुम व उसकी बेटी गुड़्डी ने एक वर्ष पूर्व दहेज के लिए काफी प्रताड़ित करने लगे और मुझे काफी मारा–पीटा। वे लोग बराबर मुझे घर से भगाने की बात करते है। मेरे गांव के गप्पू सिंह पुत्र न मालूम जिनके भाई पुलिस विभाग में बनारस में नौकरी करते है वे आज सुबह दो सिपाहियों के साथ मेरे घर पर आये और मुझे गंदी–गंदी गालियॉ दिलवाये और बोले कि

यह बड़ी झगड़ैल है इसे मारो इतना कह कर वे लोग चले गये उसके बाद मेरी ननद व उसकी बेटी ने मिल कर बहुत मारा–पीटा तथा दिन भर झगड़ा चलता रहा। शाम को लगभग सात बजे मेरी ननद–कुसुम आयु 38 वर्ष पत्नी बृजभान व उनकी बेटी गुड़्डी आयु लगभग 21–22 वर्ष पुत्री बृजभान व बृजभान पुत्र (शायद) मिश्री व जितेन्द्र उर्फ मानी व गोलू ने मिल कर कर मेरे ई३पर मिई[illegible] का तेल डालकर

4 माचिस से जला दिये। (फिर कहा कि) गोलू जलाने में नही था। गुड़्डी ने मिई[illegible] के तेल के प्लास्टिक के गैलन से मेरे ई३पर मिई[illegible] का तेल डाला उस समय बृजभान ने मुझे पकड़ रखा था अंधेरे में मुझे किसने जला दिया मै उसे नहीं देख पायी। कुसुम भी मुझसे लड़ रही थी। मुझे जलता हुआ देखकर सभी लोग छोड़ कर गये।

प्र02 – आग कैसे बुझी ?

उ0 – जब मुझे जला कर भाग गये तभी मेरा पति भट्ठे पर काम करके साइकिल से घर आ गया और मुझे किसी चीज से

प्र03 – आप का मायका कहां है ?

उ0 – मेरा मायका राज कलोनी हुसैनाबाद जौनपुर में है।

प्र04 – आप को अस्पताल कौन लाया ?

उ0 – मेरा माता जी आशा देवी पत्नी सहाजू व मेरे पति मुझे एम्बूलेंस 108 से अस्पताल लाये है।

प्र05 – क्या आप के पति भी दहेज के लिए प्रताड़ित करते थे ?

उ0– मेरे पति बहुत अच्छे आदमी है। उन्होने कभी मुझे दहेज के लिए प्रताड़ित नही किया।

बयान पढ़कर व सुनकर तस्दीक किया।

समाप्त 0–40 AM
नि0अं0 दाया
श्रीमती प्रतीक्षा

प्रमाणित

ह0 अपठनीय

09/06/13

(राम कैलाश सरोज)

नायब तहसीलदार

सदर, जौनपुर

प्रमाणित किया जाता है कि बयान देते समय यह अपने पूरे होशो हवास में रही।

12.40 AM

ह0 अपठनीय

09.06.13

आकस्मिक चिकित्साधिकारी

अ0श0उ0 नाथ सिंह जिला चिकित्सालय

जौनपुर "

"Dying Declaration dated 09.06.13

Certified that Pratiksha aged about 24 years w/o Hari Kishan Gaur r/o Kanaura is fit to give statement and is in full conscious.

12.10 A.M.
Signature illegible

(Dr. Prabhat)

Emergency Medical Officer
A.S.U. Nath Singh District Hospital

Jaunpur

Started 0-10 A.M.

I, Pratikcha aged around 24 years w/o Hari Kishan Gaur R/o vill-Kannaura Dobhi, PS-Chandwak swear in the name of god that I will state nothing but truth.

Q: How have you got burnt?

Ans: I got married on 12 December 2007 with Hari Kishan @ Santosh in the mass wedding ceremony held in Raj College. I wanted to study. My sister-in-law Kusum and my brother-in-law Brij Bhan who live in my in-law's house, in order to not let me study, under different excuses and pretensions, got me separated from my family. Then around one year ago, my sister-in-law Kusum and her daughter Guddi, started torturing me for the purpose of dowry and beaten me badly. Every now and then, they used to talk about driving me out of the house. Gappu Singh S/o unknown of our village whose brother works in police department in Banaras, came today in the morning to our house along with two sepoys and started abusing me and said "She is quarrelsome; just beat her." Saying this, he went away. Thereafter, my sister-in-law and her daughter beaten me badly and the quarrel ensued the entire day. In the evening around 7.00 p.m., my sister-in-law Kusum aged 38 years w/o Brij Bhan and her daughter Guddi aged 21-22 years D/o Brij Bhan and Brij Bhan S/o (Shayad?) Mishri and Jitendra @ Mami and Golu poured kerosene oil upon me, lit a matchstick and set me on fire. (Then stated that) Golu was not involved in setting fire. Guddi poured kerosene oil upon me with a plastic gallon. Brij Bhan was getting hold of me that time. I could not see it in dark as to who set me on fire. Kusum was also fighting with me. Seeing me set on fire, everybody ran away.

Q-2: How was the fire put off?

Ans: When they had set me on fire and ran away, my husband, after having completed his job in a kiln, came back by a cycle, and covered me with something and put off the fire.

Q-3: Where is your parent's house?

Ans: My parent's house is in Raj Colony, Husainabad, Jaunpur.

Q-4: Who brought you to hospital?

Ans: My mother Asha Devi W/o Sahju and my husband brought me to the hospital in the ambulance of 108.

Q-5: Did your husband also torture you for dowry?

Ans: My husband is a very nice man. He never tortured me for dowry.

Heard and verified.

Concluded at 0-40 A.M.

R.T.I. of Smt. Pratiksha

attested

sd/- illegible

09.06.13

(Ram Kailash Saroj)

Naib Tehsildar

Sadar, Jaunpur

Certified that she was in full conscious during statement.
12.40 A.M.

Sd/- Illegible

Emergency Medical Officer

A.S.U. Nath Singh District Hospital

Jaunpur"

(English translation by Court)

4. Deceased Pratiksha could not be saved and during treatment succumbed to severe burn injuries on 16.6.2013. After death of deceased the case was converted under Sections 498-A, 304-B I.P.C. and 3/4 D.P. Act and investigation was entrusted to Mayaram (PW-5), Deputy Superintendent of Police (Dy. S.P.) Kerakat, Jaunpur (in short 'II I.O.'). Naib Tehsildar (Local Executive Magistrate), Ramesh Chandra Yadav (PW-6), upon information, proceeded to the place where dead body of the deceased was lying and got the inquest report and relevant police papers prepared by S.I. Vijay Bahadur, sealed the dead body and sent the same for post mortem examination to district hospital, Jaunpur. After investigation, charge sheet (Ex.Ka 5) was submitted against the appellants and Subhash Gaur (since acquitted) before the Chief Judicial Magistrate, Jaunpur, who took the cognizance of offence and since the offence was exclusively triable by the Session Court, he committed it for trial to Session Court in compliance of Section 209 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code'), after providing the copies of relevant police papers to appellants and other co-accused.

5. Charges were framed by the Trial Court under Sections 498-A, 304-B I.P.C. alternatively u/s 302 I.P.C. and u/s ¾ D.P. Act, against the appellants as well as Subhash Gaur (since acquitted) who denied the prosecution case and claimed for trial.

6. In order to prove the prosecution case the prosecution examined Asha Devi (PW-1), Hari Kishan (PW-2), Dr. Ramesh Kr. Singh (PW-3), Anoop Kumar Gaur (PW-4), Mayaram (PW-5), Ramesh Chand Yadav (PW-6), Ram Kailash (PW-7), Vinod Saroj (PW-8), wherein PW-1, PW-2, PW-4 and PW-7 are witnesses of fact whereas rest witnesses are formal witnesses.

7. After the prosecution evidence, the statements of appellants and Subhash Gaur (since acquitted) were recorded under Section 313 of Code. They denied the prosecution story and stated that they have been falsely implicated. Appellant Kusum Devi further stated that she used to support her father and was residing at village Kanaura due to which deceased and her husband were annoyed with her. She had not set deceased ablaze. She has been falsely implicated, on the instigation of Hari Kishan (PW-2), by the informant Asha Devi (PW-1). Same statement/explanation was also given by appellants Brijbhan Gaur and Premsheela @ Guddi. They have further stated that they did not reside with deceased. Subhash Gaur (since acquitted) also stated that he was falsely implicated, he had not committed any offence and used to reside separately from the deceased.

8. Appellants were given opportunity by Trial Court to lead evidence in their defence but they did not produce any evidence. Upon considering the prosecution evidence, the Trial Court vide aforesaid impugned judgement and order, convicted and sentenced the appellants as above and acquitted the accused Subhash. Aggrieved by the said judgment and order these appeals have been preferred.

9. Heard Sri Kusumayudh Krishna Singh, Advocate holding brief of Sri Anjali Singh, learned counsel for appellant, Sri Asheesh Mani Tripathi, learned AGA and perused the record.

10. Learned counsel for the appellants has submitted that appellants are innocent and have been falsely implicated. Informant is not an eye witness; she had not disclosed that how she got the information of occurrence and her statement is not reliable because she has not supported the prosecution case in cross-examination. Learned counsel further submitted that the statement of Hari Kishan (PW-2) is also not reliable because he has also not supported the prosecution story in his cross-examination and his statement is contradictory also. It is submitted that the dying declaration of deceased is not reliable because it was tutored and tampered; circumstances under which Ram Kailash Saroj (PW-7) got the information/direction for recording the dying declaration are highly suspicious and doubtful; Asha Devi (PW-1), Hari Kishan (PW-2) and Anoop Kumar (PW-4), who were continuously present in hospital with deceased, have not stated anything about recording of dying declaration and Dr. Prabhat who had given fitness certificate regarding mental status of deceased as well as her capability to give statement, was not examined. Learned counsel further submitted that F.I.R. has been lodged by delay of more than 24 hours and no explanation has been given for such inordinate delay. Learned counsel further submitted that appellants are neither husband nor family members of deceased, they are *nanad-nandoi* and daughter of *nanad* of deceased hence there is no opportunity and justification to demand of dowry as well as to cause any harassment and cruelty to the deceased. Learned Trial Court has not appreciated the evidence available on record properly and has convicted the appellants in violation of settled principle of criminal law.

11. Per contra, learned A.G.A. has submitted that death of the deceased has been caused due to burn injury, within 7 years of her marriage, the place of occurrence is near the house where appellants used to reside and there is sufficient evidence available on record that prior to death of deceased she was subjected to cruelty, due to demand of dowry. Learned A.G.A. further submitted that prosecution case is well supported by the prosecution witnesses including Hari Kishan (PW-2) who is nearest relative of appellants and also husband of deceased. Learned AGA further submitted that dying declaration of deceased, recorded by Ram Kailash Saroj (PW-7) is wholly reliable. Learned A.G.A. further submitted that merely non-examination of doctor who had certified physical and mental capability of deceased to give statement, is not material in this case. Ocular evidence is wholly supported by the medical evidence. Prosecution has succeeded to prove its case beyond reasonable doubt. The impugned judgment and order requires no interference and appeals are liable to be dismissed.

12. I have considered the rival submission of learned counsels for both the parties and perused the record.

13. Asha Devi (PW-1), mother of deceased, has stated that her daughter Pratiksha was married in 2007 with Hari Kishan (PW-2). Whenever her daughter used to come to her maternal house, she used to state that appellants Kusum Devi (*nanad*), Premsheela (daughter of Kusum Devi), Brijbhan (*nandoi*) and Subhash Gaur (Jeth) (since acquitted) used to demand motorcycle in dowry and on account of that demand they used to harass and beat her. She has further stated that

she tried to pacify the appellants but they did not stop harassing the deceased. On 8.6.2013 at about 7-7:30 p.m., her daughter (deceased) called upon her and when she reached, she found that appellants Kusum Devi, Brijbhan and Premsheela and Subhash (since acquitted) had caught the deceased, carried her inside the house and just thereafter deceased came outside the house in crying and burning state. She further stated that she raised alarm and at that time her son-in-law (Hari Kishan) came there and put off the fire. They rushed with deceased by ambulance to government hospital, Kerakat and thereafter, to district hospital, Jaunpur where her daughter was admitted for treatment but during treatment she (deceased) succumbed to injuries on 16.6.2013. She further stated that she got F.I.R. (Ex.ka 1) written by some unknown person and after putting her signature filed the same at P.S. Chandvak.

14. In cross-examination, she admitted that information regarding occurrence was given to her, on phone, by Hari Kishan (PW-2) and on getting information, she came to Chandvak from Jaunpur, where she learnt that her daughter was taken away by villagers to Sadar (District) Hospital, Jaunpur, thereafter she rushed to Sadar Hospital and found that her daughter's husband and in-laws were getting her medically treated. She further admitted that, it was 9:00 p.m. of 8.6.2013, when she reached hospital; she had not given any information at Chandvak (police station). Rather she returned from Chandvak to Hospital. She further admitted that house of Subhash (since acquitted) is 100 feet away from house of Hari Kishan and between those two houses, there is house of Banarasi. Upon being questioned about F.I.R. she replied that she got the report written by some unknown bye-passer and at that time neither her daughter was present there nor her opinion was taken. She further deposed that she had gone, one hour before, to lodge F.I.R. from District Hospital Jaunpur to Chandvak (police station); *Darogaji* (Police) took her away Chandvak (police station) and got F.I.R. lodged by her. On the point of statement of deceased she replied that at that time condition of her daughter was not well due to severe burn injury; *Darogaji* (police) and other police personnels were present there with her daughter who had gone back after recording statement of her daughter and again returned on next day and took her (PW-1) to police station Chandvak and got F.I.R. written. This witness further admitted that Saas (mother-in-law), *Sasur* (father-in-law), *Nandoi* (appellant Brijbhan), *Nanad* (appellant Kusum) and *Nanad*'s daughter (Premsheela) of deceased used to demand motorcycle but she did not implicate Saas and *Sasur* of deceased as accused in F.I.R. Finally she fairly admitted that, on 8.6.2013 at 7:30 p.m. she was at her home in Jaunpur; appellants Kusum Devi, Brijbhan and Premsheela had never put any demand of dowry to her; and she had lodged report at police station on the instigation of some people.

15. Hari Kishan (PW-2), husband of the deceased, has stated that he was married to deceased Pratiksha on 12.12.2007. He further stated that he did labour work on brick kiln whereas deceased was a graduate. He further stated that on 8.6.2013 he was doing labour work at brick kiln of one Uma Singh, at that time his neighbour one Vikki s/o Gopal Harijan informed him that his brother-in-law (appellant) Brijbhan and other family

members were quarreling with deceased. On that information he rushed to his house and saw that his wife (deceased) was burning; he put off the fire and carried her to Community Health Centre, Kerakat. He further stated that appellants Brijbhan, Kusum Devi and Premsheela and Subhash (since acquitted) wanted to kill his wife by setting ablaze as they used to torture her due to demand of dowry i.e. *sikadi* (golden chain), ring and motorcycle. He further stated that on the date of occurrence i.e. 8.6.2013 at about 7-7:30 p.m., they (appellants and one Subhash) set ablaze his wife (deceased) who succumbed to the burn injuries during treatment. Information of occurrence was given by his mother-in-law Asha Devi (PW-1) at P.S. Chandvak; upon that information Police and Naib Tehsildar (Executive Magistrate) had conducted the inquest proceeding and prepared inquest report (Ex.Ka 2) whereupon he had also put his signature. He further stated that police had recovered kerosene oil plastic jerrycan and match box from place of occurrence and had prepared seizure memo (Ex.Ka 3) whereupon he had also put his signature.

16. In cross-examination he admitted that appellants Brijbhan, Kusum and Premsheela used to reside at their house at Madho Tanda and they neither demanded any motorcycle or golden chain as dowry from his wife (deceased) nor did they torture her in that regard. He further stated that at the time of occurrence he was at brick kiln and one Vikki Harijan, resident of his village informed him and after getting information, he came to his house from brick kiln and found that his wife had been burnt; and she was unable to speak. He further stated that due to severe burn injury, his wife could not speak, she pointed out to kerosene oil jerrycan but she neither pointed out to anyone nor did she disclose any person as accused. He further stated that he was in hospital and his mother-in-law (PW-1) got F.I.R. written herself. He also admitted that on 8.6.2013 at about 7:30 p.m., appellants Brijbhan, Kusum and Premsheela had not set on fire Pratiksha, by pouring kerosene oil but they were at their house. He further admitted that when his wife was burnt, he was not present in his house hence he could not disclose as to how she got burnt; he reached his house on the information given to him by one Gopal's son, resident of his village. He further stated that when he reached hospital, treatment of his wife (deceased) was continuing.

17. Dr. Ramesh Kumar Singh (PW-3) has stated that, on 17.6.2013, he was on post mortem duty and conducted the post mortem of dead body of Smt. Pratiksha Gaur, aged about 24 years, wife of Hari Kishan, at 4:30 p.m. to 5:00 p.m. He further stated that fallowing ante mortem injuries were found on the body of the deceased:-

"Infected flamed burn injuries present over whole of face, fore head, whole upper limb involving neck, whole abdomen and back and both upper part of ante thigh except occipital region of head and lower part of both leg and sole shingled hair present about 70% burn present all over body."

According to him death of the deceased was caused due to septicemic shock as a result of ante mortem injury infected flamed burn wounds. Stating that at the time of postmortem he had prepared post mortem examination report (Ex.ka 4) in his own hand writing, he further stated that deceased was admitted in hospital on 8.6.2013 at 10:00 p.m. for medical

treatment and died on 16.6.2013 at 4:30 p.m. as mentioned in post mortem report.

18. Anoop Gaur (PW-4), brother of the deceased, stating that his sister Pratiksha was married to Hari Kishan (PW-2) in 2007, in mass wedding ceremony, organized by Zebra Group, her *nanad* appellant Kusum and her *nandoi* used to beat her due to dowry but he did not know their demands, he stated that he was informed by his mother that Pratiksha had been burnt by her in-laws with kerosene oil. Thereafter he reached the hospital and saw that she had got 80% burn injuries. He further stated that Pratiksha had died in hospital. *Darogaji* (I.O.) had seized kerosene oil jerrycan, match box, stove and a tin box from place of occurrence and had prepared seizure memo (Ex.Ka 3) which was also signed by him. In cross-examination he stated that at the time of occurrence he was at Siddiquepur and his mother was at his house who informed him in the night of 8.6.2013, upon such information, he rushed to the hospital where his sister was admitted and when he reached at 7-7:30 p.m. he found that deceased was conscious. He further admitted that when he asked her about occurrence she said to look after her child. He further admitted that he was present in hospital from 8.6.2013 till death of his sister.

19. Const. Vinod Saroj (PW-8) has stated that he was posted on 8.6.2013 at P.S. Chandvak, District Jaunpur; he had prepared chik F.I.R. (Ex. Ka 8) pertaining to Case Crime No. 371 of 2013, under Section 498A, 307 I.P.C. and ¾ D.P. Act, on the written information dated 9.6.2013 of Asha Devi (informant), against appellants Kusum Devi, Brijbhan Gaur and Prem Sheela and Subhash (since acquitted) and also entered the said information in G.D. Report (Ex.Ka 9). He further stated that S.I. Mata Prasad Singh was also posted with him and he was acquainted with his writing and signature. According to him, the investigation was started by S.I. Mata Prasad Singh who prepared the site plan (Ex.Ka 10) in his own handwriting and during investigation, offence under Section 304B I.P.C. was added by S.I. Mata Prasad Singh on 17.6.2013 vide G.D. Report No. 40 at 19:30 p.m.

20. Ramesh Chandra Yadav (PW-6) (Executive Magistrate) has stated that on 16.6.2013 he was posted as Tehsildar Sadar, Jaunpur. According to him, on that day at about 6:00 p.m., information was received by him regarding death of deceased Pratiksha. He further stated that inquest was conducted in his supervision by S.I. Vijay Bahadur Singh, in the presence of the family members of deceased. He further deposed that deceased was aged about 24 years and she had died due to burn injuries, in the opinion of *Panchan*. He stated that after inquest proceeding, inquest report (Ex.ka2) and other relevant documents i.e. photonash, sample seal, letter to R.I., letter to C.M.O. (Ex.Ka 6 to Ka 10), necessary for postmortem examination were prepared; dead body was sealed and was sent for post mortem examination.

21. Ram Kailash Saroj (PW-7) has stated that he was posted as Naib Tehsildar, Jaunpur on 9.6.2013 and in compliance of direction of Sub-Divisional Magistrate, Sadar, he reached the District Hospital, Jaunpur. According to him, deceased Pratiksha was admitted in burn ward where emergency medical officer was present. He further stated that after

getting certificate from the doctor that deceased was mentally and physically fit for giving statement, he recorded the statement/dying declaration of deceased (Ex.Ka 11) *(noted in previous paragraph No. 3 of this judgement)*, in his own handwriting.

22. Mayaram Verma (PW-5), (II I.O.), has stated that on 20.6.2013 he was posted as Dy S.P., Jaunpur, and undertook the investigation of Case Crime No. 371 of 2013 under Section 498A, 304B, I.P.C. and ¾ D.P. Act, P.S. Chandvak, District Jaunpur, which was being investigated by S.I. Mata Prasad Singh. According to him during the investigation he recorded the statements of witnesses Asha Devi (PW-1), Hari Kishan (PW-2), Anoop Gaur (PW-4) and other witnesses including the witnesses of *panchnama*; he inspected the dying declaration of deceased with permission of Court, on 3.7.2013. He further stated that during the investigation he also recorded the statements of Ramesh Chand (PW-6), Dr. Ramesh Kumar Singh (PW-3), Dr. Alha Prasad and S.I. Mata Prasad. He further stated that after investigation he filed charge sheet (report u/s 173(2) of the Code) against the appellants Kusum Devi, Brijbhan Gaur & Premsheela @ Guddi and Subhah Gaur (since acquitted).

23. Thus the prosecution story is based on the evidence of Asha Devi (PW-1), Hari Kishan (PW-2), Anoop Gaur (PW-4) who are the witnesses of fact and evidence of Sri Ram Kailash Saroj (PW-7) who recorded the dying declaration of the deceased. The trial Court, relying the statements of above witnesses as well as dying declaration (Ex.ka 11), has convicted the appellants for the offence of dowry death, demand of dowry and for cruelty or harassment to the deceased.

24. The offence in question in this case is related to demand of dowry, dowry death, cruelty and harassment to deceased for demand of dowry by appellants. Before expressing any opinion on the evidences available on record, led by the prosecution, in the light of argument advanced by the learned counsels for the parties, it is necessary to refer the relevant provision of law relating to the offence in question i.e. 304-B and 498-A I.P.C. and 113-B of Indian Evidence Act which are as under:-

Section 304-B (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Section 498-A Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purpose of this section, "cruelty" means

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Section 113-B of Indian Evidence Act-Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code.

25. The above provisions clearly show that if death of any women is caused within 7 years of her marriage by burn or bodily injury or otherwise than under normal circumstances and it is shown that if *soon before her death* such women was subjected to *cruelty or harassment* by her husband or any relative of her husband, in connection with demand for dowry and if the prosecution succeeds to prove the above ingredients, such death shall be called as dowry death. In addition to above, Section 113-B of Indian Evidence Act, further provides that in such cases, if it is shown that a women was subjected *soon before her death* to cruelty or harassment by the accused in connection with any demand for dowry, the Court shall presume that such person had caused the dowry death.

26. Cruelty or harassment, soon before death of deceased for demand of dowry as required in Section 304-B I.P.C. and 113-B Evidence Act for dowry death, does not mean just soon before death, but there must be proximity between death of deceased and cruelty or harassment related to demand of dowry. It is settled principle of law that insufficient evidence of demand of dowry or harassment and cruelty or a long time gap between demand of dowry and harassment or cruelty before death of deceased will be fatal to the prosecution case to prove the dowry death.

27. In FIR (Ex.Ka 1) no specific time has been mentioned by the informant as to when cruelty or torture was caused to deceased by the appellants before her death. According to Asha Devi (PW-1) the deceased, after her marriage, had been to her matrimonial house 6-7 times and whenever she returned to her maternal house, she used to disclose that appellants and one Subhash Gaur (Jeth) used to demand the motorcycle in dowry. This witness in her cross examination on 31.1.2017 has specifically admitted that appellants had never demanded any dowry from her and the application filed against them by her was on the enticement of some people. She has also stated that appellants were living separately from the deceased Pratiksha, in their house and there was no tension (dispute) between them.

28. Hari Kishan (PW-2), in cross examination, has also admitted that appellants had neither demanded

motorcycle, golden ring and golden chain nor had committed any cruelty to the deceased.

29. Anoop (PW-4) has also not specifically stated anything regarding demand of dowry or cruelty committed by the appellants to deceased.

30. In dying declaration (Ex.Ka-11) deceased Pratiksha has stated that about one year prior to the occurrence the appellants had tortured her due to demand of dowry and they also had beaten her. She has also stated that she wanted to study but appellants were creating hinderance in her study and under different excuses got her separated from her family. From perusal of dying declaration, it further transpires that on the day of occurrence, the deceased and the appellants had quarreled; one Gappu Singh with two constables had come to the house of deceased; they hurled abuses and instigated the appellants to beat her as the deceased was quarrelsome and as they had left, the appellants had beaten the deceased brutally. She had not stated that at any time soon before the occurrence any demand of dowry was made to her or she was harassed or tortured by appellants in this regard whereas she has narrated so many reasons for dispute between her and appellants.

31. In addition to above, appellants are neither husband nor family members of deceased. They are sister-in-law (*nanad*), brother-in-law (*nandoi*) and niece of deceased. They do not reside with deceased. As per prosecution case neither any dowry was demanded nor was given at the time of marriage. Generally it is seen that if husband and his family members are not asking for dowry, their relatives who are not family members of in-laws of deceased, do not demand dowry and if prosecution alleges that they are demanding dowry, it has to be proved by prosecution by reliable evidence. But prosecution, in this case, has failed to prove such fact.

32. Thus from the perusal of aforesaid statement of witnesses as well as dying declaration it transpires that before the death of deceased there was no torture and harassment to the deceased due to demand of dowry by the appellants.

33. Now a question arises whether statements of Asha Devi (PW-1), Hari Kishan (PW-2) and Anoop Gaur (PW-4) are reliable or not. Asha Devi is not resident of the place of occurrence. She is mother of the deceased. She resides at Raj Colony, Civil Lines Road near Yadav Hotel, P.S. Line Bazar, District Jaunpur whereas occurrence had taken place in village- Kanaura which, as per Chik F.I.R. (Ex.ka 8), is 9 km. away from P.S. Chandvak, District Jaunpur. In examination-in-chief this witness has clearly stated that on 8.6.2013 i.e. date of occurrence, on the information of deceased she had gone to her matrimonial house and when she reached there, she saw that appellants along with co-accused Subhash (since acquitted) carried the deceased into her house and after sometime the deceased came out in burning condition. According to her, she and her son-in-law, Hari Kishan (PW-2) with the help of ambulance brought the deceased to District Hospital, Jaunpur. Thus according to statement made by this witness in examination-in-chief she was present at the time and place of occurrence. As noted above in cross-examination she has specifically admitted that her son-in-law Hari Kishan (PW-2) had given the information of the

occurrence on phone and after getting the information, she rushed from Jaunpur to Chandvak where she got information that her daughter was admitted in District Hospital, Jaunpur by the villagers. She further stated that then she rushed to the District Hospital, Jaunpur and saw that her daughter was getting treatment in presence of Santosh @ Hari Kishan (PW-2) and his family members. She further stated that she reached hospital on 8.6.2013 at about 9:00 p.m. She has also stated that father-in-law, mother-in-law of her daughter along with appellants also used to demand motorcycle in dowry but she had not made them as accused and lastly she has specifically admitted that appellants had never demanded any dowry from her and she had lodged the F.I.R. on the instigation of someone.

34. Hari Kishan (PW-2) although in examination-in-chief supported the prosecution story but in cross examination he took U-turn and stated that appellants had never demanded any motorcycle, golden chain or ring as dowry and had also not harassed his wife. He further stated that upon information he reached his house and saw that his wife was burning but was alive however she was not able to speak anything. According to him when he asked the deceased regarding the incident, due to inability to speak she pointed out towards kerosene oil container but neither pointed to any accused nor told anything in this regard. Lastly, stating that he was not in his house at the time of occurrence, he admitted that when he reached hospital his wife was being treated.

35. Anoop Gaur (PW-4) is not an eye witness. He has stated in cross examination that he reached hospital at 7-7:30 p.m. and asked the deceased regarding the occurrence whereupon she only said to look after her son. He has also stated that at the time of occurrence his mother Asha Devi was in his house.

36. Thus the aforesaid statement/admission of these witnesses in cross-examination is self-contradictory to their statements in examination-in-chief and is fatal to prosecution story, which shows that they are concealing the true fact of occurrence.

37. The prosecution case is also based on the dying declaration made by the deceased which was recorded by Ram Kailash (PW-7) *(as noted in para 3)*. It is settled principle of law that an accused may be convicted only on the basis of dying declaration if it is true and is reliable because the admissibility of dying declaration is based on the Latin Maxim *"Nemo Moriturus Praesumitur mentire"* which means that a person will not meet his maker with a lie in his mouth. It is also settled principle that dying declaration cannot be treated as gospel truth; it must inspire the confidence of the Court and before relying on such dying declaration the Court has to satisfy itself regarding truthfulness and veracity of the statement of the person who had recorded and proved such dying declaration because the person who had made the dying declaration never comes before the Court for examination and the defence has no opportunity to cross examine him/her. In true sense the evidence of dying declaration is nothing but heresay evidence which is inadmissible in evidence. Thus it is duty of the Court to ensure the fact that whether such dying declaration was made by the deceased or not, and if it is made by him/her, whether the deceased was in free and sound state of

mind and was not tutored, influenced or pressurized by any person. If it is proved that the maker of the statement was tutored, influenced, pressurized or was not in a position to make such dying declaration or any reasonable suspicion appears in the manner of recording thereof, such dying declaration cannot be made as sole basis for the conviction of accused.

38. Hon'ble Supreme Court in **Atbir Vs. Government (N.C.T. Of Delhi) (2010) 9 SCC 1** while discussing the factors governing the reliability of the dying declaration on the basis of law laid down by the Hon'ble Supreme Court summarizes the principles in this regard as follows:-

"The following principles can be culled out from earlier decisions of the Supreme Court:- (I) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) ***The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.***

(iii) ***Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.***

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) ***Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.***

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) ***If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."***

(Emphasis supplied)

39. In **State of Rajasthan Vs. Wakteng, AIR 2007 SC 2020,** Hon'ble Supreme Court has held as under:-

"While great solemnity and sanctity is attached to the words of dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person ***but the Court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination.*** *It is, therefore, essential that the Court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancor. Once the court is satisfied that the dying declaration is true*

and voluntary it is sufficient for the purpose of conviction."

(Emphasis suppllied)

40. In **Lakhan Vs. State of Madhya Pradesh, JT 2010 (8) SC 363,** the Hon'ble Supreme Court has held as under:-

*"The doctrine of dying declaration is enshrined in the legal maxim "Nemo moriturus praesumitur mentire", which means "a man will not meet his maker with a lie in his mouth". **The doctrine of Dying Declaration is enshrined in Section 32 of the Indian Evidence Act, 1872 (hereinafter called as, "Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases."***

(Emphasis suppllied)

41. In **Subhash Vs. State of Haryana, AIR 2011 SC 349,** where the prosecution has failed to prove as to how the Magistrate was approached by the police or the hospital authorities for recording the dying declaration, the Hon'ble Supreme Court holding that such dying declaration was not reliable, has held as under:-

*"3.....The dying declaration Ex.PCC was recorded by Ravi Malik PW on the 28th October 1985 after an application Ex.PBB had been moved before him by Rajinder Gaur, PW. Ravi Malik, when cross-examined in Court, stated that on the 28th October 1985 he had been present at his residence in Panchsheel Enclave, New Delhi when the application Ex.PBB had been presented to him on which he had gone to the Safdarjung Hospital and recorded the dying declaration after the doctor had certified Anuradha's fitness to make a statement. He also stated that a copy of the statement had been handed over to the police on the 30th of October 1985. **When cross-examined, however, he admitted that Ex.PBB had not been produced by him before the investigating agency and he was tendering this document for the first time during his evidence in Court and that there was no noting on Ex.PCC that he had gone to the hospital on the application Ex.PBB or that a copy of the dying declaration had been handed over the police on the 30th October 1985.** He also admitted that he had not obtained any opinion in writing from the doctor about Anuradha's fitness to make a statement. He further admitted that the area of Safdarjung Hospital did not fall within his jurisdiction but clarified that it was the practice that a dying declaration could be recorded by any Magistrate when the Magistrate of the area concerned was not available but clarified that he had made no efforts to find out as to whether the Magistrate of the area in which Safdarjung Hospital lay was available or not. He also admitted that he had not been approached by the police or the medical authorities for recording the dying declaration. If any doubt is left with regard to the sanctity of this dying declaration, it stands dispelled by the testimony of Dr. Devansh Sharma (who had made the endorsement Ex.PZ. that Anuradha was fit to make a statement)*

when he deposed that the endorsement had been taken from him after the statement of Anuradha had been recorded. This statement has to be read with the admission made by PW Ravi Malik that he had not taken any endorsement before actually recording the statement. We are, therefore, of the opinion that the so-called "pivot" that both the courts below have found in the dying declaration Ex.PCC is, in fact, non-existent. The very conduct of this witness and the manner in which he had recorded the dying declaration, as already indicated above, raises a deep suspicion about its veracity."
(Emphasis supplied)

42. Hon'ble Supreme Court in **Murugesan Vs. State, (2012) 10 SCC 383,** where the deceased before completing statement (dying declaration) had slipped into coma and the number of accused, stated by deceased in her dying declaration, was contrary to the earlier report as well as charge sheet filed against 23 accused persons, holding that such dying declaration is not sufficient to be relied upon against the accused, held as under:-

"38.....The efficacy of the dying declaration (Ex. P-4) when the maker thereof had slipped into a coma even before completing the statement would have a serious effect on the capacity of D-1 to make such a statement. The certification made by PW-21 with regard to the condition of the deceased is definitely not the last word. Though ordinarily and in the normal course such an opinion should be accepted and acted upon by the court, in cases, where the circumstances so demand, such opinions must be carefully balanced with all other surrounding facts and circumstances. All the above, in our view, demonstrates the fragile nature of the conclusions reached by the High Court in the present case."
(Emphasis supplied)

43. Hon'ble Supreme Court in **Bakhshish Singh Vs. State of Punjab, AIR 1957 SC 904** criticising the lengthy dying declaration which was also in form of F.I.R. has held as under:-

"Exhibit P-H, the dying declaration, is a long document and is a narrative of a large number of incidents which happened before the actual assault. Such long statements which are more in the nature of First Information Reports than recital of the cause of death or circumstances resulting in it are likely to give the impression of their being not genuine or not having been made unaided and without prompting. *The dying declaration is the statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and such details which fall outside the ambit of this are not strictly within the permissible limits laid down by s. 32 (1) of the Evidence Act and unless absolutely necessary to make a statement coherent or complete should not be included in the statement."*
(Emphasis supplied)

44. Now the question arises whether the dying declaration made by the deceased Pratiksha is truthful, voluntary and free from any doubt/suspicion. Admittedly the evidence of Asha Devi (PW-1), Hari Kishan (PW-2), Anoop Kumar Gaur (PW-4) have been found not reliable. It has also been found that these witnesses were not present at the time and place of occurrence i.e. on 8.6.2013 at

about 7-7:30 p.m. at the house of deceased because Asha Devi (PW-1) has admitted in her cross-examination that she reached the place of occurrence on the information of Hari Kishan (PW-2) and Hari Kishan (PW-2) has stated that when he reached the place of occurrence he saw that his wife had been burnt. He has not stated that he saw the appellants at the place of occurrence.

45. Record shows that F.I.R. was lodged u/s 498A, 307 IPC and ¾ D.P. Act on 9.6.2013 at about 21:50 p.m. and the investigation was entrusted to one S.I. Mata Prasad (Ist I.O.) and during investigation the deceased died in the hospital and the case was converted u/s 498A, 304B I.P.C. and ¾ D.P. Act and was entrusted to Mayaram Verma (PW-5, II I.O.) on 20.6.2013 for further investigation. Thus S.I. Mata Prasad Singh (Ist I.O.) had investigated the case from 9.6.2013 to 20.6.2013. According to Asha Devi (PW-1) *Darogaji* (police) had recorded statement of deceased but prosecution has not produced S.I. Mata Prasad to prove that whether deceased had given any statement against appellants or not or whether he (Ist I.O.) had sent any requisition or information to any Magistrate for recording dying declaration of deceased or not.

46. Dying declaration (Ex.ka 11) shows that before recording the statement of deceased on 9.6.2013 at about 12:10 a.m. the emergency Medical Officer Dr. Prabhat, on duty, had certified the mental fitness of the deceased. Dr. Prabhat has also not been examined by the prosecution to prove whether deceased was in fit state of mind or not at the time of recording of dying declaration. Neither Mayaram Verma (PW-5), (II I.O.), has stated whether any information or requisition was sent, either to any Magistrate or to Ram Kailash Saroj (PW-7) for recording statement of deceased/dying declaration nor any official of hospital was produced by the prosecution to prove any such information or requisition. Similarly Asha Devi (PW-1), Hari Kishan (PW-2) and Anoop Kumar Gaur (PW-4), who were present at hospital during the medical treatment of deceased have also not deposed whether dying declaration or any statement of deceased was recorded by Ram Kailash (PW-7) or not. According to these witnesses (PW-1, PW-2 and PW-4) deceased was badly burnt and she was unable to speak.

47. It is also notable point in dying declaration that every effort has been made to rope the whole family of appellant Brijbhan including his wife and his daughter and some innocent persons Jitendra @ Mani and Golu. Since the marriage of deceased with Hari Kishan (PW-2) was due to love and affairs between them and without dowry, Hari Kishan (PW-2) alongwith deceased was residing separately from his brother Subhash (since acquitted) and appellant Brijbhan was residing in his matrimonial house with his family and was being supported by his parents-in-law, this may have created doubt to deceased and Hari Kishan (PW-2) that appellant will grab the property of his father and due to this confusion and apprehension they would have been falsely implicated.

48. Ram Kailash (PW-7) has also not stated that any requisition, to record the dying declaration/statement of deceased (Ex.Ka11) was given to him either from any doctor, hospital authorities, any police personnel or investigating officer.

According to him he had recorded the dying declaration (Ex.ka 11) on the direction of *Up Zila Adhikari,* Sadar (Sub-Divisional Magistrate) but he did not produce any written requisition or direction of such *Up Zila Adhikari,* Sadar. Prosecution has also not produced that *Up Zila Adhikari,* Sadar, to prove whether any requisition, request or information was given to him (*Up Zila Adhikari,* Sadar) either from officials/doctor of hospital or any police personnel including I.O. or he (*Up Zila Adhikari,* Sadar) had given any direction to Ram Kailash (PW-7) to record the statement of deceased. PW-7 has also not stated that after recording the dying declaration (Ex.ka 11) he had handed over the said dying declaration to concerned hospital or to I.O. or sent it to higher authorities or to concerned Magistrate.

49. According to Mayaram Verma (PW-5) (II I.O.), on 3.7.2013 he had perused the dying declaration (Ex.ka11) with permission of Court i.e. Judicial Magistrate. He has also not stated as to how he got information that dying declaration reached in the office of Judicial Magistrate or who had sent/dispatched it to the concerned Magistrate.

50. It is also pertinent to note that the elaborated and lengthy content of the dying declaration (Ex.Ka 11), containing four pages, also creates suspicion because in response to question No.1 that how she got burnt, deceased had given descriptive statement mentioning her exact date of marriage i.e. 12.12.2007, manner and method of marriage, her ambitions, her enmity with the appellants, details of whole occurrence happened on the day of incident i.e. coming of one Gappu Singh along with two constables, quarreling of whole day, specific role played by appellants Kusum, Guddi and Brijbhan along with Jitendra and Golu and also disclosing age and husband's name of appellant Kusum, age and father's name of appellant Guddi and also father's name of Brijbhan. She had also implicated some innocent people i.e. Jitendra and Golu. In addition to it in response to question No. 2, that how fire was put off, she stated that her husband, after having completed his job in a kiln, came back by cycle and covered her with something and put off the fire. Such descriptive and lengthy statement in the form of complaint shows that such dying declaration was either tutored by someone or was not recorded in verbatim or properly because a person who had received severe burn injury having severe burning pain and suffering from trauma might not be in a position to depose such a descriptive and exhaustive statement mentioning age, parentage and implicating some false persons which are irrelevant and are not supposed to be an answer for cause of her death.

51. This dying declaration also appears false and tutored because in view of statement of deceased (answer of question No. 3 of dying declaration) that she was taken to hospital and got admitted by her mother (PW-1) and her husband (PW-2), whereas Asha Devi (PW-1) has admitted that she, upon information given by Hari Kishan (PW-2), went Chandvak where she got information that her daughter (deceased) was taken away by villagers to hospital and then she rushed to the hospital and found that Hari Kishan (PW-2) was getting the deceased medically treated and Hari Kishan also admitted that upon his information Asha Devi (PW-1) reached hospital. Similarly, Hari Kishan (PW-2) has also admitted that

when he reached hospital his wife was being treated.

52. In addition to above, from perusal of dying declaration it is further clear that dying declaration has been prepared in two sheets i.e. four pages and thumb impression of deceased has been put only on the last page. No thumb impression has been put on first three pages. Certificate of mental fitness has been noted with a short signature (initial) of the doctor at the beginning and also at the end of the dying declaration (Ex.ka 11) but both signatures prima facie being different. It is also most remarkable point that all the facts which are against the appellants have been written in such portion (pages) of dying declaration (Ex.ka-11) where thumb impression of deceased is absent. In addition to above, it is also not clear that whether such dying declaration was kept in sealed envelop at the time of its inspection by Mayaram Verma (PW-5) or at the time of recording of statement of Mayaram Verma (PW-5) before Trial Court or at the time of statement of Ram Kailash (PW-7). Ram Kailash (PW-7) has also not deposed that after recording the dying declaration, he had kept it in sealed cover and sent it to concerned Magistrate/Court or handed over to hospital authorities or police.

53. Deceased was well educated and was graduate, as stated by Hari Kishan (PW-2) but her signature was not obtained on Ex.Ka-11. Prosecution has not offered any explanation as to why the deceased, who was well educated, did not prefer to put her signature but put her thumb impression only on the last page of dying declaration.

54. Thus in view of above short coming, serious irregularities, it is clear that the said dying declaration is tutored and doubtful which cannot be treated as reliable.

55. Another point which also creates doubt in prosecution case that occurrence happened on 8.6.2013 at about 7:30 p.m. but F.I.R. was lodged after 24 hours. Prosecution has not given any explanation or reason for such delay whereas Asha Devi (PW-1) and Hari Kishan (PW-2) were awared of the occurrence and according to Asha Devi (PW-1) police had taken away her to police station and got F.I.R. lodged by her. Although delay in lodging the F.I.R. is not fatal in such case where reasonable explanation has been given by prosecution but in facts and circumstances of this case where F.I.R. was lodged after 24 hours on instigation or help of police, delay in lodging F.I.R. is fatal to prosecution case.

56. Thus in the light of above discussion, it is clear that F.I.R. has been lodged after delay of 24 hours with due deliberation and consultation and no explanation has been offered by prosecution in this regard; evidence of Asha Devi (PW-1), Hari Kishan (PW-2) and Anoop Kumar (PW-4) are contradictory and not reliable and dying declaration (Ex.ka 11) of deceased Pratiksha is also doubtful and tutored which cannot be treated as a ground to prove the prosecution case. Trial Court has not properly discussed the prosecution evidence. Prosecution has miserably failed to prove its case beyond reasonable doubt. Appellants are entitled to be acquitted.

57. I am, therefore, unable to uphold the conviction and sentence of the appellants. Impugned judgement and order passed by the Trial Court is accordingly set aside. The appellants Prem Sheela @

Guddi, Kusum Devi and Brijbhan Gaur are acquitted.

58. They are in jail. They are directed to be released forthwith unless wanted in any other case.

59. Cri. Appeal Nos. 558 of 2019 and 564 of 2019 are **allowed.**

60. Keeping in view the provision of Section 437-A of the Code, appellants- Prem Sheela @ Guddi, Kusum Devi and Brijbhan Gaur are hereby directed forthwith to furnish a personal bond of a sum of Rs.20,000/- each and two reliable sureties each of the like amount before Trial Court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against this judgment or for grant of leave, appellants- Prem Sheela @ Guddi, Kusum Devi and Brijbhan Gaur, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

61. A copy of this judgment along with lower court record be sent to Trial Court by FAX for immediate compliance.

(2020)1ILR A76

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 568 of 2017

Chandresh Yadav ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Anant Prakash Mishra, Sri Chandra Shekhar Pandey, Sri Surendra Kumar Chaubey

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

Criminal Law - Indian Penal Code -Sections 304, 504 - Appeal against conviction.

The case is, therefore, covered by Exception 4 to Section 300 IPC. It was a culpable homicide not amounting to murder. It is also peculiar fact that the blow was not repeated. It is just so happened that the *lathi* blow dealt by him proved to be fatal. (para 17)

Therefore, it is abundantly clear that there was no premeditation or prearranged plan. All these facts and circumstances are taken into consideration in proper perspective for awarding the sentence. (para 19)

Nature of simple injury inflicted by the accused on the part of the body on which it was inflicted. The weapon used to inflict the same and the circumstances in which the injury was inflicted do not suggest that the appellant had any intention to kill the deceased. All that can be said is that the appellant had the knowledge that injury inflicted by him was sufficient to cause the death of the deceased. The case would, therefore, more appropriately fall under section 304 Part II IPC. So the appellant is rightly convicted under Section 304 Part II and 504 IPC. (para 24)

The appeal is partly allowed and modifying the sentence awarded to appellant. (E-2)

List of cases cited: -

1. Jagrup Singh vs. St. of Hary. (1981) 3 SCC 616

2. Gurmail Singh & ors. Vs. St. of Punj. (1982) 3 SCC 185

3. Hem Raj Vs. St. (Delhi Administration) (1990) Supp. SCC 291

4. Pappu Vs. St. of M.P. (2006) 7 SCC 391

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

1. Heard learned counsel for the appellant and learned A.G.A.

2. This criminal appeal has been preferred by appellant- Chandresh Yadav @ Chanda against the judgment and order dated 02.12.2016, passed by Additional Session Judge, Court No. 12, Varanasi, in S.T. No. 161 of 2015 (State Vs. Chandresh Yadav @ Chanda), arising out of Case Crime No. 20 of 2015, P.S. Shivpur, District Varanasi, whereby convicted under Section 304 IPC, for 8 years rigorous imprisonment with fine of Rs. 4,000/- and in default of fine, 4 months additional imprisonment and under sections 504 IPC for 1 year rigorous imprisonment and fine of Rs. 2,000/- and in default of fine 2 months additional imprisonment to appellant. Both the sentences were directed to run concurrently.

3. Brief facts of this case are as follows-:

4. The written complaint **(Ext. Ka-1)** lodged by complainant Namwar Singh, P.W. 1 by way of NCR **(Ext. Ka-5)** with allegation that on 21.01.015 in the morning at 10.30 a.m. appellant Chandresh Yadav S/o Buddhu Yadav was giving filthy abuses to his younger brother Arvind Yadav when he refused to do so then appellant gave a *lathi* blow on the head of deceased Arvind Yadav due to such assault deceased got serious injury.

5. On the basis of written complaint by P.W.1 NCR No. 10/2015 was lodged at police station Shivpur, under sections 323, 504 IPC at 15.05 p.m. on 21.01.2015 which was duly entered in G.D. Injured Arvind Kumar Yadav admitted in Pandit. Deen Dayal Upadhyay Government Hospital, Varanasi, for treatment, but on account of serious condition deceased referred to Nova Hospital, Varanasi, for better treatment, where he died on 28.01.2015 at 6.35 p.m. after 7 days on account of head injury sustained by him. On receiving of such information this NCR No. 10/15 converted as Case Crime No. 20/15, under section 304 IPC by way of G.D. No. 19, 9.40 on 01.02.2015 as **Ext. Ka-6.**

6. The case was investigated by Sub-Inspector Raghvendra Bahadur Singh (P.W. 4). He received all the documents related to this case and enclosed in CD and during investigation recorded the statement of constable clerk Vinod Kumar and after recorded the statement of P.W. 1, prepared site plan **Ext. Ka-3** on pointing out of complainant and thereafter the statement of sub-Inspector Kashyap Kumar was recorded who prepared the inquest report **Ext. Ka-2,** after recording the statement of eye-witnesses, completing the formalities of investigation, charge-sheet **Ext. Ka-5** submitted under sections 323, 504, 304 IPC.

7. Post-mortem of the body of the deceased was conducted by Dr. Surendra Kumar Pandey (P.W.-5) on 29.01.2015 at 3.30 p.m., who also prepared the post-mortem report **Ext. Ka-7**. He has found following injuries on the person of deceased Arvind Kumar Yadav:-

1. Contusion 10.5cm x 4.5cm placed on right side upper lateral part of chest up to nipple from the axilla.

2. Contusion 6.5cm x 4cm placed on left left side upper and lateral part of chest at level of left nipple.

3. On opening scalp extravasation of blood on frontal area of scalp in area 10cm x 4.5cm.

4. on opening the scalp extravasation of blood on external occipital on protuberance below in area 5cm x 3.2cm. Colour of contusion purplish in colour.

5. Internal Examination- the bone behind the head was fractured. Membrane of brain was congested. Brain was also congested.

Cause of death due to effects of Coma as a result of Head and Brain injuries.

8. Since the offence mentioned in the charge-sheet were triable by the court of session, the Chief Judicial Magistrate, Varanasi, committed the case to the court of session for the trial where the case crime No. 20 of 2015 was registered as ST. No. 161 of 2015 (State vs. Chandrash Yadav), made over for trial from there to the court of sessions Judge, Court no. 12, Varanasi, on the basis of material on record and after affording opportunity of hearing to the prosecution as well as the accused appellant, framed charge under sections 304, 504 IPC.

9. The accused-appellant did not plead guilty and claimed to be tried.

10. The prosecution in order to prove his case against the appellant examined P.W.1 Namwar Singh, who is the real brother of the appellant, P.W. 2 Baddu Yadav, father of the deceased, P.W. 3 Heerawati Yadav, mother of the deceased, P.W. 4 Raghvendra Bahadur, Sub-inspector, Investigating Officr (formal witness) and P.W. 5, Dr. Surendra Kumar Pandey, who was conducted the autopsy of the deceased, who was also formal witness.

11. Accused-appellant in his examination under section 313 Cr.P.C. denied his participation and submitted that he has been falsely implicated in this case due to enmity. The accused-appellant did not however adduce any evidence in defence.

12. The Additional Session Judge, Court No. 12, Varanasi, by impugned judgment and order after analyzing the evidence convicted the appellant under section 304, 504 IPC as above, hence this appeal.

13. It has been contended by learned counsel for the appellant that the appellant is poor person and there is no intention to kill the deceased and due to sudden quarrel this occurrence has happened and death of the injured occurred after seven days due to negligence of the doctor and no offence against the appellant is made out under Section 323 Cr.P.C. and finally submitted that offence, if any would not traverse beyond section 325 IPC and further argued that due to poverty of appellant he could not able to engage layer of his choice at the time of trial. During trial amicus curiae was appointed by trial court and case of the appellant contested by amicus curiae. It is also submitted that he was arrested on 01.02.2015 since then the appellant languishing in jail and also submitted that he is the sole bread earner in his family and he is the father of young children, so by taking lenient view, he could be punished by minimum sentence.

14. Learned AGA has opposed the prayer and submitted that the accused was rightly convicted by the sessions court and there is no occasion for interference against the judgment and order of learned trial court and this appeal lacks merit and the same should be dismissed.

15. I have heard learned counsel for the appellant, learned AGA and carefully perused the entire record of the case.

16. In this case prosecution examined the three eyewitnesses of the fact P.W. 1 who is real brother of deceased, P.W. 2 Baddu Yadav, father of the deceased and P.W. 3 Heerawati, mother of the deceased and accused/appellant is also a real brother of P.W. 1 and son of P.W. 2 and P.W.3.

Although these 3 witnesses are relative witness but these 3 witnesses are natural witness and incident was happened inside the house, hence presence of the above witnesses at the spot is not suspicious from any point of view.

On careful examination of the evidence adducef by these 3 witnesses is transpires that the appellant inflicted the *lathi* blow on the head of deceased and due to this single *lathi* blow deceased succumbed due to this injury during treatment. Thus, the evidence is fully corroborated with medical evidence. So the evidence produced by the prosecution inspire confidence. Prosecution is able to prove his case beyond all shadow of doubt.

17. To come to the point, it was proved by evidence on record that after brief altercation and exchange of abuses between the deceased on the one hand and accused appellant on the other, in the heat of passion the appellant Chandresh gave a *lathi* blow on the head of the deceased which proved to be fatal. The case is, therefore, covered by Exception 4 to Section 300 IPC. It was a culpable homicide not amounting to murder. It is also peculiar fact that the blow was not repeated. It is just so happened that the *lathi* blow dealt by him proved to be fatal.

18. There are significant features of the case which are appropriate sentencing is very vital junction of the Court required to be taken into consideration for awarding the appropriate sentence to the accused.

1. Admittedly, the incident happened at the spur of the moment. Though he had no intention of causing either death or such bodily injury as was likely to cause his death. But knowledge has to be imputed to him that the act of striking *lathi* blow on the head of the deceased was likely to cause his death. Therefore, he committed that offence of culpable homicide not amounting to murder and the offence is punishable under Part-II of Section 304 IPC.

2. The appellant gave a single *lathi* blow on the head of the deceased which proved fatal;

3. Injury inflicted on the body of the deceased is not caused by the appellant that to fatal.

4. The incident took place on 21.01.2015 at 10.30 a.m. and the deceased remained hospitalized from 21.01.2015 to 28.01.205 and ultimately died on 28.01.2015 at Nova Hospital, Varanasi.

5. The trial court observed that there was no previous enmity between the parties.

Therefore, it is abundantly clear that there was no premeditation or prearranged plan. All these facts and circumstances are taken into consideration in proper perspective for awarding the sentence.

19. In **Jagrup Singh vs. State of Haryana (1981) 3 SCC 616,** the accused had inflected a single blow in the heat of moment in a sudden fight with blunt side of *Gandhala* on the head of the deceased causing his death. According to the opinion of the doctor this particular injury was sufficient in the ordinary course of nature to cause death. But, according to this Court, the intention to cause such an injury was likely to cause death had not been made out. The Apex Court altered the

conviction of the accused from section 302 IPC to section 304 Part II IPC and the accused was directed to suffer rigorous imprisonment for a period of seven years.

20. In Gurmail Singh & Others v. State of Punjab(1982) 3 SCC 185, the accused had no enmity with the deceased. The accused gave one blow with the spear on the chest of the deceased causing his death. The injury was an incised wound. The Sessions Judge convicted the accused undersection 302IPC and sentenced him to rigorous imprisonment for life. The High Court affirmed the same. This Court, while taking into consideration the age of the accused and other circumstances, converted the conviction fromsection 302IPC to one undersection 304Part II IPC and sentenced him to suffer rigorous imprisonment for five years and a fine of Rs.500/-, in default to suffer rigorous imprisonment for six months.

21. In case of **Hem Raj vs. State (Delhi Administration) (1990) Supp. SCC 291** the accused inflicted single stab injury landing on the chest of the deceased. The occurrence admittedly had taken place in the spur of the moment and in heat of passion upon a sudden quarrel. According to the doctor the injury was sufficient in the ordinary course of nature to cause death. Hon'ble Apex Court observed as under:

"14. The question is whether the appellant could be said to have caused that particular injury with the intention of causing death of the deceased. As the totality of the established facts and circumstances do show that the occurrence had happened most unexpectedly in a sudden quarrel and without pre-meditation during the course of which the appellant caused a solitary injury, he could not be imputed with the intention to cause death of the deceased or with the intention to cause that particular fatal injury; but he could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death. Because in the absence of any positive proof that the appellant caused the death of the deceased with the intention of causing death or intentionally inflicted that particular injury which in the ordinary course of nature was sufficient to cause death, neither Clause I nor Clause III of Section 300 IPC will be attracted....."

Hon'ble Apex Court while setting aside the conviction under section 302 convicted the accused under section 304 Part II and sentenced him to undergo rigorous imprisonment for seven years.

22. In case of ***Pappu vs. State of M.P. (2006) 7 SCC 391,*** the Hon'ble Apex Court has observed as under;

".....The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons.

It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors.

Considering the factual background in the case at hand it will be appropriate to convict the appellant under Section 304 Part II IPC, instead of Section 302 IPC as has been done by the trial court and affirmed by the High Court. Custodial sentence of eight years would meet the ends of justice. The appeal is allowed to the aforesaid extent."

23. On consideration of entire evidence including the medical evidence, I am of the view that the appellant has rightly been convicted under section 304 Part II IPC. In the facts and circumstance of the case that the appellant and all the witnesses are real family members, so before awarding sentence to the accused each case has to be seen its special circumstances and proper prospective. The relevant factors are as under:-

a. Motive or previous enmity;

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

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

d. Whether the death ensued instantaneously or the victim died after several days

e. The gravity, dimension and nature of injury.

f. The age and general health condition of the accused.

g. Whether the injury caused without premeditation in a sudden fight;

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

I. The criminal background and adverse history of the accused;

j. Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was be caused of shock;

k. Number of other criminal cases pending against the accused;

l. Incident occurred within the family members or close relations;

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

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the

gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused.

24. I am of the opinion that nature of simple injury inflicted by the accused on the part of the body on which it was inflicted. The weapon used to inflict the same and the circumstances in which the injury was inflicted do not suggest that appellant had any intention to kill the deceased (real brother of appellant). All that can be said is that the appellant had the knowledge that injury inflicted by him was sufficient to cause the death of the deceased. The case would, therefore, more appropriately fall under section 304 Part II IPC. So the appellant is rightly convicted under Section 304 Part II and 504 IPC.

25. As the appellant's family consists of one minor daughter, two minor sons and wife and all of whom dependent on him and the appellant has no previous criminal history.

26. So, considering the peculiar facts and circumstances of the case. The appeal is partly allowed and modifying the sentence awarded to appellant.

27. The conviction provided under section 304 Part II is confirmed. As the appellant is in jail since 01.02.2015 (during trial as well as appeal). I think that the ends of justice would be served by sentencing the appellant to rigorous imprisonment for 5 years, under section 304 IPC Part-II and one year imprisonment under section 504 IPC and both the sentence run concurrently. The fine imposed by trial court with default clause awarded to him shall remain unaltered. It is made clear that the period undergone in jail shall be adjusted in 5 years imprisonment.

28. The office is directed to transmit back the record of the Lower Court with a copy of judgment and order of this Court for immediate compliance.

(2020)1ILR A82

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.01.2020

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 816 of 2014

Rajjan ...Appellant(On Interim Bail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Santosh Kumar Mishra

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

Criminal Law - Indian Penal Code - Sections 323, 504, 506 - S.C./S.T. Act,1961 -Section 3(1)X - Appeal against conviction.

Section 3 and 4 of the Probation of Offender Act and Sections 360, 361 of Cr.PC. are discussed.

Considering the fact that the accused has been convicted only under Section 323 IPC and for remaining offence he has been acquitted by the learned trial court. It is a fit case in which the benefit of probation may be given. The reason being that there is no criminal history alleged against the appellant, he is a farmer and belongs to a very humble and village background, the probation of Offender Act and Sections 360 and 361 Cr.P.C. makes it mandatory. On the part of the trial Court to state reason for not according to benefit of

probation in a case relating to an offence which is punishable for less than 7 years imprisonment. Accordingly, the impugned judgment of conviction and sentence recorded by the court below under Section 323 I.P.C. is upheld. (para 12)

However, instead of sending the appellant namely **Rajjan** to jail, he shall get the benefit of Section 4 of the Probation of Offenders Act. Consequently, the appellant shall file two sureties with personal bonds to the effect that he shall not commit any offence and shall observe good behaviour and shall maintain peace during the period of one year. If there is breach of any of the conditions, he will subject himself to undergo sentence before the Magistrate. (para 13)

The appeal is disposed of. (E-2)

List of cases cited: -

1. Subhash Chand & ors. Vs St. of UP (2015 Law Suit (All) 1343)

2. Criminal Revision No. 1319 of 1999 (Hargovind & ors. Vs. State of U.P.)

3. St. of Mah. Vs. Jagmohan Singh Kuldip Singh Anand & ors. (2004) 7 SCC 659

4. Jagat Pal Singh & ors. Vs. St. of Haryana, AIR 2000 SC 3622

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

1. Heard Sri Santosh Kumar Mishra, learned counsel for the appellant and learned A.G.A. for the State and perused the record.

2. This appeal has been preferred against the judgment and order of conviction dated 30.1.2014 passed by Special Judge SC/ST (P.A.)/Act/Learned Additional Session Judge, Court NO.94/2012 (State Vs. Rajjan), arising out of Case Crime No. 321 of 2011, under Sections 323, 504, 506,I.P.C. and Section 3(1)X of SC/ST (PA) Act, Police Station Pahari, District Chitrakoot, whereby the accused-appellant was convicted and sentenced for a period of six months rigorous imprisonment for the offence under Section 323 IPC along with fine of Rs.1000/- and in default for one month.

3. Learned counsel for the appellant has submitted that he is not inclined to argue the case on merits and will seek the benefit of probation as the appellant has been convicted for the offence under Section 323 IPC.

4. Learned counsel for the appellant has relied upon the judgment in the case of **Subhash Chand & others Vs State of UP (2015 Law Suit (All) 1343)** and the judgment passed in **Criminal Revision No. 1319 of 1999 (Hargovind & Others vs. State of U.P.)** passed by this Court on 11.01.2019.

Section 3 of the Probation of Offenders Act reads as follows:

"3. Power of court to release certain offenders after admonition.- When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then,

notwithstanding anything contained in any other law for the time being in force, the court may instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

Explanation.- For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4."

5. Thus, this was the bounden duty of the learned trial court and also the appellate court to consider why they did not proceed to grant the benefit of Probation of Offenders Act. Section 4 of the Probation of Offenders Act reads as follows:

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2)Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

6. A similar provision finds place in the Code of Criminal Procedure. There, Section 360 provides:

360. Order to release on probation of good conduct or after admonition :

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is-convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than

might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders."

Again, Section 361 reads as below:

"361. Special reasons to be recorded in certain cases.- Where in any case the Court could have dealt with-

(a) an accused persons under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so."

7. These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not been much utilized by the trial courts. It becomes more relevant and important in our system of administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused person.The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

8. In this instant case, the court below has not considered the probation

law, although, the appellant was only convicted for the offence under Section 323 I.P.C. for which the appellant was convicted for the maximum period of six months. Therefore, the benefit of probation could have been given in view of the law referred above. But, while awarding sentence this aspect was not considered. The learned court below did not even write a single word as to why the benefit of this beneficial legislation was not given to the accused whereas it was mandatory to do so under the provisions of Section 361 Cr.P.C. Moreover, the occurrence relates to the year 2011 and this appeal is pending since 2014 and therefore, no purpose of justice will be served if the appellant is sent to jail to undergo the terms of sentence after lapse of such long time.

9. In **Subhash Chand Case (supra),** this court has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:

"30. It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellante courts. The Registrar General of this Court is directed to circulate copy of this Judgement to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgement. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

10. In addition to the above judgment of this Court, I perused the judgment of Hon'ble the Apex Court in **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659** in which, giving the benefit of Probation of Offenders Act, 1958, the Court has observed as below:

"The learned counsel appearing for the accused submitted that the accident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The accident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them

to execute a bond of one year for good behaviour."

11. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622,** the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

12. Considering the fact that the accused has been convicted only under Section 323 IPC and for remaining offence he has been acquitted by the learned trial court. I find it to be a fit case in which the benefit of probation may be given. The reason being that there is no criminal history alleged against the appellant, he is a farmer and belongs to a very humble and village background, the probation of Offender Act and Sections 360 and 361 Cr.P.C. makes it mandatory. On the part of the trial Court to state reason for not according to benefit of probation in a case relating to an offence which is punishable for less than 7 years imprisonment. Accordingly, the impugned judgment of conviction and sentence recorded by the court below under Section 323 I.P.C. is upheld.

13. However, instead of sending the appellant namely **Rajjan** to jail, he shall get the benefit of Section 4 of the Probation of Offenders Act. Consequently, the appellant shall file two sureties with personal bonds to the effect that he shall not commit any offence and shall observe good behaviour and shall maintain peace during the period of one year. If there is breach of any of the conditions, he will subject himself to undergo sentence before the Magistrate. The bonds and sureties aforesaid be filed by the accused person within two months from the date of the Judgment as per law and Rules.

14. With the above modification, the appeal is accordingly **disposed of** finally.

15. Office is directed to send the certified copy of this judgment along with lower court record to the court concerned for information and necessary action.

(2020)1ILR A88

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.12.2019

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 941 of 2010
connected with
Criminal Appeal No. 254 of 2010 & 886 of 2010

Kamlendra Dwivedi ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Saurabh Srivastava, Maneesh Kumar Singh, Navita Sharma

Counsel for the Respondent:
Govt. Advocate, Firoz Ahmad Khan, Mohd. Usman Gani Khan, S.H. Ibrahim

Criminal Law - Indian Penal Code - Sections 498-A, 304-B - Dowry Prohibition Act, 1961 - Section ¾ - Appeal against conviction.

Therefore, what actually had happened in that room could only be in the specific knowledge of appellant and, therefore, by virtue of Section

106 of the Indian Evidence Act, appellant was required to explain as to how and in what circumstances deceased had died and if no reasonable and acceptable explanation is given by the appellant or a false explanation is coming from his side, adverse inference will be drawn against him. On the basis of evidence on record a presumption as provided under Section 113-B of the Indian Evidence Act could be drawn against appellant that he has caused the dowry death of deceased. He has also failed to rebut this statutory presumption and, therefore, his conviction under Sections 304-B, 498-A and 201 of I.P.C. is liable to be sustained. (para 22)

Keeping into mind, the aforesaid proposition of law laid down by the Court in the aforementioned cases and having regard to the totality of facts and circumstances of this case, we are of the considered opinion that justice would be served, if we alter the sentence of the appellant from life imprisonment to that of 12 years. (para 30)

Criminal appeal Nos. 254 of 2010, 886 of 2010 and 941 of 2010 are allowed. (E-2)

List of cases cited: -

1. Anil Kumar Vs. St. of U.P [2018 JIC (Supp.) 657 (All)]

2. Mohammad & ors. Vs. St. of U.P. [2018 (1) JIC 693 (All)]

3. Chandra Prakash Rathur Vs. St. of U.P. [2018 (3) JIC 560 (All)]

4. Ahsan & anr. Vs. St. of U.P. [2019 (1) JIC 660 (All)]

5. Hari Om Vs. St. of Har. & anr. (2015) 1 SCC (Cri) 141

6. Baijnath & anr. Vs. St. of M.P. (2017) 1 SCC (Cri) 225

7. Shailendra Vs. St. of U.P. [2018 JIC (Supp.) 54(All)]

8. Badam Singh Vs. St. of U.P. [2018 JIC (Supp.) 861 (All)]

9. Balram & anr. Vs. St. of U.P. [2018 JIC (Supp.) 1015 (All)]

10. Baijnath & ors. Vs. St. of M.P. MANU/SC/1501/2016

11. Kaliyaperumal Vs. St. of T.N., MANU/SC/0624/2003

12. Hira Lal & ors. Vs. St. (Government of NCT), Delhi, MANU/SC/0495/2003 (2003) 8 SCC 80

13. Rajinder Kumar Vs. St. of Har., MANU/SC/0046/2015 (2015) 4 SCC 215

14. Baljinder Kaur Vs. St. of Punj., MANU/SC/1047/2014 (2015) 2 SCC 629

15. Vijay Pal Singh & ors. Vs. St. of Uttarakhand, MANU/SC/1172/2014 (2014) 15 SCC 163

16. Trimukh Maroti Kirkan Vs St. of Mah. MANU/SC/8543/2006

17. St. of U.P. Vs. Virendra Prasad, MANU/SC/0079/2004

18. St. of Karnataka Vs. M.V. Manjunathegowda & ors., MANU/SC/0005/2003
19. Hari Om Vs. St. of Har. (31.10.2014 - SC) MANU/SC/0987/2014

20. Hem Chand Vs. St. of Har. MANU/SC/0026/1995 (1994) 6 SCC 727

21. St. of Karn. Vs. M.V. Manjunathegowda & anr. MANU/SC/0005/2003 (2003) 2 SCC 188

22. G.V. Siddaramesh Vs. St. of Karn. MANU/SC/0088/2010 (2010) 3 SCC 152

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard learned counsel for the appellants and learned A.G.A. for the State and perused the record.

2. Criminal Appeal No. 941 of 2010 has been filed by appellant-**Kamlendra**

Dwivedi, Appeal No. 254 of 2010 has been filed by the appellants-**Raghvendra Dwivedi @ Raghvendra Prasad Dwivedi & Smt. Usha Devi** and Criminal Appeal No. 886 of 2010 has been filed by appellants-**Krishnanand Dwivedi & Smt. Poonam** against the judgment and order dated 01.02.2010 passed by learned Additional District & Sessions Judge, Court No.7, Raebareli in Sessions Trial No. 279 of 2005, arising out of Case Crime No. 60 of 2005, under Sections 498-A, 304-B, 201 of I.P.C. & Section ¾ of Dowry Prohibition Act, Police Station Maharajganj, District Raebareli, whereby all the appellants have been convicted under Sections 498-A, 304-B, 201 of I.P.C. & Section 4 of Dowry Prohibition Act, while other co-accused **Atulendra** was acquitted of the charges under Section 304-B, 498-A of I.P.C.

Appellant **Kamlendra Dwivedi** being the husband of the deceased was sentenced under Section 304-B for life imprisonment and under Section 498-A for 02 years' rigorous imprisonment and fine of Rs. 1500/- and also under Section 201 I.P.C. for 02 years rigorous imprisonment and fine of Rs. 1500/-, while for the offence under Section 4 of the Dowry Prohibition Act he is sentenced for 03 months rigorous imprisonment and fine of Rs. 500 and in default to undergo further imprisonment for 09 months.

Appellants **Raghvendra Dwivedi, Krishnanand Dwivedi, Smt. Usha Devi and Smt. Poonam** were sentenced under Section 498-A for rigorous imprisonment of 02 years and fine of Rs. 1500/-, under Section 304-B for 10 years' rigorous imprisonment and under Section 201 I.P.C. for rigorous imprisonment of 02 years and fine of Rs. 1500/- and under Section 4 of the Dowry Prohibition Act for 03 months rigorous imprisonment and fine of Rs. 500/- with default imprisonment of 09 months.

Above Criminal Appeals No. 941 of 2010, 254 of 2010 and 886 of 2010, for the purpose of convenience and to avoid the repetition in appreciation of the evidence available on record are being decided by this common Judgment.

Earlier criminal appeal No. 887 of 2010 was filed by mother-in-law Meena Kumari, which has been abated on account of her death vide order dated 10.11.2010 passed in that appeal.

3. The prosecution case in nutshell is that an FIR was lodged by informant Chandra Bhal Dwivedi against appellants and co-accused Atulendra on 22.06.2005 at 22:10 hours at Police Station Kotwali Maharajganj, Sub District Maharajganj, District Raebareli stating therein that her daughter Poornima was married to appellant Kamlednra Dwivedi son of late Anjani Kumar Dwivedi, resident of Village Salethu, Police Station Maharajganj, District Raebareli and adequate dowry was given in her marriage. When Poonam, first time came back from her matrimonial home she informed that her husband Kamlendra and his above mentioned family members are demanding a motorcycle and Rs. 20,000/- in cash for the purpose of establishing a shop for her husband and also treating her with cruelty. They consoled her that by the passage of time everything shall be allright. When she went to her matrimonial home for the second time appellants again started demanding dowry and also started beating her and treating her with cruelty on non-fulfillment of demand of dowry. Informant

along with his brother-in-law Ram Kumar Mishra and Sanjay Kumar went to the matrimonial home of his daughter for the purpose of *''Vidai'*, where all appellants demanded dowry and threatened them that if their demand is not fulfilled in the next 4 to 5 months, they will have to bear the consequences. They tried hard to make them understand and also requested not to treat Poonam with cruelty and they will do everything to meet their demand, but they did not sent Poonam with them. On 21.06.2005 at about 9:00 pm., Raghvendra informed him to come immediately as the daughter of the informant is in miserable condition. He immediately rushed to the matrimonial home of her daughter and found that her daughter had been burnt alive after being assaulted and her body had been hanged from the ledge, but her feets were resting on the ground.

On the basis of the above application, (Exhibit-ka-1), the First Information Report (Exhibit-ka-10) was lodged against all above mentioned appellants and Atulendra under Sections 498-A, 304-B of I.P.C. and Section ¾ Dowry Prohibition Act at Case Crime No. 60 of 2005 at Police Station Kotwali Maharajganj, District Raebareli. The substance of this information was entered in the General Diary (Exhibit-ka-11) at Serial No.-41 at 22:10 hours on 22.06.2005 and the investigation of the case was entrusted to Circle Officer of Police Maharajganj.

4. The inquest (Exhibit-ka-8) of the dead body of the deceased Poonam was done by Shri Ved Prakash Tripathi, the then "Tehsildar', Maharajganj in the presence of S.H.O. Kotwali Maharajganj. He also prepared a recovery memo of "rope' as well as of blood stained and simple soil (Exhibit-ka-4 & 5). He also prepared necessary papers for the postmortem of the dead body of Poonam i.e. Photo Lash, Challan Lash, Chitthi C.M.O., Chitthi R.I. (Exhibit-ka-6 to Ka-9) and after properly sealing the dead body, sent the same for postmortem.

5. The postmortem on the dead body of Poornima @ Poonam was performed by Dr. Rajendra Sharma (P.W.-4) on 22.06.2005 at 4:15 pm. at District Hospital, Raebareli, who also prepared the postmortem report (Exhibit-ka-2). He found the age of the deceased to be about 23 years and the deceased was found to be of average built. Her eyes and tongue were protruded, whole face, fore-arms, hands, chest, abdomen and both lower limbs were found burnt showing first to second degrees of burn. Fluid vesicles were found present on the body of the deceased in burnt areas and line of redness was also found present. A ligature mark was also found present below the thyroid cartilage interrupted at the back of neck. Rigor mortis was found passed in upper limbs and was present in lower limbs. One lacerated wound was also found in lower part of vagina in between vagina and anus.

On internal examination, brain and its membrances were found congested, sooth particles were found present in larynx, trachea. Right chamber of the heart was found full and left was found empty. Skin of the abdomen was found burnt and 70 ml. of semi-digested food was found in the stomach. Gases were found in small intestine while in large intestine, gases and faecal matter was found. Liver was found congested weighing about 1200 grams and the gall bladder was found half full. Spleen

and kidneys were congested and in the opinion of the Doctor, the cause of death was shock due to ante-mortem burn injuries.

6. The Investigating Officer of the case namely Shri Charan Pal Singh, Circle Officer of the Police recorded the statement of informant Shri Chandra Bhal Dwivedi, Smt. Kusum Trivedi, Shri Sanjay Kumar Mishra, Shri Subhash Trivedi and also prepared the Site Plan (Exhibit-ka-12) and also collected the postmortem report and inquest report. He also recorded the statement of witness Ram Naresh Tiwari, Rajeev, Shailendra Kumar Tiwari, Vishnu Kant Dwivedi, Smt. Saira Bano and Dr. Rajendra Sharma and also the statement of appellant **Kamlendra Dwivedi** @ Vidyanand Dwivedi, Head Constable Suresh Kumar Shukla. He also recorded the statements of accused persons Krishnanand Dwivedi and Smt. Poonam as well as of appellant Raghvendra, Smt. Meena Kumari, Smt. Usha Devi and Atulendra Kumar. On 14.07.2005, the statement under Section 164 Cr.P.C. of Smt. Poonam and Krishnanand was recorded, a copy of which was made by him in the case diary and after finding sufficient evidence against all accused persons, he submitted the Charge-Sheet (Exhibit-ka-13) against them under Sections 498-A, 304-B of I.P.C. and Section 4 of the Dowry Prohibition Act.

7. The case being triable by the Court of Sessions was committed to it and the trial Court after hearing the prosecution and appellants framed charges against all accused persons under Sections 498-A, 304-B of I.P.C. and Section 4 of the Dowry Prohibition Act. All appellants denied the charges and claimed trial.

Prosecution in order to prove its case beyond all reasonable doubt against the appellants and other accused person Atulendra Dwivedi placed reliance on following documentary evidence:-

Written Application (Tehrir F.I.R.), Exhibit-ka-1, Postmortem Report of deceased Poornima @ Poonam, Exhibit-ka-2, Inquest Report, Exhibit-ka-3, Seizure memo of Rope and blood stained and simple soil, Exhibit-ka-4 and Exhibit-ka-5, Photo Lash, Exhibit-ka-6, Challan Lash, Exhibit-ka-7, Chitthi C.M.O., Exhibit-ka-8, Chitthi R.I., Exhibit-ka-9, Chick F.I.R., Exhibit-ka-10, G.D. Qayami, Exhibit-ka-11, Site Plan, Exhibit-ka-12, Charge-Sheet, Exhibit-ka-13.

Prosecution in addition to the above documentary evidence also produced following witnesses:- P.W.-1/Chandra Bhal Trivedi (Informant), P.W.-2/Kusum Trivedi (Mother of the informant/deceased), P.W.-3/Ram Naresh Tiwari (Witness), P.W.-4/Dr. Rajendra Sharma (Doctor, who performed postmortem), P.W.-5/Ved Prakash Tripathi, (Tehsildar, who conducted inquest), P.W.-6/Constable Ram Prasad Saroj (Scribe of the Chick FIR and G.D.), P.W.-7/A.P. Singh (First Investigating Officer), P.W.-8/Shri Charan Pal Singh (Second Investigating Officer).

8. After the completion of the prosecution evidence, statement of all appellants was recorded by the trial Court. In their statement, recorded under Section 313 of the Cr.P.C., all accused persons have admitted the fact of solemnization of marriage of deceased Poonam @ Poornima with appellant **Kamlendra Dwivedi** one year before the incident. They denied the other evidence produced by the prosecution and stated that fake

documentary evidence has been prepared to falsely implicate them. Appellant **Kamlendra Dwivedi** has stated that in the morning of the fateful day, there was some verbal altercation between him and his wife Poornima and thereafter he left his home without eating anything in order to meet his nephew Atulendra and returned late in the night at about 8:00 pm. and found that her wife had committed suicide. He informed the police as well as his father-in-law. He further stated that after postmortem his father-in-law started demanding Rs.1 lac to which he denied and in consequence thereof he has been falsely implicated.

Appellant **Raghvendra** in his statement, recorded under Section 313 of the Cr.P.C., has stated that he after constructing his own house, is residing at Village Atrehta, Maharajganj since 1997. He is working at Gramin Bank and at the time of incident he was on duty at Chandapur Branch of the Bank and he has been falsely implicated.

Appellant **Krishnanand** has stated that he is residing separately from Kamlendra since 1998 and all properties between them have been partitioned in the year 2003. At the time of the incident, he had gone to Maharajganj to collect *''Tahbazari'* and he has been falsely implicated.

Smt. Meena Devi in her statement under Section 313 of the Cr.P.C. has stated that in the year 2003, the ancestral house and the agricultural land of her husband was partitioned between herself and her sons and she got ¼th share in agricultural land, Since then, she had been living separately from Kamlendra and at the time of incident she had gone to the house of a co-villager to participate in *''Akhand Ramayan'* and she had been falsely implicated.

Appellant **Usha Devi** in her statement recorded under Section 313 of the Cr.P.C, has stated that since 1997, she had been living separately at Village Atrehta, Maharajganj along with her husband and children and she had been falsely implicated. Similarly, appellant Poonam Devi stated in her statement recorded under Section 313 of the Cr.P.C. that she had been living separately from Kamlendra for the last 12-13 years and at the time of incident she was in other Village to participate in *''Akhand Ramayan Path'*.

9. In addition to their statement under Section 313 of the Cr.P.C., appellants have also produced witnesses D.W.-1/Mohd. Israr, D.W.-2/Vinod Kumar (Lekhpal), D.W.-3/Bhoopendra Bahadur Singh, Manager, Chandapur Branch of Gramin Bank, D.W.-4/Smt. Sharda Singh Village Pradhan, Atrehta and in documentary evidence, has produced 09 documents in list 14-ka and also recalled prosecution witness No.6/Constable Ram Prasad Saroj, who proved Exhibit-kha-1, G.D. No.-5.

10. The trial Court after appreciating the evidence on record found that the prosecution has been able to prove its case against above mentioned appellants beyond all reasonable doubt and, therefore, convicted the appellants for the offences under Sections 498-A, 304-B, 201 of I.P.C. & Section 4 of Dowry Prohibition Act, in the manner described in the second paragraph of this judgment, however, the trial Court came to the conclusion that the prosecution has not been able to prove its case beyond

reasonable doubt against accused Atulendra and, therefore, acquitted him of all the charges levelled against him.

11. Aggrieved by the judgment and order of conviction and sentence dated 01.02.2010, the appellants have challenged the same in this appeal.

12. Learned counsel for the appellants submits that the trial Court has convicted the appellants purely on the basis of *"surmises and conjectures'* and has also failed to appreciate the evidence available on record in right perspective.

He further submits that the trial Court has ignored the major contradictions present in the testimony of prosecution witnesses and has also not taken note of the fact that P.W.-2/Smt. Kusum Trivedi has contended in her statement that deceased did not tell her about any demand of dowry made by the appellants and, therefore, the trial Court appreciated the evidence in a mechanical manner. He pointed out that appellant No.1-Raghvendra Dwivedi was a Bank employee and was posted in Baroda Gramin Bank, Branch Chandapur, Raebareli at the time of incident and was also on duty at the time of incident. The Bank Manager of the relevant branch has been produced as D.W.-3, who has testified that the appellant Raghvendra Dwivedi was present in Bank on 21.06.2009 from 9:30 am. till 5:00 pm. He has also proved the Attendance Register of the Bank, but the trial Court has misread his evidence.

It is next submitted that the trial Court, despite there being sufficient evidence, ignored the fact that Raghvendra Dwivedi had also purchased a plot at Village Atrehta. He had constructed a house there and was residing there with her wife Smt. Usha Devi since 1997. Contrary to this, findings of the trial Court in respect of separate living of appellant Raghvendra Dwivedi is contrary to the evidence on record.

It is further submitted that it was apparent and established on record that the appellants Raghvendra, Krishnanad, Smt. Poonam, Smt. Usha and Smt. Meena Kumari were living separately from Kamlendra Dwivedi, therefore, there was no occasion for the trial Court to convict all the appellants for the offence under Section 304-B and 498A of I.P.C. and Section 4 of the Dowry Prohibition Act, as other appellants except Kamlendera could not be the beneficiary of any dowry and were not in a position to treat the deceased with cruelty.

It is next submitted that the evidence of the prosecution is not so strong that on the basis of which, conviction of appellants could be sustained and, therefore, keeping in view the evidence available on record, the appellants are liable to be acquitted of all the charges framed against them.

It is also submitted that appellant Kamlendera has been sentenced for life imprisonment for the offence under Section 304-B and the reasons given by the trial Court for inflicting the maximum penalty are not cogent and trial Court failed to understand the fact that instant case is not of a rare specie and therefore the sentence of the appellant Kamlendera under Section 304-B I.P.C. be altered from life imprisonment to the sentence already undergone as the appellant has already undergone sentence of more than 10 years.

Learned counsel for the appellants has relied on following case laws:-

1. Anil Kumar Vs. State of U.P [2018 JIC (Supp.) 657 (All)].

2. Mohammad & Ors. Vs. State of U.P. [2018 (1) JIC 693 (All)].

3. Chandra Prakash Rathur Vs. State of U.P. [2018 (3) JIC 560 (All)].

4. Ahsan & Anr. Vs. State of U.P. [2019 (1) JIC 660 (All)].

5. Hari Om Vs. State of Haryana and another (2015) 1 Supreme Court Cases (Cri) 141.

6. Baijnath and others Vs. State of Madhya Pradesh (2017) 1 Supreme Court Cases (Cri) 225.

7. Shailendra Vs. State of U.P. [2018 JIC (Supp.) 54(All)].

8. Badam Singh Vs. State of U.P. [2018 JIC (Supp.) 861 (All)].

9. Balram & Anr. Vs. State of U.P. [2018 JIC (Supp.) 1015 (All)].

13. Per contra, learned A.G.A. submits that the trial Court after taking into consideration and appreciating the evidence available on record in its totality has convicted the appellants for the offence committed by them. Therefore, there is no illegality or irregularity either in the marshalling of facts or in appreciation of evidence by the Court below.

It is next submitted that to prove offence under Section 304-B of I.P.C. ingredients mentioned therein are required to be proved by the prosecution and if the prosecution has succeeded in establishing the ingredients of Section 304-B I.P.C. then by virtue of application of Section 113-B of the Indian Evidence Act, a presumption shall be drawn against appellants that they have committed the dowry death. Therefore, no illegality has been committed by the trial Court in convicting the appellants and the appeal of the appellants is liable to be dismissed.

14. Prosecution in order to prove its case before the trial Court has produced 8 witnesses. **P.W.-1/Chandra Bhal Dwivedi** who is the father of the deceased has stated that her daughter Poornima @ Poonam was married to Kamlendra Dwivedi on 23.04.2004. They gave adequate dowry in her marriage but from the beginning of her marriage, her mother-in-law, *Jeth* Raghvendra, *Jethani* Usha, Atulendra and another *Jeth* Krishnanand and *Jeth*ani Poonam started demanding Rs. 20,000/- in cash and a motorcycle and started treating her daughter with cruelty on non-fulfillment of such demand. When they brought Poornima to their house, she told them that the above mentioned accused persons are demanding Rs. 20,000/- and a motorcycle and also treating her with physical cruelty. He consoled her daughter that by the passage of time everything shall be allright. Raghvendra Dwivedi also came to his house for the purpose of *''Vidai'*, but after *''Vidai'* she was again ill-treated for demand of dowry and was also physically assaulted. It is further stated by him that in the month of May, 2005, he along with his brother-in-law Rajkumar Mishra and a close relwqative Sanjay Kumar Bajpayee went to perform the *''vidai'* of Poornima at Village Salethu, where accused persons demanded dowry and asked him to part with the dowry and *''Vidai Ceremony'* could only be performed then. They threatened that if in the next 4-5 months, a motorcycle and Rs. 20,000/- are not arranged then they will have to face the consequences. They asked them not to treat Poornima with cruelty and that they

will arrange whatever they could. On 21.06.2005 at about 9:00 pm., Raghvendra Dwivedi made a call at the shop, where he is working and asked him to come to the Village as the condition of the Poornima was bad. He along with his wife and son and brother-in-law Suresh rushed to Village Salethu and arrived there at 7:00 am. and saw that after burning her daughter they had placed her in hanging condition on a "Ledge' *(Chajja)*. No person from her in-law's house was present there. He lodged the First Information Report, (Exhibit-ka-1) at P.S. Maharajganj.

P.W.-2/ Kusum Trivedi is the mother of the deceased Poornima @ Poonam, has corroborated the statement of P.W.-1/ Chandra Bhal Trivedi, pertaining to the solemnization of marriage of her daughter with Kamlendra Dwivedi on 23.04.2004 and the cruelty committed by the appellants on her for demand of Rs.20,000/- and motorcycle. She also stated that on 21.06.2005, Raghvendra telephonically informed them about the bad condition of their daughter and they reached the matrimonial home of her daughter in the morning at about 6:00 pm. and saw that her daughter was hanging from the "Ledge' *(Chajja).*

P.W.-3/Ram Naresh Tiwari is the witness who arranged this marriage who stated that he was instrumental in solemnization of this marriage, which was solemnized in the year 2004. No demand of dowry was made by the appellants before marriage and even after the solemnization of marriage, no such demand has also been made in his presence. This witness has proved his signatures on "Panchnama'.

P.W.-4/Dr. Rajendra Sharma has stated to have conducted the postmortem on the dead body of deceased Poornima @ Poonam on 22.06.2005 at 4:15 pm. which was brought by Constable Sarvdev Trivedi and Constable Rajesh Pandey of Police Station Maharajganj, Raebareli. He has proved the postmortem report in his handwriting and signature as Exhibit-ka-2. The details of the postmortem report including the injuries found on the person of the deceased has been elaborately discussed and reproduced at Para 5 of this judgment, herein-before.

P.W.-5/Ved Prakash Tripathi was Tehsildar Maharajganj, District Raebareli at relevant point of time. He stated to have prepared the *"Panchnama'* and proved the same as Exhibit-ka-3 in his hand writing and signatures. He has also proved the seizure memo of a "rope' and also the seizure memo pertaining to simple and blood stained soil from the spot as Exhibit-ka-4 & 5. He has also proved preparation of Photo Lash, Challan Lash, Chitthi C.M.O., Chitthi R.I. and proved the same in his hand writing and signatures as Exhibit-ka-6 to Exhibit-ka-9.

P.W.-6/Constable Ram Prasad Saroj of Police Station Maharajganj is the witness who registered the FIR and prepared the chick. He has stated that on 22.06.2005, he was posted as Constable Clerk at P.S. Maharajganj, District Raebareli and prepared Chick on the basis of the application, Exhibit-ka-1 and proved the same as Exhibit-ka-10 under his hand writing and signatures. He also prepared the G.D. Serial No. 41 time 22:10 hours dated 22.06.2005 in his hand writing as Exhibit-ka-11.

P.W.-7/Shri A.P. Singh was the Circle Officer Police Tiloi on 23.06.2005. He stated that as the then Circle Officer,

Police Maharajganj was on leave, he was his link officer and he took the investigation of the case in that capacity and collected the copy of application, Chick FIR and also the copy of General Diary and has written the first "parcha' of the C.D.

P.W.-8/Shri Charan Pal Singh is the second Investigating Officer of the crime, who stated in his evidence that on 25.06.2005, he recorded the statement of witness Chandra Bhal Dwivedi, Smt. Kusum Trivedi, Shri Sanjay Kumar Mishra, Shri Shubhash Trivedi and also inspected the spot and prepared the Site Plan in his hand writing and signatures and proved the same as Exhibit-ka-12. He further stated to have arrested the accused Kamlendra Kumar @ Vidyanand Dwivedi and recorded his statement and after recording the statement of the witnesses and recording of the statement of Poonam and Krishnanand under Section 161 of the Cr.P.C., submitted the charge-sheet against accused persons under his signatures and his hand writitng.

15. The appellants also produced 04 defence witnesses namely D.W.-1/Mohd. Israr, D.W.-2/Vinod Kumar, D.W.-3/Bhoopendra Bahadur Singh and D.W.-4/Smt. Sharda Singh.

D.W.-1/Mohd. Israr in his statement has stated that he was the *"Pradhan'* of Village Salethu for the last five years and knew Krishnanand very well. He further submitted that Krishnanand was residing separately from his brother Kamlendra for the last 10-11 years, while Raghvendra was residing at Village Atrehta, Maharajganj for last 12 years of the incident and hadalso constructed a house there. He also stated that Krishnanand was residing in Village Atrehta with his family and all three brothers have got all the assets of their father partitioned in between them and Krishnanand was not having any concern with either Kamlendra or his family.

D.W.-2/Vinod Kumar is "Lekhpal' of Tehsil Maharajganj, District Raebareli, who has proved that the agricultural land of Raghvendra Dwivedi, Krishnanand, Kamlendra Kumar had been partitioned in between them in the revenue records. He also filed an extract of *"Khatauni'* as Paper No. 153-Kha, which had been issued on 06.08.2009.

D.W.-3/Shri Bhoopendra Bahadur Singh is Branch Manager, Chandpur Branch, Uttar Pradesh Gramin Bank, Raebareli, who has stated that on 21.06.2005, he was Branch Manager of the aforesaid branch and accused/appellant Raghvendra Prasad was working there as Process Server. He also stated to have brought the Attendance Register with him and also stated that the said register was maintained in due course. He stated that on 21.06.2005, Raghvendra Prasad was at his duty in the Bank from 9:30 in the morning till 5:00 in the evening. He has also produced an attested copy of the Attendance Register and also proved the same as Exhibit-kha-3.

D.W.-4/Smt. Sharda Singh is the Pradhan of Village Atrehta. She stated that appellant Raghvendra Prasad was known to her and he had been living at Village Atrehta along with his family since 1997 by constructing a house there.

We have perused the evidence available on record. A perusal of definition of dowry death as provided under Section 304-B of I.P.C. would reveal that if it is proved that death of a women is caused by any burn or bodily injury or occurs otherwise than under normal

circumstances within 07 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or his relatives and such cruelty or harassment was for or in connection with demand of dowry and such cruelty or harassment was soon before her death, then it shall be obligatory on the Court to raise a presumption that the accused person(s) have caused the dowry death.

In **Baijnath and Ors. vs. State of Madhya Pradesh reported in MANU/SC/1501/2016** Honble Suprme Court while considering the requirement of section 304B I.P.C. opined as under :

"27. The evidence on record and the competing arguments have received our required attention. As the prosecution is on the charge of the offences envisaged in Sections 304B and 498A of the Code, the provisions for reference are extracted hereunder:

304B. Dowry death.-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.-For the purpose of this Sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

498A. Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purpose of this section, "cruelty" means--

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

28. Whereas in the offence of dowry death defined by Section 304B of the Code, the ingredients thereof are:

(i) death of the woman concerned is by any burns or bodily injury or by any cause other than in normal circumstances and

(ii) is within seven years of her marriage and

(iii) that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of the husband for, or in connection with, any demand for dowry.

the offence Under Section 498A of the Code is attracted qua the husband or his relative if she is subjected to cruelty.

The explanation to this Section exposits "cruelty" as:

(i) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) or ''Tahbazari' ''Tahbazari' ''Tahbazari'

(ii) harassment of the woman, where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

29. Patently thus, cruelty or harassment of the lady by her husband or his relative for or in connection with any demand for any property or valuable security as a demand for dowry or in connection therewith is the common constituent of both the offences.

30. The expression "dowry" is ordained to have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. The expression "cruelty", as explained, contains in its expanse, apart from the conduct of the tormentor, the consequences precipitated thereby qua the lady subjected thereto. Be that as it may, cruelty or harassment by the husband or any relative of his for or in connection with any demand of dowry to reiterate is the gravamen of the two offences.

31. Section 113B of the Act enjoins a statutory presumption as to dowry death in the following terms:

113B. Presumption as to dowry death.-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.-For the purpose of this section, "dowry death" shall have the same meaning as in Section 304B of the Indian Penal Code (45 of 1860)

32. Noticeably this presumption as well is founded on the proof of cruelty or harassment of the woman dead for or in connection with any demand for dowry by the person charged with the offence. The presumption as to dowry death thus would get activated only upon the proof of the fact that the deceased lady had been subjected to cruelty or harassment for or in connection with any demand for dowry by the accused and that too in the reasonable contiguity of death.

Such a proof is thus the legislatively mandated prerequisite to invoke the otherwise statutorily ordained presumption of commission of the offence of dowry death by the person charged therewith.

33. A conjoint reading of these three provisions, thus predicate the burden of the prosecution to unassailably substantiate the ingredients of the two offences by direct and convincing evidence so as to avail the presumption engrafted in Section 113B of the Act against the accused. Proof of cruelty or harassment by the husband or her relative or the person charged is thus the sine qua non to inspirit the statutory presumption, to draw the person charged within the coils thereof. If the prosecution fails to demonstrate by cogent coherent and persuasive evidence to prove such fact, the person accused of either of the above referred offences cannot be held guilty by taking refuge only of the presumption to cover up the shortfall in proof.

34. The legislative primature of relieving the prosecution of the rigour of the proof of the often practically inaccessible recesses of life within the guarded confines of a matrimonial home and of replenishing the consequential void, by according a presumption against the person charged, cannot be overeased to gloss-over and condone its failure to prove credibly, the basic facts enumerated in the Sections involved, lest justice is the casualty.

35. This Court while often dwelling on the scope and purport of Section 304B of the Code and Section 113B of the Act have propounded that the presumption is contingent on the fact that the prosecution first spell out the ingredients of the offence of Section 304B as in Shindo Alias Sawinder Kaur and Anr. v. State of Punjab MANU/SC/0499/2011 : (2011) 11 SCC 517 and echoed in Rajeev Kumar v. State of Haryana MANU/SC/1144/2013 : (2013) 16 SCC 640. In the latter pronouncement, this Court propounded that one of the essential ingredients of dowry death Under Section 304B of the Code is that the accused must have subjected the woman to cruelty in connection with demand for dowry soon before her death and that this ingredient has to be proved by the prosecution beyond reasonable doubt and only then the Court will presume that the accused has committed the offence of dowry death Under Section 113B of the Act. It referred to with approval, the earlier decision of this Court in K. Prema S. Rao v. Yadla Srinivasa Rao MANU/SC/0890/2002 : (2003) 1 SCC 217 to the effect that to attract the provision of Section 304B of the Code, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty and harassment "in connection with the demand for dowry"."

The Apex Court in the case of **Kaliyaperumal Vs. State of Tamil Nadu,MANU/SC/0624/2003** has held that presumption shall be raised only on proving of the following essential:-

(I) The question before the court must be whether the accused has committed the dowry death of a woman.

(II) The woman was subjected to cruelty or harassment by her husband or his relatives.

(III) Such cruelty or harassment was for, or in connection with, any demand for dowry.

(IV) Such cruelty or harassment was soon before her death.

16. A conjoint reading of Section 304-B IPC and Section 113-B of the Evidence Act indicates that if the prosecution has proved that the death of the wife was not natural or accidental death then it brings the case within the purview of 'death occurring otherwise than in normal circumstances and once the prosecution had succeeded in proving that the deceased had died an unnatural death in her matrimonial home within seven years of her marriage and soon before her death she was subjected to cruelty or harassment by husband or her relatives, the presumption under Section 113-B of Indian Evidence Act shall be attracted.

17. The word "soon before death" fell for consideration in a large number of cases before the Supreme Court and this Court. The Supreme Court in the case of **Hira Lal and others v. State (Government of NCT), Delhi, MANU/SC/0495/2003 : (2003) 8 SCC 80,** has considered the scope of Section 113-B of the Evidence Act and Section 304-B IPC in the following terms:

"9. A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show

that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. "Soon before" is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to expression "soon before" used in Section 114. Illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods "soon after the theft, is either the thief has received the goods knowing them to be stolen, unless he can account for his possession". The determination of the period which can come within the term "soon before" is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibriu45m of the woman concerned, it would be of no consequence."

The principle laid down in this case has been uniformly followed by the Supreme Court in a large number of cases. Reference may be made to the judgments in the case of **Rajinder Kumar v. State of Haryana, MANU/SC/0046/2015 : (2015) 4 SCC 215; Baljinder Kaur v. State of Punjab, MANU/SC/1047/2014 : (2015) 2 SCC 629; and, Vijay Pal Singh and others v. State of Uttarakhand, MANU/SC/1172/2014 : (2014) 15 SCC 163.**

18. We now propose to ascertain whether the prosecution has succeeded in proving the four essentials of Section 304-B I.P.C., as spelt out by the Apex Court in the aforementioned cases for raising the presumption under Section 113B of the Indian Evidence Act by scrutinizing the evidence adduced by the prosecution against the appellants in this regard.

It has been stated in the First Information Report that marriage of the deceased Poonam @ Poornima was solemnized with appellant **Kamlendra Dwivedi** on 23.04.2004. P.W.-1/Chandra Bhal Trivedi, P.W-2/Kusum Trivedi and P.W.-3/Ram Naresh Tiwari (who actually arranged this marriage) have stated in their statement before the trial Court that the marriage of the deceased Poornima @ Poonam was solemnized with appellant Kamlendra on 23.04.2004. The appellants in their statements recorded under Section 313 of the Cr.P.C. have also admitted that

the marriage of deceased Poornima @ Pooam was held with appellant Kamlendra in the year 2004. Therefore,keeping in view the evidence on record, it is proved that the deceased was married to appellant Kamlendra in the year 2004. It is also proved by the evidence available on record that the deceased had died on 21.06.2005. Therefore, there is also no doubt pertaining to the proof of the fact that deceased Poornima @ Poonam died within 07 years of her marriage.

Now it has to be seen whether the deceased Poornima @ Poonam died a natural death or her death was otherwise than in normal circumstances. It has been stated by P.W.-1/Chandra Bhal Trivedi and P.W.-2/Kusum Trivedi that when they reached the matrimonial house of the deceased, they found her hanging in a burnt condition. She was hanging with a "rope', however her feets were found on the ground. In the Inquest Report (Exhibit-ka-3), which was performed on the information given by appellant Kamlendra Dwivedi (husband of the deceased) on 22.06.2005 at 2:05 pm., P.W.-5 Ved Prakash Tripathi found her hanging in burnt condition and she was bleeding from the nose, vagina and anus. He also noted in the inquest report, an injury on the left knee of deceased and burn injuries all over her body. P.W.-4/Dr. Rajendra Sharma, who has conducted postmortem on the body of deceased Poornima @ Poonam, has stated in his statement that the whole face, fore arm and hands, chest, abdomen and both lower limbs of the deceased were burnt by 1st to 2nd degree burns. He further stated that fluid filled vesicles were present on the body of the deceased and at the edge of these, line of redness was also present. A ligature mark was also found around neck of the deceased below thyroid cartilage, length of which was about 28 cms. and it was interrupted at the back of the neck. The cause of death of the deceased was determined as shock due to ante-mortem burn injuries. P.W.4/Dr. Rajendra Sharma has also stated in his cross-examination that the body or injuries of the deceased were not smelling of any kerosene oil and an injury has also been found at the place between the vagina and anus and apart from this no other injury was found. He further stated that it is correct to say that **if after an hour or two of the death a rope is tied, the ligature mark, as described in the postmortem report may be inflicted.** According to him, no bone of the neck of the deceased was found fractured and the deceased had not died due to strangulation. He stated that the burn injuries could also come by burning at the time of cooking of food or by accidental burn and if in the process of putting off the fire deceased runs here and there and falls on any sharp object she may suffer the injury of the nature found around her private part. Keeping in view the evidence of the Dr. Rajendra Sharma/P.W.-4, it is evident that the death of the deceased was caused by burn injuries and not by strangulation or smothering.Therfore it is also proved by the evidence available on record that the death of the deceased Poornima @ Poonam had occurred otherwise than in normal circumstances.

19. Now it has to be seen as to whether deceased Poornima @ Poonam was subjected to any cruelty or harassment by her husband Kamlendra or his relatives (other appellants) soon before her death in connection with any demand of dowry. P.W.-1/Chandra Bhal Trivedi in his evidence has stated that since beginning of the marriage of her daughter Poornima @

Poonam all accused persons were demanding Rs. 20,000/- and a motorcycle in dowry and were treating Poornima with cruelty. It is also stated by him that in the month of May, 2005, he went to Village Salethu for *"Vidai Ceremony'*, but in-law's of deceased did not perform *"vidai'* and asked him to provide Rs. 20,000/- and a motorcycle within 4 to 5 months or to face grave consequences and thereafter on 21.06.2005 appellant Raghvendra Dwivedi informed them about the incident. He further stated that when he reached at the spot he found deceased hanging from the ledge *(Chajja)* in a burnt condition, but her clothes were intact and none of the members of the appellant's family was there.

In his cross-examination, he has stated that the demand of Rs. 20,000/- and motorcycle started after solemnization of marriage and this demand was not having any connection with the marriage. He did not lodge any report against accused persons for demanding the dowry and he did not mention the fact of going to the matrimonial home of deceased in May, 2005. He further submitted that he did not file any FIR even when the appellants threatened him. He admits that it is correct to say that appellant Raghvendra Dwivedi was having a *"LML Vespa Scooter"* from the last 10-12 years and the age of mother-in-law of the deceased namely Smt. Meena Kumari was about 65-70 years. He further admits that after death of the father of the appellants, the agricultural land inherited by them had been partitioned by them on 11.09.2003 amongst themselves and their mother. He also admitted that appellant Raghvendra was serving at Baroda Gramin Bank Chandpur Branch and his duty hours were from 9:30 am. to 5:00 pm. This witness has claimed that this fact was not in his knowledge that appellant Raghvendra was living in Village Atrehta from 1992 by constructing a house in that village. He also shows ignorance of the fact that appellant Krishnanand was doing the job of collecting *"Tahbazari'* at Tempo Stand at Maharajganj. It is admitted to him that the main door of the appellant Krishnanand's house is situated towards the South and the *"kothri'*, wherein he lives with his wife which is *"kacchi'*. He further admits that the mother-in-law of the deceased is living in a room built separately towards East of the house. He also shows ignorance about the fact that a Separate *"Parivar Register'* of appellant Krishnanand was maintained and has admitted that on 21.06.2005 appellant Raghvendra informed him through telephone at 9:00 pm. that deceased Poornima @ Poonam had committed suicide. He shows ignorance of the fact that appellant Kamlendra informed the Police Station, Maharajganj through a written application about the suicide committed by the deceased, which was entered at Serial No.5 of the G.D. dated 22.06.2005 at 2:05 pm.

P.W.-2/Kusum Trivedi, who is the mother of the deceased has stated about the fact of demand of dowry of Rs. 20,000/- and motorcycle by accused persons after the marriage and also that the same continued till May, 2005. She stated that when they reached the matrimonial house of the deceased, her daughter was bleeding from nose and she noticed an injury on her Naval area and she was also bleeding from her private part and anus and her body was in burnt condition. She stated in her cross-examination that she did not see any accused person throughout the inquest proceeding. This witness was contradicted with her statement recorded under Section 161 of the Cr.P.C., wherein she had stated that in the night of 21.06.2005, appellant Raghvendra informed them through telephone that

deceased Poonam had committed suicide. She further stated in her cross-examination that she had 03 daughters and Mithilesh Kumari was the eldest one amongst them, who had also committed suicide. It was admitted by her that they did not lodge any FIR against in-law's of Mithilesh. It is also admitted by her that appellant Kamlendra was not doing any job at the time of incident and Raghvendra was serving in a Bank, while appellant Krishnanand was collecting *"Tahbazari'* at Tempo Stand of Maharajganj. She admitted that she never went to the matrimonial home of her daughter and had never met with mother of Kamlendra, Krishnanand or Raghvendra's wife and she could not recognize them. She shows ignorance of the fact that appellant Raghvendra was living at Village Atrehta by constructing a house since 1997 and that her daughter went to her matrimonial home happily after her marriage. She admitted in her cross-examination that appellant Kamlendra wanted to establish a shop, but she is not aware of the fact, as to for what business he was demanding money. She further stated that her daughter did not tell the fact of demand of dowry to her, but she told this to her father and her father in turn informed her about the demand and the cruelty committed to his daughter by the appellants.

P.W.-3/Ram Naresh Tiwari has also admitted in his evidence that he was instrumental in arranging the marriage of deceased with Kamlendera and also that no dowry was demanded at the time of marriage. In his cross-examination he admitted that he was aware that Raghvendra was serving in a Bank and he was living at Village Atrehta with his family since 1997.

P.W.-8/Charan Pal Singh, Circle Officer of the Police (2nd Investigating Officer) has stated in his cross-examination that "Panchnama' of the body of the deceased was prepared on the basis of information given by appellant **Kamlendra Dwivedi** @ Vidyanand Dwivedi, because he got the General Diary, where in the information given by him was registered at Serial No.-5 on 22.06.2005. He further stated that informant in his statement recorded under Section 161 of the Cr.P.C. had not taken the name of appellant Raghvendra Dwivedi in connection with the second *"vidai'* of the deceased. He further stated that informant had told him that motorcycle and Rs. 20,000/- were being demanded for establishing a shop. He further admitted that on 10.07.2005, appellant Raghvendra Dwivedi told him that he lived at Village Atrehta along with his family for the last one and half years, but he did not verify it, as there was sufficient evidence against Raghvendra Dwivedi. He admitted that Krishnanad Dwivedi also told him that he lived separately and in the Site Plan prepared by him, he shows his house towards south. He has not shown any door of appellant Krishnanand's house towards East.

Perusal of this Site Plan, Exhibit-ka-12, which has been proved by Investigating Officer/P.W.-8 Shri Charan Pal Singh, would reveal that the house of appellant Krishnanand is shown towards South and there is no door of this portion opening towards East where appellant **Kamlendra Dwivedi** was living. Perusal of this Site Plan would further reveal that it is shown in this Site Plan that deceased Poornima @ Poonam was living in a room shown by word *"B"*, while her body was found in hanging position at the place shown by the word *"A"*, which is situated in front of the room shown to be of appellant Raghvendra. A separate room of

mother-in-law namely Smt. Meena Kumari has also been shown in this Site Plan. No objection has been raised by anyone, pertaining to the authenticity of this Site Plan, therefore, this Site Plan in the background of the statement of P.W.-8/Charan Pal Singh would reveal that mother-in-law of the deceased namely appellant Meena Kumari, appellant Krishnanand and deceased Poornima @ Poonam along with her husband Kamlendra were living separately in the same house and appellant Krishnanand's was living in a seprate house, main gate of which was situated towards the South, while the door of the house where deceased was living along with her husband and mother-in-law was opening towards North and both these houses were separate.

20. Perusal of record would also reveal that appellants have produced oral as well as documentary evidence in their favour. In oral evidence appellants have produced D.W.-1/Mohd. Israr, D.W.-2/Vinod Kumar, D.W.-3/Bhoopendra Bahadur Singh and D.W.-4/Smt. Sharda Singh. **D.W.-1/Mohd. Israr** is the 'Pradhan' of Village Salethu, wherein the matrimonial home of the deceased is situated and he has stated that appellant Krishnanand is living separately from his brother appellant-Kamlendra for the last 10-11 years and appellant Raghvendra is also living separately along with his family by constructing a house at Village Atrehta from before 12 years. He has also stated that appellants Kamlendera, Raghvendera and Krishnanand have partitioned their agricultural land amongst themselves, which they inherited from their father and appellant Krishnanand was not having any concern with appellant Kamlendra or his family. In his cross-examination, he has stated that Village Salethu is about 7 to 8 kilometers away from Village Atrehta and appellant Kamlendra is the youngest of the three sons of Anjani, who is residing in a separate house, while the appellant Krishnanand is residing in a separate house.

D.W.-2/Vinod Kumar is a 'Chakbandi Lekhpal', who has proved the fact that appellants Raghvendra, Kamlendra and Krishnanand have got their agricultural land partitioned amongst themselves along with their mother Meena Kumari. He also produced an extract of the 'Khatauni' which has been placed on record as Paper No. 153-Kha. The testimony of this witness, who is a Government servant, proves that three sons of Anjani i.e. appellants Kamlendra, Raghvendra and Krishnanand had partitioned the agricultural land amongst themselves which they inherited from their father.

D.W.-3/Bhoopendra Bahadur Singh is the Branch Manager of baroda Gramin Bank and he has proved that appellant Raghvendra was working in his branch situated at Village Chandapur as Process Server and on 21.06.2003 he was present in the Chandpur branch of the Bank from 9:30 am. to 5:00 pm. He has produced a copy of Attendance Register in the trial Court. Evidence of this witness is not of much significance as the trial Court has convicted the appellants of the charges under Sections 304-B, 498-A and Section 201 of I.P.C. and deceased, as per the statement of Kamlendra under Section 313 Cr.P.C., died at 8:00 pm. on 21.06.2005.

D.W.-4/Smt. Sharda Singh is the "Pradhan' of Village Atrehta and she has stated that appellant Raghvendra is living in Village Atrehta along with his

family since 1997 by constructing his own house.

21. In documentary evidence appellants have produced electricity bill, a copy of sale deed and also a certificate issued by the Bank Manager which establishes the fact that appellant Raghvendra was working in Baroda Gramin Bank, Chandapur Branch and is also residing at Village Atrehta. However, being employed in the bank would not necessarily mean that he has severed all his connection from his ancestral home situated at Village Salethu. It is common practice amongst those who do jobs outside their home towns or villages to keep a room or two of their ancestral house with themselves for their use, even if they do not reside there and they use to come to their ancestral home on special occasions like marrige or festivals. So, in the background of this factual matrix, if Investigating Officer has shown one room of appellant Raghvendra at Village Salethu in the Site Plan of the house where Kamlendera lives, the same is not of much significance, as it is otherwise established from the evidence on record that both brothers of Kamlendra i.e. Raghvendra and Krishnanand Dwivedi were living separately and in fact Raghvendra was living at Village Atrehta, while there was no connection of the house of Krishnanad with the house where appellant Kamlendra was residing. It is also established on record that deceased was also living separately in a room of the house shown by the Investigating Officer in the Site Plan and appellant Meena Kumari was residing separately in a separate room, though in the same house. So, when it is established that appellants Raghvendra, Krishnand along with their family and Meena Kumari were living separately from appellant Kamlendra, in absence of any specific role alleged against them, they should not have been convicted by the trial Court only on the basis of general and sweeping allegations of demand of dowry and cruelty in lieu of such demand, specially in the background of the fact that P.W.-2/Smt. Kusum Trivedi in her evidence has clearly admitted that Kamlendra was willing to establish a shop, but she did not know as to for what business, the money was being demanded. This statement and other pieces of evidence available on record clearly suggests that the demand of Rs.20,000/- along with a motorcycle was being made by none other than appellant **Kamlendra Dwivedi** only, as he, at that point of time was not doing anything and was solely dependant on the income from his agricultural land, while the other two brothers namely Raghvendra and Krishnanand, apart from holding agriculture land, were also doing their separate jobs and, therefore, demand of Rs. 20,000/- and motorcycle could only be for the benefit of Kamlendra. It is hard to believe that in this era of nuclear families, brothers who are residing separately and having their independent source of income would commit cruelty with the deceased, in lieu of demand such dowry which could only benefit their brother i.e. appellant **Kamlendra Dwivedi**.

Therefore, keeping in view the overall evidence available on record, we are not inclined to believe that deceased Poornima @ Poonam was subjected to any cruelty in lieu of any demand of dowry by appellant Raghvendra, his wife Usha Devi, Krishnanand Dwivedi and his wife Smt. Poonam or Smt. Meena Kumari (mother-

in-law). Since it is apparent from the evidence on record that appellant **Kamlendra Dwivedi** was dependant only on the income of his agricultural land and was also living separately with the deceased, he alone could be the only beneficiary of the demand of Rs. 20,000/- for the purpose of establishing a shop and also of a motorcycle, which can only be used by him. The trial Court contrary to the evidence on record has concluded at Page No. 22 and 23 of its judgment that only on the basis of separate living it could not be presumed that the above mentioned appellants were not having any connection with the husband of the deceased i.e. **Kamlendra Dwivedi** and also that Raghvendra was having good relation with his brothers. The trial Court thereafter also disbelieved the defence of separate living of appellants Raghvendra, Krishnanand Dwivedi and mother-in-law Meena Kumari and concluded that even if it is presumed that they were living separately, it was their moral and social duty to save the deceased from the cruelty which was being allegedly committed by appellant Kamlendra and hold that all of them have treated the deceased with cruelty in lieu of demand of dowry. We are unable to concur with this finding of the trial Court that the above mentioned appellants could be convicted only on the basis that they failed to discharge their social or moral obligations. The trial Court has completely forgotten one of the mandatory ingredient and important ingredient of Section 304-B I.P.C. i.e. soon before the death of the deceased she was subjected to cruelty by the appellants for or in connection with any demand of dowry. Therefore to prove this ingredient some positive act is required on behalf of the appellants and only on the basis of non discharge of any social or moral obligation offence under Section 304-B I.P.C. could not stand proved nor any adverse presumption could be raised against these appellants under Section 113-B of the Indian Evidence Act. No evidence is either available against these appellants pertaining to the charge of section 498A and Section 201 of the IPC and Section 4 of the Dowry Prohibition Act as they were living separately and for the commission of the offence under section 201 of the IPC there is no presumption available either. Therefore, the trial Court has committed a manifest error in appreciating the evidence on record, pertaining to appellants Raghvendra, Krishnanand, Smt. Usha Devi and Smt. Poonam Devi in holding that they were not living separately and the trial Court has based its findings on "surmises and conjectures', so far it relates to the above mentioned appellants and appeal filed by them is liable to be allowed.

In **Trimukh Maroti Kirkan Vs State of Maharashtra** reported in **MANU/SC/8543/2006,** Hon'ble Supreme Court observed as under :

"10. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want

to keep aloof and do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

11. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh MANU/SC/0585/2003 : 2003CriLJ3892). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

22. Therefore so far as appellant Kamlendra is concerned, we are of the considered view that he is the person with whom deceased Poornima @ Poonam was living separately in a room of the house. In the normal course he should be present with his wife at the time of incident. Perusal of Site Plan (Exhibit-ka-12) would also reveal that the deceased got burnt in the room where she was living with her husband i.e. Kamlendra Dwivedi. Therefore, what actually had happened in that room could only be in the specific knowledge of appellant Kamlendra Dwivedi and, therefore, by virtue of Section 106 of the Indian Evidence Act, appellant Kamlendra Dwivedi was required to explain as to how and in what

circumstances deceased Poornima @ Poonam had died and if no reasonable and acceptable explanation is given by the appellant Kamlendera or a false explanation is coming from his side, adverse inference will be drawn against him and since demand of Rs. 20,000/- and of a Motorcycle was being made, as claimed by P.W.-2/Kusum Trivedi for establishing a shop for him and the motorcycle can only be used by him would clearly suggest that there is ample evidence on record to establish that soon before her death he has subjected Poornima @ Poonam to cruelty in lieu of demand of dowry and thus on the basis of evidence on record a presumption as provided under Section 113-B of the Indian Evidence Act could be drawn against appellant **Kamlendra Dwivedi** that he has caused the dowty death of deceased Poornima @ Poonam. He has also failed to rebut this statutory presumption and, therefore, his conviction under Sections 304-B, 498-A and 201 of I.P.C. is liable to be sustained.

23. At this juncture learned counsel appearing for the appellant Kamlendra submits that the appellant Kamlendra has already undergone 12 years of imprisonment and still continues to be in jail, this Court should alter the award of life sentence to that of one already undergone by the appellant. He has further submitted that though Section 304-B IPC prescribes awarding of imprisonment for a term which shall not be less than seven years which may extend for life, yet according to him the instant case is not a case where the trial judge should have awarded life sentence to the appellant. Learned counsel for the appellant submitted that any term of more than seven years could meet the ends of justice and this Court should allow the appeal to the extent of modifying the impugned judgment in sofar as the quantum of sentence is concerned and reduce the same from life imprisonment to that of already undergone.

Learned counsel for the State, while refuting the submission made by the counsel for the appellant Kamlendra has submitted that having regard to the totality of circumstances emerging out from the evidence and the fact that the wife of appellant was murdered in her matrimonial home within seven years of her marriage, the award of sentence of life imprisonment to the appellant is fully justified and hence, this Court should not interfere in quantum of sentence.

24. In **State of U.P. vs. Virendra Prasad, MANU/SC/0079/2004** Hon'ble Supreme Court while discussing principles of sentencing opined as under:

23. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of

keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

24. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times on account of misplaced sympathies to the perpetrator of crime leaving the victim or his family into oblivion. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the gravity of the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

25. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle MCG Dautha v. State of California: 402 US 183: 28 L.D. 2d 711 that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

26. These aspects were highlighted by us in State of Karnataka v. Puttaraja MANU/SC/0976/2003 : 2004CriLJ579 .

27. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be."

25. The question as to whether we should reduce the appellant Kamlendra's sentence and if so, to what extent, as urged by the appellant's counsel, has been the subject matter of debate before the Apex Court in many cases, pertaining to Section 304-B /Section 498-A IPC and wherein the Apex Court while interpreting the expression "may" occurring in Section 304-B IPC has held that it is not mandatory for the Court in each and every case to award life imprisonment to the accused once he is found guilty of offence under Section 304-B. It has been held that the Court could award sentence in exercise of its discretion between seven years to

life imprisonment depending upon the facts and circumstances of each case. It was held that in no case it could be less than seven years and that extreme punishment of life term should be awarded in "rare cases" but not in every case.

26. In **State of Karnataka vs. M.V. Manjunathegowda and Ors., MANU/SC/0005/2003** It was held that *"26. The next question to be considered is the quantum of punishment. While considering the quantum of punishment, the Court must keep in view the background and intendment of the legislature so as to eradicate the evil practice of giving and taking dowry by prescribing the deterrent punishment. This was clear from the Objects and Reasons of Amending Act of 1986 (Act 43 of 1986). Consequent upon the aforesaid amendment Section 304B IPC was introduced in which the punishment is, imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. As would reveal from the various amendments as noticed above, despite stringent law, the evil practice of giving and taking of dowry remains unabated. On the contrary, it is menacingly on the increase. In the instant case, the conduct of the accused is of vital importance while considering the quantum of punishment. The marriage of the accused with the deceased on 17.5.1987 is neither an arranged marriage nor a love marriage. As already noticed, is a marriage by accident and the main consideration was the payment of dowry and nor out of love. It also appears from the testimony of PW-9 that a suggestion was put to the witness that accused used to permanently go to one Kallugudde Earegowda's house for work and that Kallugudde Earegowda has three female children. It was also suggested that accused was also having love affair with the first daughter of Kallugudde Earegowda. All this go to show that the main consideration of the accused marrying with the deceased was love of dowry and not love for the girl. So greed of the accused of the dowry, even for a paltry sum of Rs. 2000/- and three sovereign of gold, would cost the precious life of a human being. Such conduct of the accused is not only abhorrent to the concept of rule of law, but also against the conscience of the entire society. The practice of giving and demanding dowry is a social evil having deleterious effect on the entire civilized society and has to be condemned by the strong hands of judiciary. Despite various amendments providing deterrent punishment with a view to curb the increasing menace of dowry deaths, the evil practice of dowry remains unabated. The Court cannot be oblivion to the intendment of the legislature and the purpose for which the enactment of the law and amendment has been effected. Every court must be sensitized to the enactment of the law and the purpose for which it is made by the legislature keeping in view the evil practice of giving and taking dowry, which is having a deleterious effect on the civilized society. It must be given a meaningful interpretation so as to advance the cause of interest of the society as a whole. No leniency is warranted to the perpetrator of the crime against the society. Keeping these overall accounts and circumstances in the background, we are of the view that a deterrent punishment is called for. Accused No. 1 (M.V. Manjunathe Gowde) is accordingly convicted under Section 304B IPC and*

sentenced to rigorous imprisonment for ten years."(Emphasis Ours)

27. The case law, i.e., **Hari Om vs. State of Haryana (31.10.2014 - SC) :MANU/SC/0987/2014** which has been relied upon by learned Counsel for the appellants is also on the said issue wherein the Apex Court has held that extreme sentence of life term should be awarded in rare cases but not in every case. Relevant Para of the said judgment is reproduced here in below:--

"21. This issue has been the subject matter of debate before this Court in several cases, which arose out of Section 304B read with Section 498B and wherein this Court while interpreting the expression "may" occurring in Section 304B Indian Penal Code held that it is not mandatory for the Court in every case to award life imprisonment to the accused once he is found guilty of offence Under Section 304B. It was held that the Court could award sentence in exercise of its discretion between seven years to life imprisonment depending upon the facts of each case. It was held that in no case it could be less than seven years and that extreme punishment of life term should be awarded in "rare cases" but not in every case.

22. In the case of ***Hem Chand v. State of Haryana MANU/SC/0026/1995 : (1994) 6 SCC 727,*** *the courts below had awarded life term to the accused Under Section 304B read with Section 498A but this Court reduced it to 10 years. This was also a case where the accused was a police officer who had suffered life imprisonment. This Court held as under:*

7 ...the accused-Appellant was a police employee and instead of checking the crime, he himself indulged therein and precipitated in it and that bride-killing cases are on the increase and therefore a serious view has to be taken. As mentioned above, Section 304B Indian Penal Code only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.

8. Hence, we are of the view that a sentence of 10 years' RI would meet the ends of justice. We, accordingly while confirming the conviction of the Appellant Under Section 304B Indian Penal Code, reduce the sentence of imprisonment for life to 10 years' RI....

23. Similarly this Court in ***State of Karnataka v. M.V. Manjunathegowda and Anr. MANU/SC/0005/2003 : (2003) 2 SCC 188,*** *while convicting the accused Under Section 304B awarded 10 years imprisonment in somewhat similar facts.*

24. Recently in ***G.V. Siddaramesh v. State of Karnataka MANU/SC/0088/2010 : (2010) 3 SCC 152,*** *this Court while allowing the appeal filed by the accused only on the question of sentence altered the sentence from life term to 10 years on more or less similar facts. Hon'ble H.L. Dattu, J. (as His Lordship then was) speaking for the Bench held as under:*

31. In conclusion, we are satisfied that in the facts and circumstances of the case, the Appellant was rightly convicted Under Section 304B Indian Penal Code. However, his sentence of life imprisonment imposed by the courts below appears to us to be excessive. The Appellant is a young man and has already undergone 6 years of imprisonment after being convicted by the Additional Sessions

Judge and the High Court. We are of the view, in the facts and circumstances of the case, that a sentence of 10 years' rigorous imprisonment would meet the ends of justice. We, accordingly while confirming the conviction of the Appellant Under Section 304B Indian Penal Code, reduce the sentence of imprisonment for life to 10 years' rigorous imprisonment. The other conviction and sentence passed against the Appellant are confirmed.

25. Applying the principle of law laid down in the aforementioned cases and having regard to the totality of facts and circumstances of this case, we are of the considered opinion that the ends of justice would meet, if we reduce the sentence of the Appellant from life imprisonment to that of 10 years. In our view, this case does not fall in the category of a "rare case" as envisaged by this Court so as to award to the Appellant the life imprisonment. That apart, we also notice that while awarding life imprisonment, the courts below did not assign any reasons."

28. Having perused all the evidence and other materials on record, we find that the deceased after being burnt was either hanged herself or she was hanged by some other person as a ligature mark was found around her neck. The cause of death of deceased has been determined as shock due to ante-mortem burn injuries, therefore, hanging was not the cause of death of deceased. A lacerated wound has also been found on the person of deceased in between her vagina and anus. P.W.-4/Dr. Rajendra Sharma in his statement has stated that grievous injuries of burn were not caused to the deceased and the one injury found on the person of deceased, according to the Doctor may come by falling on some sharp object during the course of running here and there in an attempt to put off the fire. The Doctor has also opined that no bone of the neck of the deceased was found fractured.

29. The above factual matrix thus reveals that the deceased, though, was not seriously burnt but she died of 1st and 2nd degree burn injuries. However, her clothes were found changed and much emphasis has been given by prosecution to take this fact into consideration for awarding maximum sentence of life imprisonment. We may realize that the deceased was burnt and there is no possibility that any part of her clothes would have been intact. Therefore, in such a scenario, if fresh clothes were put on her person by the appellant Kamlendra, it is not a circumstance on the basis of which the extreme penalty of life imprisonment should be awarded.

30. Keeping into mind, the aforesaid proposition of law laid down by the Apex Court in the aforementioned cases and having regard to the totality of facts and circumstances of this case, we are of the considered opinion that justice would be served, if we alter the sentence of the appellant Kamlendra from life imprisonment to that of 12 years. In our view, this case does not fall in the category of a "rare case" on the parameters set forth herein before so as to award the appellant the life imprisonment . That apart we are also not satisfied by the reasoning given by the trial Court for awarding Life imprisonment to appellant Kamlendra, the conviction of the appellant is hereby upheld but the sentence of life imprisonment awarded to him by the Trial Court under section 304-B I.P.C. is hereby reduced to 12 years rigorous

imprisonment. The impugned judgment and order of the Trial Court is modified to that extent only with respect to appellant Kamlendra, who is in jail as on date. The conviction and sentence of appellant Kamlendra Dwivedi for the offence under sections 498A, 201 IPC and Section 4 of the Dowry Prohibition Act shall remain the same as was awarded by the trial Court and the judgment of the trial court is affirmed to this extent. The appeal filed by appellant Kamlendra Dwivedi is this **partly allowed.**

31. In view of the foregoing discussions, we order as follows:-

(i) Criminal appeal Nos. 254 of 2010 and 886 of 2010 are **allowed**. The recorded conviction of the appellants Raghvendra, Krishnanand, Smt. Usha Devi and Smt. Poonam Devi and the sentences awarded to them under Sections 304-B, 498 A and 201 IPC and Section 4 of Dowry Prohibition Act, are hereby **set aside.** Appellants Raghvendra, Krishnanand, Smt. Usha Devi and Smt. Poonam Devi are **acquitted** of all the charges levelled against them.

They are on bail, they need not to surrender. Their bail bonds are cancelled and their sureties are discharged.

However, they will comply with the provisions of Section 437-A of Code of Criminal Procedure and file two sureties each to the satisfaction of the trial Court concerned in the trial Court within one month from today.

(ii) Criminal appeal No. 941 of 2010 also succeeds and is **allowed in part.** The recorded conviction of the appellant-Kamlendra under Sections 304-B, 498A and 201 IPC is upheld, but the awarded sentence of life imprisonment to him under section 304-B I.P.C. is reduced to 12 years' rigorous imprisonment. The Sentence awarded by the trial Court pertaining to Section 498A and 201 IPC, as well as under Section 4 of the Dowry Prohibition Act shall remain the same as awarded by the trial Court.

He will also get the benefit of Section 428 of the Cr.P.C. He is detained in prison and he will serve out the sentence awarded by the trial Court as altered by this court.

In case appellant Kamlendra has served out the imprisonment awarded by the trial Court as altered by this Court, he will be released from the prison if he is not liable to be detained in any other case. He will also comply with the provisions of Section 437-A of Code of Criminal Procedure and file two sureties to the satisfaction of the trial Court concerned in the trial Court within one month from his release from the prison today.

The record of the trial Court along with a copy of this Judgment be sent to the trial Court, at the earliest.

(2020)1ILR A114

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2019

BEFORE
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Appeal No. 1723 of 1996

Hari Shanker & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Arun Kumar Shukla, Sri Ram Chandra Uttam

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code - Sections 148, 323/149 and 307/149 - Appeal against conviction.

The role of all the accused persons has not been shown in F.I.R. Therefore, evidence of prosecution witness is not believable as they are afterthoughts and taught by legal experts. (para 36)

It can be said that F.I.R. is not an encyclopedia of the details of crime. It is not necessary that it should set out minute details of occurrence. If the fact narrated in F.I.R. indicates that a crime has been committed and facts mentioned in F.I.R. are in consonance with facts reflected from evidence on record then in that case accused may not take the plea that there is no detailed description in F.I.R. (para 37)

Injury report of injured persons indicates that they have received the injury of firearm. The genuineness of medical reports/injury reports have not been disputed by accused persons. It was duty of I.O. to recover the incriminating articles. If, I.O. has failed to recover the weapons used may or may not be with intention to provide benefit to accused persons, then in that case prosecution case will not be affected adversely. The injuries of above persons have been narrated in the oral evidences of prosecution witnesses PW-1 to PW-3. (para 41)

According to law, if eye witnesses who received injury in the course of occurrence, if their evidences are not contradictory and is believable, it will not be necessary in every case to produce independent witnesses. Quality of witness is needed not quantity. (para 47)
Prosecution has succeeded to prove the charges against appellants without any shadow of doubt. (para 49)

Appeal is dismissed. (E-2)

List of cases cited: -

1. Sahdev Prasad Shah Vs. St. of Bihar 1999 Supreme (Patana) 615

2. Ganesh Ram @ Ganesh Chamar Vs. St. of Bihar 1989 Law Suit (Pat) 62 (D.B.)

3. Surjit Singh @ Gurmit Singh Vs. St. of Punj. 1993 SCC (Cri) 161

4. Dharampal and others Vs. St. of U.P. 2008 Cr.L.J. 1016

5. Akhtar and others Vs. St. of Uttaranchal SCC (Cri) 1590 of 2007

6. Siddiq and ors. Vs. St. 1981 AWC (80)

7. Madan Shah Vs. St. of Bihar 1997 S.C.C. Online Patana 543

8. Shanker Shah & ors. Vs. St. of Bihar 2007 Cr.L.J. 355

9. Pandurang Chandrakant Mhatre & ors. Vs. St. of Mah. (2010) 1 S.C.C. 413

10. St. of Punj. Vs. Hakam Singh, Appeal (Crl.) 130 of 2000

11. Hardev Singh & ors. Vs. Harbhej Singh and others 1996 94) Crimes 216 (S.C.)

12. Rizan & ors. Vs. St. of Chattisgarh (Supra)

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. Present appeal has been filed against the judgment and order dated 30.08.1996 passed by Special/Additional Sessions Judge, Fatehpur convicting the appellants-Hari Shanker and Radhey Shyam under Section 148, 323/149 and 307/149 of Indian Penal Code (hereinafter referred to as "I.P.C.") and sentencing the appellants to undergo six months' rigorous imprisonment under Section 148 I.P.C., further six months' rigorous imprisonment under Section 323/149 I.P.C. and two years' rigorous imprisonment with a fine of Rs.2000/- each under Section 307/149 I.P.C. in Session Trial No.85 of 1988

(State and others Vs. Hari Shanker and others), Police Station-Jahanabad, District-Fatehpur.

2. The case of the prosecution in brief is that Ram Kishore Uttam has given a *Tahrir* to S.O., Jahanabad on 29.11.1986 that at about 08:00 a.m. in Village-Lahuri Sarai, in front of northern gate of the factory of complainant; Hari Shanker and Radhey were raising construction of shop. One Pramod Kumar asked and prohibited not to do so. Annoyed of it, Hari Shanker, Radhey, Bhagween Deen, Raj Kumar and Bhikhari Neta, residents of Sarai Dharampur and some other outsiders armed with guns, pistols, lathi and danda attacked the family members of complainant with common intention. As a result of which, Vinod Kumar, Pramod Kumar, Bachchi Lal, Km. Shyam Shree, Km. Shyam Kali and Km. Manju Devi received injuries. On hearing the noise, the residents of the same village Gulab and Ram Kumar reached on spot and saw the incident.

3. On the basis of Tahrir, F.I.R. was lodged on the same date at about 09:30 a.m. under Crime No.254/86, under Sections 147, 148, 149, 307 I.P.C. with entry in G.D.

4. The investigation of occurrence was entrusted to Sub-Inspector-U.B. Singh. Injured persons were sent to primary health centre for medical examination. Investigating Officer prepared the spot map and after investigation he has submitted charge-sheet against Hari Shanker, Radhey Lal, Bhagwandeen, Raj Kumar. Bhikhari Neta was summoned under Section 319 Cr.P.C.

5. As documentary evidence prosecution filed *Tahrir* (Ex. Ka-1) which has been proved by witness PW-1. Apart from that, following papers have also been filed by prosecution whose genuineness has been admitted by learned counsel for accused persons and endorsed accordingly. Consequently, the papers were exhibited accordingly;

Chik F.I.R. (Ex. Ka-2), Corban Copy of G.D. dated 29.11.1986 (Ex. Ka-3), Site Plan (Ex. Ka-4),Injury Report of Km. Shyam Shree (Ex. Ka-5),Injury report of Km. Shyam Kali (Ex. Ka-6),Injury Report of Km. Manju Devi (Ex. Ka-7), Injury Report of Bachchi Lal (Ex. Ka-8), Injury Report of Vinod Kumar (Ex. Ka-9), Injury Report of Pramod Kumar (Ex. Ka-10), Charge-sheet (Ex. Ka-11).

6. As oral evidence for prosecution witnesses Ram Kishor as PW-1, Bachchi Lal as PW-2 and Km. Shyam Shree deposed as PW-3, since learned counsel for the prosecution has admitted the genuineness of prosecution paper as mentioned above, the evidence of relative formal witness as were dispensed with by the court considering the endorsement of Counsel for defence.

7. On the other hand, learned counsel for the accused persons submitted *Panch Nirnay* (Ex. Kha-1), Receipt of postal department dated 06.05.1986 (Ex. Kha-2), Extract of statement of Ram Kishore PW-1 (Ex. Kha-2 & 3), Extract of statement of Bachchi Lal (Ex. Kha-4 to 7)), Extract of statement of Shyam Shree (Ex. Kha-8 to 11). Apart from that with list 11 Kha/1, paper no.11 Kha/3 Certified Copy of F.I.R., Crime No. 254-A 11 Kha/4 under Sections 147, 148, 149, 349, 336 I.P.C. and Certified Copy of Injury Report of Rajeshwati , 11 Kha/5 (Ex. Kha-13), Certified Copy of Injury Report of Akhilesh Kumar, 11 Kha/A (Ex. Kha-14),

Certified Copy of Injury Report of Hari Shanker 11 Kha/9 (Ex. Kha-15), Certified Copy of Injury Report of Shravan Kumar 11 Kha/11 (Ex. Kha-16), Certified Copy of Injury Report of Meera Devi, 11 Kha/13 (Ex. Kha-17), Certified Copy of Injury Report of Satish Kumar 11 Kha/15 (Ex. Kha-18), Certified Copy of Injury Report of Sheela Devi 11 Kha/17 (Ex. Kha-19), Certified Copy of Injury Report of Mohani Devi 11 Kha/19 (Ex. Kha-20) have been filed.

8. No oral evidence has been produced by accused persons.

9. Statement of accused persons Hari Shanker, Raj Kumar, Bhikhari Neta and Radhey Shyam was recorded under Section 313 Cr.P.C., wherein they have denied the prosecution version and evidence. Accused Hari Shanker has mentioned that when he was making construction in place of wooden shop to cemented shop and he and his family members were busy in its cleaning, Ram Kishor and Vinod etc. demolished his shop and beaten them brutally for which cross case against prosecution persons is pending. Accused persons Raj Kumar and Radhey Shyam adopted the statement of accused Hari Shanker. Accused Bhikhari Neta has mentioned that his enmity is continuing with the family of complainant, he resides in another village. His eye-sight is weak. His age is 70 years and he has made accused in party bandi only.

10. Learned Sessions Judge after consideration of the facts and evidence of both the parties held guilty and convicted accused persons-Hari Shanker and Radhey Shyam under Sections 148, 307 /149 and 323/149 I.P.C. Learned court below acquitted to accused Raj Kumar from the charges under Sections 148, 307/149 and 323/149 I.P.C. extending benefit of doubt to him.

11. As during the proceeding of trial, accused persons Bhagwati Deen and Bhihari Neta were died, hence, the case stood abated against them.

12. Against the aforesaid conviction and sentences accused persons Hari Shanker and Radhey Shyam preferred the present appeal.

13. Heard learned counsel for the appellants and learned A.G.A. for the State and perused the record.

14. Learned counsel for the appellants submitted that accused persons have falsely been implicated in the present case. In fact, the persons from complainant side started quarrelling and fighting when appellants were converting their wooden Gumti into cemented shop. Complainant side was aggressor. Appellants defended themselves in exercise of their right to private defence. Witnesses of prosecution are family members. No independent witness as named in F.I.R. has been examined by prosecution. The weapons have not been recovered. Role of accused persons has not been shown in F.I.R. Doctor who had examined the injuries of prosecution persons and Investigating Officer were the necessary witnesses, but they have not been produced by prosecution. Prosecution has failed to prove the case beyond any shadow of doubt against accused appellants. Out of 5 persons only the two persons have been convicted, hence the judgment and order of court below dated 30.08.1996 is liable to set aside. Appellants are liable to be acquitted and appeal is liable to be

allowed. In support of his argument, learned counsel for the appellants has referred case laws of **Sahdev Prasad Shah Vs. State of Bihar 1999 Supreme (Patana) 615 and Ganesh Ram @ Ganesh Chamar Vs. State of Bihar 1989 Law Suit (Pat) 62 (D.B.)**

15. Per contra, learned A.G.A. has submitted that F.I.R. is prompt. Prosecution witnesses are injured eye witnesses and are believable. There is no contradiction in their evidence on substantial points. If such witnesses are genuine and believable, then in that case it does not affect the prosecution case only on the ground that they are family members. If eye witnesses support the prosecution case, the conviction can be based on their evidence. There is no evidence from defence that complainant side were ever aggressor, rather appellants' side used deadly weapons to attack complainant side. The injuries so indicated by appellants' side are not proved. Learned counsel for the appellants in sub-ordinate court has admitted the genuineness of injury report of complainant side along with other prosecution papers. Therefore, the formal proof/evidence of concerning witnesses were dispensed with by the Court. In the light of admissible evidence of eye-witnesses if the recovery of weapons has not been done by Investigating Officer then in that case prosecution case does not suffer adversely. The F.I.R. is not an encyclopedia. Prosecution has proved his case beyond any doubt against appellants. Appellants have rightly been convicted and sentenced by the court, therefore, appeal is liable to be rejected.

16. As according to the F.I.R., occurrence had taken place on 29.11.1986 at about 8:00 a.m. and its F.I.R. was lodged on the same date at about 9:30 a.m. The distance of police station from the place of occurrence has been shown 5 Kms. Therefore, in absence of any evidence, it cannot be said that F.I.R. has been lodged with any inordinate delay.

17. Witness PW-1 is not eye witness but, he has carried injured persons to police station, Jahanabad and hospital for their medical examination. He has proved the *Tahrir* of F.I.R. also. The witness has been cross examined by learned counsel for the defence properly, but nowhere any such facts came into light that he did not carry the injured persons to police station and hospital.

18. Witnesses PW-2 and PW-3 have been produced by prosecution as eye-witnesses. Witness PW-2 as eye witness, who is injured in occurrence also has stated at Page-2 of his statement of evidence that at the time of occurrence, Bhagwan Deen was carrying lathi in his hand who blown lathi to his son Pramod. Hari Shanker and Radhey Shyam were having Tamanche (Country-made pistols) who fired on him and on Shyam Shree, Shyam Kali and Manju. Bhikhari Neta and Raj Kumar were carrying the guns in their hands who also fired by their firearms. There were 8-10 more persons on spot. Further, at page 8 of his statement, he has mentioned that all the 4 persons attacked with their firearms.

19. Witness PW-3 Km. Shyam Shree is also an injured eye witness. She has also narrated the facts at page-2 of his evidence that Hari Shanker and Radhey Shyam were carrying Tamanche, Bhikhari Neta and Raj Kumar were carrying guns in their hands and Bhagwan Deen with lathi. He has

mentioned that all the 4 persons fired on them. Subsequently, she has narrated the role of appellant Hari Shanker that the fire blown by Hari Shanker, her right eye became injured by pellets of cartridge and she lost her right eye. There is no contradiction on this core point in between evidence of PW-2 and PW-3.

20. Injury report of PW-2 and PW-3 is on record as Ex. Ka-8 and Ex. Ka-5. The following injuries have been mentioned in Ex. Ka-8 (Bachchi Lal, PW-2):-

Firearm wound of entry 1/4 c.m. x 1/4 c.m. x muscle deep/bone deep with fresh oozing in (a) back of (Lt) forearm at middle (b) back of (Lt) forearm just above wrist (c) (LTO) zygomatic region (d) front of (Rt) shoulder joint (e) (Rt) thigh lower part at back (f) (Rt) thigh lower part at front (g) (Lt) metatarsal region lateral aspect (h) (Lt) leg lower third lateral aspect (I) left leg lateral aspect at middle (j) (Lt) thigh lateral aspect at middle. Adv. X-ray AP/Lat view for (a) to (j) for presence/confirmation of pellets and extent thereof.

21. Injury Report of PW-3, Km. Shyam Shree (Ex. Ka-5), shows following injuries:-

(i) Blackening of (Rt) eye with profuse conjunctival (Rt) haemorrhage having fresh blood clots with lacerated wound round shaped 1/8 c.m. x 1/8 c.m. in lower part of (Rt) side of eye ball. Advised X-ray AP/Lat. view. Injury u/o.

(ii) Abrasion 1/4 c.m. x 1/4c.m. in (Rt) side of nose just below eye brow.

(iii) Firearm wounds of entry with no exit wound having fresh bleeding with different depths each measuring 1/4c.m. x 1/4c.m. to 1/8c.m. x 1/8c.m. located at (a) (Lt) forearm. at back 3c.m. above wrist (b) mid of front of (Rt) forearm (c) frontal area of skull on left side of midline. Adv. X-ray AP/Lat view for confirmation/of presence of pellets and extent of injuries. Wounds are muscle to bone deep.

22. So far as the testimony of injured witness is concerned, it has been held by Hon'ble Supreme Court in the case of **Surjit Singh @ Gurmit Singh Vs. State of Punjab 1993 SCC (Cri) 161** that:-

"9.-To be fair to the learned counsel for the appellant, we may mention that he ventured to argue that the evidence regarding the marrying of the crime bullet shells with the pistol recovered was not convincing, more so when the 303 pistol, the alleged crime weapon, was recovered from Gurmit Singh, co-accused. It is noteworthy that Gurmit Sing, co-accused, stands convicted under the Arms Act for being in possession of that pistol. This aspect of the case cannot be a substitute to the eyewitness account or the plea taken by the appellant. Had the presence of the two witnesses, that is, Jaswinder kaur PW 5 and Taljit Singh PW 2 at the scene of the occurrence been doubted, the recovery of the weapon of offence and its connection with the empty shells recovered at the spot would have assumed some significance. When the two eyewitnesses are natural witnesses of the crime, one being the young wife who would normally be in the company of the husband at 10.30 p.m. on a summer night and the other the nephew of the deceased who had suffered grievous injuries in the occurrence and was thus a stamped witness, not much importance is to be attached to this aspect of the case. The venture is futile."

(Emphasized)

23. So far as the evidentiary value of relative witness is concerned, it has been held by Hon'ble Supreme Court in the case of **Dharampal and others Vs. State of U.P. 2008 Cr.L.J. 1016**. The relevant part of the judgment is reproduced as under:-

"12. This takes us to the next question viz. whether the other lacunae pointed out by the learned counsel for the appellants are fatal to the prosecution case . We agree that the High Court erred in relying on the evidence of PW4, who admittedly was declared a hostile witness. Nevertheless, we fell that in the fact of the other evidence of PW2 Dannu, PW3 Om Prakash who were corroborated in all material respects by PW7 Dr. R.P. Goyal and by PW9, Dr. U. Kanchan, the evidence of PW4, even if discharged, is inconsequential. The evidentiary value of a dying declaration and the principles underlying the imprtance of a dying declaration have already been discussed herein earlier. Simply because PW2 and PW3, in their cross-examination, have been shown to be related to the deceased does not mean that their testimony has to be rejected. It is well settled that evidence of a witness is not to be rejected merely because he happens to be a relative of the deceased. In State of Himanchal Pradesh V. Mast Ram [(2004) 8 SCC 660], this Court observed as under:-

".....The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not a requirement of law....."

In this view of the matter and this being the well-settled law, it is difficult for us to discard the evidence of the witnesses, as discussed hereinabove, only on the ground that they were related to the deceased, in the absence of any infirmity in the said evidence."

(Emphasized)

24. On the same point, Hon'ble Supreme Court in case law **Rizan and another Vs. State of Chatisgarh (Supra)** it has been held that:-

"6.- We shall first deal with the contention regarding interest of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

(Emphasized)

25. Injury reports of other persons from prosecution side are also on record, which are as follows:-

Injury Report of Km. Manju Devi (Ex. Ka-7)

1. Firearm wound of entry 1/4c.m. x 1/4c.m. x muscle deep in (Lt) deltoid upper part at middle fresh oozing. Adv. X-ray AP/Lat. view for confirmation/presence of pellet, if any.

2. Injury as above in (Lt) side of chest 8 c.m. below mid point of (Lt) collar bone. Adv. X-ray AP/Lat. view for confirmation/presence of pellet if any.

Injury report of Km. Shyam Kali (Ex. Ka-6)

Firearm wounds of entry 1/4c.m. x 1/4c.m. three in number each having fresh oozing muscle deep to bone deep circular round shaped located in (a) dorsam of base of (Lt) thumb (b) (Rt) leg medially at middle (c) (Lt) frontal prominance. Adv. X-ray AP/Lat view for confirmation/presence of pellets and extent of injuries.

Injury report of Vinod Kumar (Ex. Ka-3)

Multiple firearm wounds of entry each measuring 1/4cm. X 1/4cm. App ro. Muscle deep to bone deep scattered in back of (Lt) lower limb front of chest front of (Rt) thigh lower part (Rt) upper limb lower part fresh oozing. Adv. X-ray AP/Lat view for presence and confirmation of pellets if any.

Apart from that, injury report of **Pramod Kumar** (Ex. Ka-10) shows that he is suffering from pain in left ear.

26. All the injured witnesses were examined on 29.11.1986 between 11:30 a.m. to 12.35 p.m. The injury reports of all the injured persons are also prompt.

27. Learned counsel for the appellants has submitted that although the appellants have admitted the genuineness of injury reports of injured persons for prosecution under Section 294 of Cr.P.C., but even then it was needed to examine doctor concerned who had examined the injured persons. In case, the doctor has not examined in above circumstances then in that case the injury report will not be treated as proved as it does not have the status of the substantial evidence. In support of his contention, he has submitted the case law of **Ganesh Ram @ Ganesh Chamar (Supra)** and relied on its para-22 which reads as under:-

"22. Thus the injury report and the postmortem report are not substantive evidence. They are only notes which are prepared by the Doctor at the time of examination of the injured or the deceased. They become evidence only when the doctor is examined and cross-examined in court and says that he had examined the injuries of the injured or the deceased. His evidence will clearly given out the nature of injury and also the weapons used or the manner of assault and in the case of postmortem it will show the cause of death of the deceased. These are relevant things as corroborative piece of evidence to the oral evidence of the witnesses. But these evidence (injury report and post mortem report) can be used only to contradict or corroborate the doctor. The injuries of the victim may be noticed and observed even by a layman, but this layman cannot give the opinion about the cause of death, which is given by the doctor after examination of the dead body, as an expert. Further if a man receives injuries and then dies immediately thereafter, inference may be drawn that these injuries may be the cause of death. But such inference is not sufficient for purposes of conviction for murder. A doctor alone can give the opinion that the victim died as a result of injuries or that the injuries were such that the assailant must have known that it was likely to cause death. Section 32 of the Evidence Act provides exception to the general rule about the injury report or the postmortem report. Similarly Section 294 Cr.P.C. though provides for no formal proof of certain documents, but it cannot take the place of the direct evidence of the doctor. It refers to only that document

which can be needed in evidence and the postmortem report or the injury report cannot be read in evidence unless the doctor is examined, subject to exceptions provided under Section 32 of the Evidence Act. The Court will have to consider the other evidence on the record if any help, at all, is available, which may show the injuries, but that cannot become substitute for the injury report or the postmortem report in the absence of the examination of the doctor barring the case covered by Section 32 of the Evidence Act. If, at all, doctor is not easily available or quite easily available as he has gone abroad or is not likely to come within reasonable time and that there will be delay in the disposal of the case causing harassment to the accused, then the postmortem report may be brought on the record not by a clerk but it should be brought through some person having technical knowledge of medical science and jurisprudence or through some doctor who may be able to answer the questions put by the prosecution as well as the defence in respect of the writings of the doctor of postmortem or injury report. But this is all subject to the Evidence Act or the code of Civil Procedure."

28. In reply, learned A.G.A. has submitted that if the accused persons have admitted and did not dispute the genuineness of prosecution paper including injury report of injured persons from prosecution side then in that case it is not needed call concerning formal witnesses for their evidence.

29. In this regard, the provisions of Section 294 of Cr.P.C. are reproduced hereinunder:-

"294. No formal proof of certain documents.--(1) *Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.*

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed.

Provided that the Court may, in its discretion, require such signature to be proved."

(Emphasized)

30. Accordingly under sub-clause (3) of Section 294 Cr.P.C. if the genuineness of any documentary evidence is not disputed by either side such document may be read in any enquiry trial or other proceedings without formal proof of signature of witness concerned.

31. On the above point of argument, it has been held by Hon'ble Apex Court in the case of **Akhtar and others Vs. State of Uttaranchal SCC (Cri) 1590 of 2007** that:-

" 9. Another post mortem examination report, genuineness of which has also been admitted by the defence, discloses that autopsy was conducted on the dead body of Asgar on 14.05.1987 at about 10.00 AM by Dr. A.K. Lumba. In the

opinion of the Medical Officer, both Shakil and Asgar died on account of shock and haemorrhage resulting due to ante mortem injuries.

10. The medical report with respect to the injuries caused to two eyewitnesses, namely Jamil Ahmad and Mobin, genuineness of which has also been admitted by the defence counsel, discloses that on Page 7 of 14 13.05.1987 at about 12.15 p.m., injuries were found on the body of Jamil Ahmad (PW-2) by the Medical Officer who examined the injured at L.D. Bhatt Civil Hospital, Kashipur. In the opinion of the Medical Officer the injuries were fresh and simple in nature, caused by sharp edged weapon. The same Medical Officer also examined PW-3, Mobin and opined that four injuries were caused by some hard blunt object and two injuries were caused by a fire arm and all the injuries were fresh in duration.

11. Admittedly, there is no dispute as far as the genuineness of the injury reports, post mortem reports and also the genuineness of the Ballistic Expert's report is concerned. As defence has already admitted the same no useful purpose would be served to discuss those reports again."

(Emphasized)

32. On the same point, Full Bench of this Court in case of **Siddiq and Ors. Vs. State 1981 AWC (80)** has given the finding that:-

"9. An injury report filed by the prosecution is obviously a document as defined in Section 29 I.P.C. Before the Cr. P.C. 1973 came into force an injury report could not be read in evidence as it was only a writing of the doctor made at the time of the examination of the injuries of the injured person. It contained his observations regarding the nature, dimension and location of the injuries and also his opinion regarding their duration and the instrument with which they were caused. The doctor who prepared the injury report was required to enter the witness box during the inquiry or trial to prove the injuries of the injured person. He could refresh his memory under Section 159 Evidence Act by referring to the injury report prepared by him and the injury report was proved by him under Section 67 Evidence Act and it corroborated his deposition in Court under Section 157 Evidence Act. Under sub-section (3) of Section 294 Cr. P.C. an injury report filed by the prosecution under sub-section 294 Cr. P.C. may be read as substantive evidence in place of the deposition of the doctor who prepared it if its genuineness is not disputed by the ??? accused. If its genuineness is disputed then the doctor who examined the injured person must appear in the witness box to prove his injuries and also to prove the injury report and in such a case the statement of the doctor would he the substantive evidence and the injury report may be used to corroborate or discredit his testimony.

10. In Jagdeo Singh v. State [1979 Cr. L.J. 236.] a Division Bench of this Court held "it was not permissible to exhibit the postmortem report under Section 294 Cr. P.C. and even if it was done the report could not be used as substantive piece of evidence until and unless the doctor concerned was examined in Court. Documents that Section 294 Cr. P.C. contemplates reading in evidence upon admission about genuineness by the opposite party are only such documents which when formally proved Speak for themselves. It does not refer to any

document, which even if exhibited cannot be read in evidence as substantive evidence". With great respect, we are unable to agree with the view taken by this Court in the above-mentioned case. As mentioned earlier, there is no restriction placed on documents in sub-section (1) of Section 294 Cr. P.C. and it applies to all documents filed by the prosecution or the accused. If the genuineness of any document filed by the prosecution or the accused under sub-section (1) of Section 294 Cr. P.C. is not disputed by the opposite party sub-section (3) of Section 294 Cr. P.C. is applicable and it may be read as substantive evidence. It is true that prior to the coming into force of the Cr. P.C. 1973 the post-mortem report after it was proved was not substantive evidence but only corroborated the statement of the doctor made in Court and even now if the genuineness of the post-mortem report is disputed by the accused, the doctor must be examined to prove the injuries found on the body of the deceased and also the post-mortem report and the post-mortem report may only be used to corroborate or discredit his testimony which is the substantive evidence. This, however, cannot lead to the conclusion that the post-mortem report cannot be read as substantive evidence under sub-section (3) of Section 294 Cr. P.C. if its genuineness is not disputed by the accused. As already mentioned, the very object of enacting Section 294 Cr. P.C. would be defeated if the signature and the correctness of the contents of the post-mortem report are still required to be proved by the doctor concerned even if its genuineness is not disputed by the accused. Section 294 Cr. P.C. is clear and unambiguous. It is only when the genuineness of the post-mortem report filed by the prosecution is not disputed by the accused that sub-section (3) of Section 294 Cr. P.C. is applicable and the post-mortem report may be read as substantive evidence and the signature and the correctness of its contents need not be proved by the doctor concerned. We are, therefore, clearly of the opinion that if the genuineness of the post-mortem report filed by the prosecution under sub-section (1) of Section 294 Cr. P.C. is not disputed by the accused, it may be read as substantive evidence under sub-section (3) of Section 294 Cr. P.C.

11. In Ganpat Raoji Suryavanshi v. State of Maharashtra [1980 Cr. L.J. 853.] it was also held that the post-mortem report even if admitted to be genuine by the accused cannot be read as substantive evidence under Section 294 Cr. P.C. For the reasons already given we are, with great respect, unable to agree with the view taken in that case."

(Emphasized)

33. A Division Bench of Patana High Court has given the same verdict in case law of **Madan Shah Vs. State of Bihar 1997 S.C.C. Online Patana 543.**

"13. In this regard it would be useful to notice that at the time when the Public Prosecutor filed the post-mortem report with a petition to mark the same as Exhibit, Sri Ravindra Prasad Srivastawa, the defence counsel, admitted the genuineness of the document. Therefore, having regard to the provisions of Section 294 of the Code of Criminal Procedure, the post mortem report was marked at Ext. 6 by the court below. As per sub-section (3) of Section 294 of the Code of Criminal Procedure where the genuineness of such document is not disputed, it may be read in evidence in any inquiry, trial or other proceedings under the Code. That apart

having regard to the law laid down by this Court in the case of Dasrath Mandal v. The State of Bihar, 1993 (1) P.L.J.R. 737, if the prosecution or the accused does not dispute the genuineness of such document, filed under Sub-Section (1) of Section 294 of the Code, it amounts to an admission that the entire document is true and correct. Reference in this regard can also be made to a Full Bench decision of Allahabad High Court in the case of Saddiq v. State (1981 Cri. L.J. 379).

14. It has to bear in mind that Section 294 of the Code has been introduced by the Legislatures with a view to avoid unnecessary delay in disposal of the criminal cases. An accused has every right to doubt the genuineness of such document at the time when it is filed. Because undisputedly unless such a document is admitted by the parties no value can be attached with regard to its genuineness. Reference in this regard can also be made to a Full Bench decision of Bombay High Court in the case of Shaikh Farid Hussain Sab v. The State of Maharashtra (1983 Cri. L.J. 487). Therefore, the facts of this case being quite different, appellants can not get any benefit of the ratio laid down in the case as reported in 1994 (1) P.L.J.R. 488 (supra). Because in the present case genuineness of the document was already admitted by the defence at the time when it was brought on the record."

(Emphasized)

34. A similar view has been taken by another Division Bench of Patana High Court in case law of **Shanker Shah and others Vs. State of Bihar 2007 Cr.L.J. 355.**

" 26. From a plain reading of S. 294 of the Code of Criminal Procedure, it is evident that when particulars of a document is included in a list and when accused is called upon to admit or deny the genuineness of such document and in case it is not disputed same can be read in evidence in trial without proof of the signature of the person to whom it purports to be signed. However, the Court may in its discretion, require such signature to be proved.

27. Here in the present case, the signature of the doctor, who conducted the postmortem examination, had been proved by the compounder P.W. 7 Ram Chandra Tiwari and he had stated in his evidence that the said post-mortem report was prepared in his presence and he identified the signature of its author. The said post-mortem report has been filed by the prosecution with the list of documents and the endorsement made by the learned Judge show that the appellants admitted that without objection. The endorsement of the learned Judge in the list of documents clearly goes to establish that the genuineness of the post-mortem report was not disputed and, as such, same was fit to be read in evidence in trial in view of the clear language of S. 294 of the Code of Criminal Procedure."

(Emphasized)

35. Law has been framed for providing justice to victims. It cannot be placed as a tool in the hands of legal experts. It will not be proper to apply the principle in every case that doctor must be called for evidence even in the cases, where accused persons have admitted and not disputed the genuineness of injury report. If during the course of evidence before trial court, learned counsel for defence does not dispute the genuineness of medical/injury report of injured persons

and endorse on paper that formal proof is dispensed with, accordingly court concerned dispensed with evidence of concerning formal witnesses, then in that case if during the course of argument accused persons take plea that, no matter he has not disputed the genuineness of document and endorsed about dispensation of formal proof of witness concerned, even then if the concerning witness has not been summoned and has not been given evidence/proof regarding the signature and contents of document then in that case it may cause injustice to accused persons. This argument is not acceptable in the light of provisions of Section 294 Cr.P.C. In above circumstances, if such documents will not be read in evidence, it may cause miscarriage of justice. In sub-clause (3) of Section 294 Cr.P.C., the word **''may'** has been used by legislature, therefore, considering the above legal position, the arguments advanced by learned counsel for the appellants has no force. The injury reports of prosecution persons (Ex. Ka-5 to Ex. Ka-10) are liable to be believed as substantive evidence of prosecution which corroborates the oral evidence of injured eye witnesses PW-2 and PW-3.

36. Learned counsel for the appellants has further submitted that role of all the accused persons has not been shown in F.I.R. Therefore, evidence of prosecution witness is not believable as they are afterthoughts and taught by legal experts.

37. So far as the argument on this point is concerned, it can be said that F.I.R. is not an encyclopedia of the details of crime. It is not necessary that it should set out minute details of occurrence. After the occurrence, the mind of informant does not remain in peace. Rather, it reflects in flutter or panic in condition, therefore, minute details of occurrence may omit. If the fact narrated in F.I.R. indicates that a crime has been committed and facts mentioned in F.I.R. are in consonance with facts reflected from evidence on record then in that case accused may not take the plea that there is no detailed description in F.I.R., what is needed, facts mentioned in F.I.R. be not in contradiction in evidence regarding factum of occurrence and role of accused substantially. It has been held by Hon'ble Supreme Court in the case of **Pandurang Chandrakant Mhatre and others Vs. State of Maharashtra (2010) 1 S.C.C. 413** that:-

" 38. It is fairly well settled that first information report is not a substantive piece of evidence and it can be used only to discredit the testimony of the maker thereof and it cannot be utilised for contradicting or discrediting the testimony of other witnesses. In other words, the first information report cannot be used with regard to the testimony of other witnesses who depose in respect of incident. It is equally well settled that the earliest information in regard to commission of a cognizable offence is to be treated as the first information report. It sets the criminal law in motion and the investigation commences on that basis. Although first information report is not expected to be encyclopaedia of events, but an information to the police to be "first information report" under Section 154(1) must contain some essential and relevant details of the incident. A cryptic information about commission of a cognizable offence irrespective of the nature and details of such information may not be treated as first information report."

(emphasized)

38. In present case, the informant has mentioned that accused persons Hari Shanker, Radhey, Bhagwan Deen, Raj Kumar and Bhikhari Neta and other outsider were carrying guns, tamanche and lathi-dande who attacked family members of informant. Resultantly, family members-Vinod Kumar, Pramod Kumar, Bachchi Lal, Km. Shyam Shree, Km. Shyam Kali and Km. Manju Devi received injuries. Since, the informant has narrated the occurrence with role of accused persons with weapons, then in that case, it cannot be said the said F.I.R. is not believable. Hence, the argument advanced by learned counsel for the appellants has no force.

39. The F.I.R. has the motive of occurrence also that before occurrence accused persons Hari Shanker and Radhey were raising construction of shop and injured Pramod Kumar asked them not to do so. Eye witness PW-2 in his evidence at page-2 has stated that accused persons were raising construction of shop which is in front of northern gate of his factory. This fact has also been narrated in his evidence at page-4 and at page-7. Witness PW-3 has also narrated the fact in his evidence at page-1 that accused persons Hari Shanker and Radhey Shyam were raising construction adjacent to northern gate of the factory. There is no contradiction on the point of genesis of occurrence in prosecution witness. This fact is also supported by the statement of appellant-Hari Shanker. In reply of question no.8 in his statement under Section 313 Cr.P.C. Appellant-Radhey Shyam has adopted the statement of appellant-Hari Shnaker in his statement under Section 313 Cr.P.C. that "We had constructed Pakki (cemented) shop, in place of existing wooden shop and we were moisturising the same, Ram Kishore and Vinod Kumar demolished the shop and beaten them, resultantly accused persons received injuries; for which cross case is pending." Although, where there is ocular evidence, motive is not necessary to be proved by prosecution yet the above evidence proves the motive of accused persons.

40. It has been argued by learned counsel for the appellants that the alleged guns, tamanche, lathi have not been recovered, therefore, the case of the prosecution is not believable .

41. Injury report of injured persons-Km. Shyam Shree, Km. Shyam Kali, Km. Manju Devi, Bachchi Lal and Vinod Kumar (Ex. Ka-5 to Ex. Ka-9) indicates that they have received the injury of firearm whereas, injury report of Pramod Kumar has made complainant of pain with the opinion of doctor that it has been caused by blunt weapon (which might be injury of lathi). The genuineness of above medical reports/injury reports have not been disputed by accused persons. It was duty of I.O. to recover the incriminating articles. If, I.O. has failed to recover the weapons used may or may not be with intention to provide benefit to accused persons, then in that case prosecution case will not be affected adversely. The injuries of above persons have been narrated in the oral evidences of prosecution witnesses PW-1 to PW-3.

42. In the case of State of **Punjab Vs. Hakam Singh, Appeal (Crl.) 130 of 2000** decided on 31.08.2005, it has been held by Hon'ble Supreme Court that:-

" The High Court has disbelieved her testimony on the grounds

i.e. on the manner of firing and recovery of the guns, non seizure of blood stained clothes but these short-comings hardly impeach her testimony In order to impeach her testimony technical questions were asked to her which was not the correct approach for discarding her testimony. Therefore, we are of the opinion that the High Court has committed an error in discarding the testimony of this witness on technical grounds de hors the factual statement given by her.

Learned counsel for the respondent has also tried to make out that the defence version is more probable. The defence version was that in fact Bhola Singh who was coming for bus stop was first attacked by the prosecution party and in retaliation the accused persons went there and that the prosecution could not explain the second injury to the deceased Bhola Singh. We do not think that the defence version improbablises the prosecution story. It is just an afterthought theory put up by the defence to improbablise the prosecution story. But the facts as mentioned above articularly the testimony of P.Ws. 3 & 4 sufficiently lend support to the prosecution story.

It was also pointed out by learned counsel for the respondent that no fire arms were recovered and no seizure has been made of empties. It would have been better if this was done and it would have corroborated the prosecution story. Seizure of the fire arms and recovering the empties and sending them for examination by the Ballistic expert would have only corroborated the prosecution case but by not sending them to the Ballistic expert in the present case is not fatal in view of the categorical testimony of P.W. 3 about the whole incident."

(Emphasized)

43. Learned counsel for the appellants has further stated that in spite of the F.I.R. version, evidence of PW-1 to PW-3, the three accused persons have not been convicted. Therefore, appellants are also liable to get benefit.

44. On this point, the arguments of learned counsel for the appellants is not believable as misconceived. It reveals from record that accused Bhagwan Deen and Bhikhari Neta were died during the pendency of trial. Therefore, the trial has been abated against them. Eye witness PW-2 has stated in his statement at page-6 that at the time of occurrence accused Raj Kumar was standing in the guise of shop. This witness, PW-2 is injured and has been found as a reliable witness. Therefore, learned lower court has given the benefit of doubt to accused Raj Kumar which has not been challenged by prosecution, whereas the roll of appellants regarding causing injuries to prosecution persons are proved by injured eye witnesses of prosecution which is corroborated by documentary evidence of prosecution. Therefore, on the point of not convicting three accused persons, argument advanced by learned counsel for the appellants has no force.

45. So far as the injuries of accused persons are concerned, the injury reports of Rajeshwati, Akhilesh, Hari Shanker, Shravan Kumar, Meera Devi, Satish, Sheela, Smt. Mohani Devi, although has been exhibited as Ex. Kha-13 to Ex. Kha-20, but they have not been proved by any witness from accused side. Even the said injuries of so-called injured persons from accused side has not specifically been mentioned by them in their statement under Section 313 Cr.P.C. It has been informed by learned A.G.A. that the cross

case which was lodged by present appellant-Hari Shanker as Case Crime No.254-A under Section 147, 148, 149, 307 and 336 has been decided by the Court concerned with acquittal of all the accused persons. The order of acquittal has not been challenged by appellants, therefore, they cannot take plea that there was any sudden or free fighting and complainant side was aggressor, in which, persons from accused side received injuries and appellants have not acted with any overact.

46. It has also been mentioned by learned counsel for the appellants in his argument that there are two persons named in F.I.R. as independent witnesses, but prosecution failed to produce them in evidence. In absence of evidence of any independent witness, conviction cannot be based only on the ground of interested witnesses of fact that is of evidence of PW-1 to PW-3.

47. So far as the above argument advanced by learned counsel for the appellants, in concern, it has no force as witnesses PW-2 and PW-3 are injured eye witnesses. Their testimony is supported by medical evidence i.e. injury reports Ex. Ka-5 and Ka-10. There is no discrepancy in the oral evidence. According to law, if eye witnesses who received injury in the course of occurrence, if their evidences are not contradictory and is believable, it will not be necessary in every cases to produce independent witnesses. Quality of witness is needed not quantity. In paragraph-16 of case law of **Hardev Singh and others Vs. Harbhej Singh and others 1996 94) Crimes 216 (S.C.)** Hon'ble Apex Court has held that :-

16. Coming to the finding as regards the non-examination of independent eye witnesses who saw the incident in question we must hasten to add that it is completely erroneous and unmerited. The prosecution has examined Hardev Singh (P.W. 2) and an injured witness Suba Singh (P.W. 3), although some other villagers did come at the place of incident but in our opinion merely because other independent witnesses were not examined could not be a ground to discredit the evidence of these two eye witnesses. This Court time and again has emphasised that the evidence of close relations who testified the facts relating to the occurrence be not rejected merely on the ground that they happened to be the relatives. All that this Court has ruled is that the evidence of such witnesses be scrutinised very carefully. We have very carefully gone through the evidence of Hardev Singh (P.W. 2) and Suba Singh (P.W. 3) who were consistent in their evidence as regards the details of assault caused by the respondents (accused). Both the witnesses have given minute details in regard to the weapons used by each of the accused and the manner in which they have assaulted Harbhajan Singh in front of the house of Chanan Singh. They also stated that A-1 fired from his gun at Harbhajan Singh causing him bleeding injuries. They further stated that the second shot fired by A-1 missed the target. It is true that the medical evidence does indicate two gun shot injuries. In the facts and circumstances of the case non explanation of the gun shot injury No.6 by these two eye witnesses would neither dilute their evidence nor their presence could be doubted. It is the positive case of both the witnesses that Harbhajan Singh had come to the house of Chanan Singh to help him in the construction work. There is nothing in their evidence which can persuade us to disbelieve the story

narrated as regards the assault on Harbhajan Singh. Coming to the assault on Baldev Singh caused by the respondents (accused), Hardev Singh (P.W. 2) and Suba Singh (P.W. 3) had stated that Baldev Singh, on noticing that the respondents (accused) were coming towards him, left the driver's seat and went to the trolley to escape himself from the probably attack by the accused. Harbhej Singh (A-1) gave a lalkara and thereupon Amrik Singh (A-3) climbed up the trolley and chopped off the leg of Baldev Singh with gandasa. Gurmej Singh (A-4) also climbed up the trolley and gave 2-3 blows on his left arm from the sharp side of gandasa. Mohan Singh (A-5) also gave a gandasa blow from the sharp side on his chest. After inflicting injuries to Baldev Singh the accused fled away. Both these witnesses were searchingly cross-examined by the defence but there is hardly any material brought on record to discredit their evidence. The evidence of both these witnesses in our considered view unmistakably proves that the respondents (accused) who were the members of the unlawful assembly having a common object to cause the murders of Harbhajan Singh and Baldev Singh did cause such bodily injuries to them as a result thereof they met with homicidal deaths.

(Emphasized)

48. Lastly, learned counsel for the appellants has argued that accused persons are of more than 65 years of age and occurrence has taken place approximately 33 years back. Therefore, a lenient view be taken and appellants should be acquitted.

49. Offence of appellants has been proved by prosecution. Km. Shyam Shree, Km. Shyam Kali, Km. Manju Devi, Bachchi Lal and Vinod Kumar have received firearms injuries in day light. Prosecution has succeeded to prove the charges against appellants without any shadow of doubt. No legal ground has been placed before this Court to set aside the conviction. Learned Sessions Court has convicted and sentenced to appellants-Hari Shanker and Radhey Shyam for six months' rigorous imprisonment under Section 148, six months' rigorous imprisonment under Sections 323, 149 I.P.C. and two years' rigorous imprisonment with fine of Rs. 2,000/- each under Section 307/149 of I.P.C. In default of non-payment of find, they have been awarded rigorous imprisonment for a period of three months. Learned court below has also directed that if fine amount is paid, half of the shall be paid to Km. Shyam Shree who lost her eye in the occurrence. It has also been admitted that all the sentences shall run concurrently, therefore, the sentence awarded by learned lower court is not too harsh.

50. It has been held by Hon'ble Supreme Court in case of **Rizan and others Vs. State of Chattisgarh (Supra),** if sentences imposed do not in any way appear to be harsh, merely because the occurrence took place sometime back, same cannot be a factor to reduce the sentences.

51. Considering the facts, circumstances and arguments advanced by both the sides and citations produced in support of the arguments, no illegality or infirmity is found in the judgment of court below. Appellants have rightly been convicted and sentenced. Appeal lacks merit and is liable to be dismissed.

52. The appellant-Hari Shanker and Radhey Shyam will surrender before court,

concerned forthwith, failing which the court will issue non-bailable warrant against them. In compliance, if accused-Hari Shanker and Radhey Shyam appear or brought before the court, concerned they shall be sent to jail by warrant for their sentences as awarded by trial court.

53. Let the copy of the judgment be sent to court concerned forthwith for compliance.

54. Accordingly, the appeal is **dismissed.**

55. No order as to costs.

(2020)1ILR A131

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 1878 of 1991

Ram Lalak & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri G.S. Chaturvedi, Sri Anita Tripathi, Sri Keshawa Prasad Pandey, Sri Krishna Chandra Pandey, Sri Prashant Vyas

Counsel for the Opposite Party:
A.G.A., Sri Majahar Ali, Sri Raj Bahadur, Sri Rahul Kumar

Criminal Law - Indian Penal Code - Sections 302/149 - Appeal against conviction.

Criminal Law - Indian Penal Code - Sections 141, 142, 149 - Are discussed.

The role of A-1 to A-3 is concerned, same was undoubtedly established with the evidence of P.W-1 and 2 unequivocally. Learned Counsel for A-1 to A-3 in all fairness submitted that in view of direct clinching evidence he is not in a position to assail their conviction. We too, independent of his submission find that there was strong previous enmity between both the faction, a day light occurrence supported by testimony of injured witnesses and nothing has been elicited in their cross examination to doubt their credibility, prosecution has established its case beyond reasonable doubt against all the appellants, the appeal is bereft of merits, liable to be dismissed.

Appeal is rejected. (E-2)

List of cases cited: -

1. Maiyadin & 4 ors Vs. St. 1973 (43) A.W.R 266

2. Mizaji Vs. St. of U.P A.I.R 1959 AIR (SC), 572

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

This appeal has been preferred against the judgment and order dated 26.9.1991 passed by Sessions Judge, Basti in S.T. no.33 of 1986, whereby appellants have been convicted/sentenced under Sections 302/149 IPC for life along with ancillary sentences.

1. The prosecution case is comprised in two parts:-

The first part alleged that there is a mango grove across the house of P.W-1/the informant, belonging to the family of the informant. On 20.5.1984 at about 10 in the morning while P.W-1 was plucking mangoes, accused Ram Lalak (A-1), Bajrangi (A-4) (real brothers) and Devmani (A-2), Indramani (A-5) (real brothers) dissuaded P.W-1 from plucking mangoes. P.W-1 replied that trees have

been planted by his father and ancestors, as such he was plucking them. Accused went back hurling abuses.

2. The second part alleged that on the same day while P.W-1 was tethering livestock in the grove, accused Ramlalak (A-1) with a DBBL gun, Devmani (A-2) and Ramchand (A-3) with SBBL guns, Indramani (A-5) and Rammilan (A-6) with lathis, and Bajrangi (A-4) with ballam came, out of whom, Ramlalak(A-1) exhorted P.W-1 that he better not move as he wanted to teach him a lesson. P.W-1 sensing trouble attempted to flee towards his house while raising cries for help. Dwarika (P.W.2), Ramdas, (deceased) (relatives of P.W-1) and Ayodhya ran to rescue PW-1. Accused Ramlalak (A-1), Devmani (A-2) and Ramchand (A-3) fired at P.W-1 which hit him on his head, waist and legs. The witnesses dissuaded the accused persons from doing so. Accused too exhorted the witnesses to stay away, upon which accused Ramlalak, Devmani and Ramchandra fired at Ramdas (deceased) and Dwarika (P.W-2). Ramdas (deceased) succumbed to the injuries on the spot. Dwarika (P.W-2) and Ayodhya (not examined) sustained pellete injuries, thereafter accused Bajrangi (A-4) inflicted ballam blow at Dwarika (P.W-2) on his waist, who fell down, followed by lathi blows on him by Indramani (A-5) and Rammilan (A-6). P.W-1 subsequently learnt that the accused Ramnarayan with a view to eliminate P.W-1 and his family had lent licensed ams belonging to his family to accused Ramlalak (A-1), Devmani (A-2) and Ramchandra (A-3).

3. The accused were charged under sections 27 and 28 of the Arms Act, 120-B,302/109,147,148, 307/149 and 302/149 IPC.

4. Accused alleged that the trees were sown by father of Devmani (A-2) i.e, Gaya Prasad and they have been falsely implicated. No defence evidence was led.

5. The trial court after analysing the evidence finding ocular evidence compatible with the medical while convicting the appellants as above acquitted accused Ram Narayan, Ravindra, Umashankar and Master Badri Vishal for the role of conspiracy.

6. During pendency of appeal, A-6/ Rammilan died, his appeal has already been abated.

7. Heard Sri G.S. Chaturvedi, learned Senior Advocate assisted by Sri Prashant Vyas, for the appellants, Sri Ran Vijai Chaubey and Sri Raj Bahadur, learned counsel for the informant and Sri A.N. Mulla, the learned A.G.A.

8. The Learned Senior Counsel for the appellants argued that conviction of A-4 and A-5 i,e, Bajrangi and Indramani under section 302/149 IPC is not sustainable as the said appellants were not likely to know that A-1, A-2 and A-3 would also commit the murder of Ramdas as the common object of all the appellants was to harm P.W-1 only with whom an altercation had taken place in the morning. He thus submits that the death of Ramdas was not a part of common object of A-4 and A-5. He placed reliance on **Maiyadin and others vs. State 1973 (43) A.W.R 266.**

9. The learned A.G.A, and the learned counsel for the informant opposed the submission on the ground that once an unlawful assembly is formed which is also armed with lethal weapons, then each and every member of such an assembly would be vicariously liable for the acts committed by any of the members. He

further submitted that the common object of the unlawful assembly was not only to harm P.W-1 but also any other person who posed a threat for the appellants to enjoy the fruits of the trees including the deceased who is alleged to have sown the trees.

10. We before adverting to the evidence deem appropriate to discuss in brief the provisions relating to offences committed by an unlawful assembly.

11. Section 141 IPC provides that an assembly of 5 or more persons is considered an "unlawful assembly" if the common object of the persons comprising the assembly is one of the acts mentioned therein. Section 142 IPC provides that if a person intentionally joins the unlawful assembly, then he is said to be a member of such assembly.

12. Section 149 IPC can be split for convenience into 3 parts:-

(I) If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or

(II) such as the members of that assembly knew to be likely to be committed in prosecution of that object,

(III) every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

13. The first part would make every members of an unlawful assembly liable if an offence is committed in prosecution of common object i.e, each member of the unlawful assembly is aware of the common object and the offence committed must be connected immediately with the common object of the unlawful assembly. For example if 5 or more persons constituting an unlawful assembly of which the common object is to assault a particular person then all such members would be vicariously responsible for the acts committed by any of them in assaulting that particular person.

14. The second part makes the members of an unlawful assembly liable vicariously only if the members of the unlawful assembly have the knowledge that an offence is likely to be committed in the prosecution of the common object. Conversely, if the act complained of is absolutely distinct having no nexus with the common object those members cannot be made vicariously liable who have not committed any overt act as in such an eventuality the members who commit such overt act which is not likely to be committed in prosecution of common object, would be individually responsible for their acts.

15. Third part makes each person vicariously liable for the offence committed, who was the member of the unlawful assembly at the time of committing the offence, whether such member individually committed the offence or not, is of no consequence.

16. The scope of Section 149 IPC has been explained in the leading judgement of the Apex Court in **Mizaji vs. State of U.P A.I.R 1959 AIR (SC), 572.** Para-6 thereof is extracted hereunder:-

6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the

common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C.J., in Sabid Ali's case (1873) 20 W.R. 5, that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part, but not within the first. The distinction between the two parts of section 149, Indian Penal Code cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of section 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

17. We in the light of above legal position proceed to examine as to whether in the light of the evidence, the prosecution has been able to establish the guilt of A- 4 and A-5 under the second part of Section 149 IPC?

18. The informants and the accused are members of the same family. There is animosity between the two over fruit bearing trees. A-1 to A-3 were armed with guns Bajrangi (A-4) with Ballam, Indramani (A-5) and Rammilan/(A-6) (since deceased) armed with lathis. P.W.1 alleged that the fruit bearing trees had been sown by his uncle/Ramdas (deceased), while appellant Ramlalak exhorted other accused not to spare P.W-1. Ramdas (deceased) alongwith Dwarika and Ayodhya were present in the near vicinity of P.W-1. While appellants were assaulting P.W-1, deceased alongwith Dwarka and Ayodhya sought to intervene, so as to dissuade the appellants. All the appellants exhorted that interveners stay away. A-1 to A-3 fired at Ramdas (deceased) and Dwarka while P.W-2 was being assaulted by Bajrangi with a ballam (pointed weapon).

19. Once all the appellants are armed with lethal weapons, the common

object as sought to be bifurcated by learned senior counsel for appellants only qua P.W-1 cannot be sustained as the deceased had sown the seeds of the fruit bearing trees, which were being plucked in the earlier part of the day by P.W-1 (nephew of the deceased), to which all the 4 accused had taken an offence. The deceased was not a rank outsider who can be said to have no interest in the dispute between P.W-1 and the appellants. P.W-1 is a close blood relative of the deceased, was being attacked with lethal weapons. It was but natural for the deceased (Ram Das) alongwith Dwarka and Ayodhya (family members of P.W-1) to make an attempt to rescue P.W-1. The appellants instead of acceding to the request of the deceased, attacked not only Ramdas (deceased) but also persons accompanying him i.e, Dwarika and Ayodhya. The object of the appellants cannot be bifurcated qua P.W-1 and the deceased. Thus in view of above A-4 and A-5 cannot feign ignorance that they had no knowledge that such assault was likely to be made on Ramdas in prosecution of the common object.

20. We have perused the judgment of **Maiyadeen** (supra) and are of the view that the said decision would not come to the rescue of appellants as in the said case Maiyadeen (injured) and Babulal-deceased were cutting their crops. The evidence indicated that the said appellants' grievance was against Khushali as the latter was cutting the crops at the fields at which there was dispute between them. The said appellants chased Khushali. While the chase was on Maiyadeen and Babulal sought to intervene. One of the appellants therein assaulted them as a result of which Babulal died and Maiyadeen got injured. The said appellants never resisted Maiyadeen and Babulal from cutting the crops. On such evidence appellants therein were not convicted with the aid of Section 149 IPC as the common object of the unlawful assembly was to harm Khusali.

21. We find that in so far the role of A-1 to A-3 is concerned, same was undoubtedly established with the evidence of P.W-1 and 2 unequivocally. Learned Senior Counsel for A- 1 to A-3 in all fairness submitted that in view of direct clinching evidence he is not in a position to assail their conviction. We too, independent of his submission find that there was strong previous enmity between both the faction, a day light occurrence supported by testimony of injured witnesses and nothing has been elicited in their cross-examination to doubt their credibility, prosecution has established its case beyond reasonable doubt against all the appellants, the appeal is bereft of merits, liable to be dismissed.

22. The appeal is dismissed. The appellants are on bail. Their bail bonds stand cancelled. They shall be taken into custody forthwith to serve the remainder sentence.

23. Let a copy of this judgement along with records be sent to the learned Sessions Judge, for compliance and intimation to this court within 2 months.

(2020)1ILR A135

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 2077 of 2014

Mohammad Abrar ...Appellant
Versus
State of U.P. Opposite Party

Counsel for the Appellant:
Sri Sushil Kumar Pandey, Sri Pawan Singh Pundir, Sri Sanjay Singh, Sri Vikas Sharma

Counsel for the Opposite Party:
A.G.A., Sri Harish Chandra

Criminal Law - Indian Penal Code - Sections 376 and 506 - Appeal against conviction.

There is no material contradiction or exaggeration or embellishment regarding contention made for commission of offence of rape by accused. (para 15)

In cross-examination, there is no material contradiction in his statement, except of trivial one, which has been asked in hair spiting cross-examination, but learned trial court has rightly appreciated that those minor contradictions bound to occur in such type of hair-splitting cross-examination. There was no material contradiction, rather, they make witness as a natural witness. (para 29)

In the present case, prosecutorix was subjected to rape by her real maternal uncle. She was a minor and crippled girl, suffering with trauma of being nonambulatory, having upper and lower limbs polio affected. The apathy of that Station House Officer, who was posted there at that time. Neither cloths of the victim were taken nor same were got examined in laboratory nor DNA test was got conducted. If these steps would have been taken by the Station House Officer, concerned, in time, it would have been much more helpful, in judicial proceeding and its decision making, but even then, the prosecutorix, in her testimony, and other formal witnesses, discussed above, proved charges leveled against convict-appellant beyond reasonable doubt. (para 35)

The appeal is rejected. (E-2)

List of cases cited: -

1. Anil Rishi Vs. Gurbuksh Singh, AIR 2006 SC 1971

2. Prem Lata Jain Vs. Arihant Kumar Jain, AIR 1973 SC 626

3. Babban Vs. Shiva Nath, AIR 1986, Allahabad, 185

4. Kumbhan Lakshmanna & ors. Vs. Tangirala Venkateswarlu, AIR (36) 1949 PC 278

5. St, of J &K Vs. Hindustan Forest Company, reported in (2006) 12 SCC 198

6. M. Krishnan Vs. Vijay Singh & anr., reported in 2001, Cr. L.J, 4705

7. A. Raghavamma & anr. Vs. A Chenchamma, AIR 1964 SC 136

8. Kalu Ram vs. St. of H.P., reported in AIR 1976 SC 966

9. Pratap Vs. St. of U.P., AIR 1976 SC 966

10. Narbada Prasad Vs. Chhagan Lal, reported in AIR 1969 SC 393

11. Kunwar & ors. Vs. St. of U.P., reported in 1993 (3) AWC 1305,

12. Rajinder @ Lala & etc. Vs. St., reported in 2010 CRL.L.J. 15

13. Rajendra Prasad Vs. Narcotic Cell, reported in AIR 1999 SC 2292

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Criminal Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short, hereinafter, referred to as "Cr.P.C."), has been filed by the convict-appellant, Mohammad Abrar, against the judgment of conviction and sentence, awarded therein, by the court of Additional Sessions Judge, court no.6,

Muzaffar Nagar, in Sessions Trial No.1566 of 2010, arising out of Case Crime No. 64 of 2010, under Sections 376 and 506 of Indian Penal Code (hereinafter, in short, referred to as "IPC') of Police Station-Mirapur, District-Muzaffar Nagar, with a prayer for setting aside impugned judgment of conviction and sentence, awarded therein. Thereby, awarding acquittal, for offences, charged with.

2. Grounds of challenge, taken in the Memo of Appeal, are that the judgment and order of conviction and sentences, awarded therein, was made without appreciating evidence on record, resulting finding perverse. It was based on surmises and conjectures. Medical evidence was not in support of the prosecution case. There was deliberate delay of more than twenty nine days in lodging first information report because the incident was of 12.1.2010 and the report was of the same was lodged on 31.1.2010. This itself creates doubt on the prosecution version and lead it into peril of suspicion. Judgment of conviction and sentence, awarded therein, was against facts, law and evidence and it was a conviction, not in commensurate to the degree of offence. Hence, a prayer for quashing of the impugned judgment and order, dated 7.5.2014, passed by the court of Additional Sessions Judge, Court No.6, Muzaffar Nagar, in Sessions Trial No.1566 of 2010, arising out of Case Crime No. 64 of 2010, under Sections 376 and 506 of IPC of Police Station-Mirapur, District-Muzaffar Nagar, and to acquit the appellant from the charges levelled against him, was made.

3. From very perusal of the impugned judgment and record of Trial court, it is apparent that the first information report, Exhibit Ka-1, was presented before the Senior Superintendent of Police, Muzaffar Nagar, on 31.1.2010, whereupon, order of Senior Superintendent of Police, Muzaffar Nagar, was passed for getting prosecutorix medically examined and taking appropriate action in the matter, upon which, Case Crime No. Nil of 2010, under Sections 376 and 506 of IPC was got registered, at Mahila Thana, Distrct Muzaffar Nagar. Chik FIR, Exhibit Ka-7, was prepared, with a copy of General Diary Entry of registration of this case crime number, Exhibit Ka-8. Since place of this occurrence was within the jurisdiction of Police Station-Mirapur, hence, this case was remitted to that Police Station-Mirapur, where it was entered as Case Crime No.64 of 2010, for offences, punishable, under Sections 376 and 506 of IPC, by making its entry in General Diary, Exhibit Ka-2 of above Police Station, wherein, investigation was deputed to Sub Inspector, Layak Ram. Prosecutorix was got medically examined on 31.1.2010, at District Hospital, Muzaffar Nagar. Her Medico Legal Report, Exhibit Ka-3, Ossification report regarding her age, Exhibit Ka-4, X-ray, Exhibit Ka-5 were got prepared. Her statement was recorded on 31.10.2010 and spot was got inspected upon pointing of victim-prosecutorix, whereupon, spot map, Exhibit Ka-9, was got prepared. Thenafter, investigation was transferred to Sub Inspector, Mitrapal Sen, who detained accused, Mohammad Abrar on 17.2.2010. His statement was got recorded and after investigation, a conclusion was drawn for commission of offence, as above, punishable, under Section 376 and 506 of IPC. Hence, chargesheet, Exhibit Ka-6, was submitted by the Investigating Officer before the Chief Judicial Magistrate, Muzaffar Nagar, upon which cognizance was taken by the

Chief Judicial Magistrate, Muzaffar Nagar, for offecnes, punishable, under Sections 376 and 506 of IPC. As offence, punishable, under Section 376 of IPC, was triable before the court of Sessions, hence, this file was committed to the court of Sessions, vide order of the Chief Judicial Magistrate, Muzaffar Nagar, where, this Sessions Trial was entered in the Register of Sessions Cases. Subsequently, this file was allocated to the court of Additional Sessions Judge/Fast Track Court No.1, Muzaffar Nagar, where the Presiding Judge, Shamsher Khan, framed charges in vernacular, English Translation of which, done by the Court, is being reproduced below:

Charge

I, Shamsher Khan, Additional Sessions Judge, Fast Track court no.1, do hereby, charge, Abrar, as follows:

Firstly : That on 12.1.2010 at about (time not known) at village Churiyala, Police Station-Mirapur, at a distance of 28 Kilometeres, towards western side of Police Station-Mirapur, in the District of Muzaffar Nagar, you committed rape with daughter (prosecutorix) of informant, who was disabled, against her consent, thereby, committed offence, punishable, under Section 376 of IPC, within cognizance of this Court.

Secondly : That on above date, time and place, you committed rape against wishes of prosecutorix, daughter of informant and extended threat of dire consequences, in case of opening of lips to anyone, thereby committed, offence, punishable, under Section 506 of IPC, within cognizance of this Court.

So, I, hereby direct you for your trial for above offences.

Sd/-

Dated:7.2.2011

(Shamsher Khan)

Additional Sessions Judge/FTC-1

Muzffar Nagar.

Charges were readover and explained to the accused, who pleaded not guilty and requested for trial.

4. Prosecution examined informant, Noor Mohammad, as PW-1, Prosecutorix-victim, as PW-2, Constable, Subhash Chand as PW-3, Dr. Indra Singh, as PW-4, Dr. Anand Swaroop, as PW-5, Mitrapal Sen, as PW-6, Ravita Gupta, as PW-7 and Layak Ram as PW-8.

5. For having explanation, if any, of accused over incriminating materials and evidence furnished by the prosecution and for getting defence version, statement of accused was recorded, under Section 313 of Cr.P.C., wherein, accusation levelled was denied by submitting that it is a false and malicious accusation for which a false first information report was got registered, whereby, false accusation was got made with preparation of false and fictitious documents. Prosecutorix was major at the time of occurrence and the testimony of PW-1 is false and under greed. Testimony of PW-2, prosecutorix, is under influence of her step father, informant. It was a false and fabricated testimony. Statement of Constable-Subash Chand, PW-3, was false, statement of Dr. Subash Chand was also false and medical report was prepared by him was false and fictitious, testimony of Dr. Anand Swaroop and documents prepared by him were false and fictitious. Investigation by Sub Inspector, Mitrapal Sen, was made

for false accusation and a false chargesheet was filed. First information report was got registered by Ravita Gupta and her testimony was false and against facts. Sub Inspector, Layak Ram, had made a false accusation and investigation conducted by him was owing to enmity and with false and malicious contention. He has categorically stated that the informant, step father of the prosecutorix, and his mother, who is sister of accused-appellant, took ornaments of the mother of accused-appellant, and thereafter taken loan, after mortgaging ornaments, for construction of their house, with an assurance to return the ornaments at the earliest. On being asked to return the ornaments, they started quarrelling with them, and as such, the ornaments of the mother of was not returned back, rather, this false case was got registered.

6. In defence, Ikramulla, DW-1, and DW-2, Mohd. Abrar, accused-appellant, himself have been examined.

7. Learned Additional Sessions Judge, after hearing arguments of learned Public Prosecutor as well as learned counsel for the defence, passed impugned judgment of conviction, wherein Mohammad Abrar, accused-appellant, has been held guilty for offence, punishable, under Section 376 and 506 of IPC. Both sides were heard on quantum of sentence, thereupon, sentence of 10 years' rigorous imprisonment, with fine of Rs. 20,000/-, in default of deposit of which, two years' imprisonment, and three years' imprisonment, for offence, punishable, under Section 506 (2) of IPC, was awarded, with a direction for concurrent running of sentences, so awarded.

8. Against this judgment of conviction and sentence, this Criminal Appeal, with above prayer, has been preferred by the accused-appellant.

9. Learned counsel for the accused-appellant has argued that the prosecutorix is a close relative of accused, Mohammad Abrar. Informant, Noor Mohammad, step father of the prosecutorix, had taken money, by way of taking ornament of mother of the accused for getting it mortgaged, for taking loan from market to construct his house and this construction was made by him, but, even after completion of construction, neither money was returned nor ornaments were returned back. When ornaments were demanded back, this false accusation for offence of rape was lodged, wherein, prosecutorix was a major one. She was disabled girl and was used as a victim by her step father. Testimony of PW-1 and of prosecutorix, PW-2, was in contradiction to each other. Though there were several contradictions on record, but learned Trial Judge failed to appreciate the same and on the basis of surmises and conjectures, passed impugned judgment of conviction, wherein, sentences, awarded were too severe, i.e., not commensurate with the degree of offence. Hence, this Appeal with above prayer.

10. Learned AGA, representing State of U.P., has vehemently opposed arguments of learned counsel for appellant with this contention that the prosecutorix is a close relative of accused-appellant and she, being physically disable, always needs help of some-one. Under belief and trust, accused was given that responsibility for that day of occurrence. Accused-appellant committed this offence of rape with the victim, who was a minor and disabled girl. Offence was very heinous, hence, learned Trial Judge, on the basis of

those facts and circumstances, has passed the impugned judgment of conviction and sentences, awarded therein. There is no illegality, irregularity or short-coming in this judgment.

11. Under Section 102 of Evidence Act, initial onus to prove a fact always remains upon plaintiff, i.e., as propounded by the Apex Court in the case of **Anil Rishi vs. Gurbuksh Singh, AIR 2006 SC 1971**, initial onus to prove a fact is on the person who asserts it. Initial onus is always on the plaintiff to prove his case and if he discharges, then so, onus shifts to defendant. As has been propounded by the Apex Court, in the case of **Prem Lata Jain vs. Arihant Kumar Jain, reported in AIR 1973 SC 626,** as well as in the case of **Babban vs. Shiva Nath, reported in AIR 1986, Allahabad, 185** of this Court, where, both parties have already produced whatever evidence they had, the question of burden of proof ceases to be of any importance, but, while appreciating the question of burden of proof, misplacing the burden of proof on a particular party and recording finding in a particular way will definitely vitiate the judgment. In civil cases, burden of proof on the pleading never shifts, it always remains constant. Initial proving of a case in his favour is cast on plaintiff when he fulfils it, onus shifts over to defendant to adduce rebutting evidence to meet the case made out by the plaintiff, the onus may again shift back to plaintiff, as has been propounded in an age old precedent in the case of **Kumbhan Lakshmanna and others vs. Tangirala Venkateswarlu, reported in AIR (36) 1949 PC 278.** In the case of **Sate of Jammu & Kashmir vs. Hindustan Forest Company, reported in (2006) 12 SCC 198,** Apex Court has propounded that the plaintiff cannot obviously take advantage of the weakness of defendant. The plaintiff's case must stand or fall upon evidence, adduced by him. In civil cases, burden of proof is not to prove beyond all reasonable doubt, but even preponderance of probabilities may serve as a good basis for decision, as has been propounded by the Apex Court, in the case of **M. Krishnan vs. Vijay Singh and another, reported in 2001, Cr. L.J, 4705.** Burden to prove and onus to prove are two different things. Burden to prove lies upon a person, who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence as has been propounded by the Apex Court, in the case of **A. Raghavamma and another vs. A Chenchamma, AIR 1964 SC 136.**

12. In a criminal trial, as has been propounded by the Apex Court, in the case of **Kalu Ram vs. State of Himanchal Pradesh, reported in AIR 1976 SC 966,** the onus is upon prosecution to prove the different ingredients of the offence and unless it discharges that onus, it cannot succeed. As propounded by the Apex Court, in the case of **Pratap vs. State of U.P., AIR 1976 SC 966,** prosecution has to prove charge beyond all reasonable doubt and accused has to prove only establishing or existence of preponderance of probabilities for a case, other than proved by the prosecution. In Appeal, burden is always on the appellant to prove how the judgment, under Appeal, is wrong. He must show where the assessment has gone wrong, as has been propounded by the Apex court in the case of **Narbada Prasad vs. Chhagan Lal, reported in AIR 1969 SC 393.**

13. Hence, in the present Appeal, the prosecution had proved charges levelled

against the appellant before the Trial court/learned Sessions Judge, where, judgment of conviction and, thenafter, order of sentence was passed. Now in this Appeal, appellant has to show as to where and on what points, learned Trial Judge had failed to appreciate facts and law placed on record. This Court of Appeal has to appreciate facts and evidences placed on record, under above perspective of law.

14. PW-1, Noor Mohammad, informant, in his statement, on oath, has stated that Nusarat Jahan, victim, who is his daughter, is disabled. Three and half years back, he was residing with his family at Village, Churiayala, within the area of Police Station-Mirapur. He was a patient of tuberculosis and was under treatment at Delhi. Hence, he went to Delhi on 10.1.2010, alongwith his wife, for getting medicines, leaving behind his disabled daughter, prosecutorix, alone at the home, under guardianship of accused, Abrar, who is her maternal uncle. He came back on 13.1.2010. Her daughter was under threat and agony. She had narrated to her mother that she was subjected to rape by accused-Abrar, who is her maternal uncle, in the night of 12.1.2010, at about 4.00 AM. He went at the house of accused-Abrar, where, his parents were present. Matter was complained, but, they abused him. He went to concerned Police Station, but report was not got lodged. Abrar was not traceable. Report was not being registered inspite of repeated visits to Police Station, then, he went to Superintendent of Police, Muzaffar Nagar on 31.10.2010, where, an application, under his signature was filed and upon the order of Senior Superintendent of Police, Muzaffar Nagar, this case crime number was registered. The same application is on record as paper no. 5Ka, having signature of this witness, in a typed form, and it has been exhibited as Exhibit Ka-1. His daughter, prosecutorix, was medically examined.

15. In his cross-examination, there is no material contradiction or exaggeration or embellishment regarding contention made for commission of offence of rape by accused-Abrar with prosecutorix in the night of 12.1.2010, at about 4.00 AM, while she was left at her home, under the care of accused-Abrar, who is her maternal uncle and the prosecutorix was a minor girl of 17 years of age, whereas, his another daughter was about 18 years of age. Entire cross-examnation was related with facts, which were not material or relevant to this fact said in examination-in-chief, rather, were explanatory, in nature, that he is resident of Ghaziabad and after marriage shifted to this village, Churiyala. His wife was previously married to someone else. Prosecutorix is not daughter from him, rather, he was a step father etc. etc. But, all these facts are not related with above material fact regarding offence, in question. Prosecutorix was said to be disabled by her limbs, but, her mental condition was proper. When he came back from Delhi, prosecutorix was all alone at the home and she was under trauma. When asked for her agony, she narrated that after tying her limbs, she was subjected to rape by her maternal uncle, Abrar. Police personnel visited spot, after report was lodged, in compliance of the order of the Senior Superintendent of Police, Muzaffar Nagar. A suggestive question has been put about taking of some ornaments or quarrel regarding it. This was answered in negative. Report was got lodged on 31.1.2010, whereas, occurrence was of night of 12.1.2010. This was because of the fact that the Police Station, concerned, did not register report. Thenafter, repeated

visits was made, failing which, he moved an application before the Senior Superintendent of Police, Muzaffar Nagar. Thereafter, this report was got lodged.

16. No cross-examination is over this fact of registration of this case crime number by proving it as Exhibit Ka-1, whereas, a Division Bench of this Court, in the case of **Kunwar and others vs. State of U.P., reported in 1993 (3) AWC 1305,** has propounded fact not examined and a fact admitted in examination-in-chief, under Section 137 of Evidence Act and held that if some fact has been averred in examination-in-chief of testimony of a witness and same is not being cross-examined, truthfulness of unctroverted part of fact shall be accepted.

17. In the present case, it was specifically said by this witness, in his examination-in-chief that he went at Police Station for getting first information report lodged, but inspite of repeated visits, same was not lodged. Then, on 31.1.2010, he went to Senior Superintendent of Police, Muzaffar Nagar, where an application, which was in typed form and under his signature, was presented and upon an order over this Application by the Senior Superintendent of Police, Muzaffar Nagar, a report was got lodged and this report is Exhibit Ka-1, on record, but no question in cross-examination, on this portion of examination-in-chief, has been put by learned counsel for defence. Hence, this un-cotroverted part justified that there was no delay in lodging of this report and it was lodged by presenting Exhibit Ka-1 over which there was an order of Senior Superintendent of Police for registration of a report.

18. PW-3 is Constable-Clerk, Subshash Chandra, who, in his testimony, has categorically said, in examination-in-chief, that, while being posted at Police Station-Mirapur, District Muzaffar Nagar, as Constable-Clerk, on 31.1.2010, he had received Chik FIR of Case Crime No. Nil/2010, under Sections 376/506 of I.P.C., against Mohammad Abrar of Police Station Mahila Thana and this was brought by Sub Inspector of Mahila Thana, Muzaffar Nagar, on the basis of which Case Crime Nmber 64 of 2010, under Sections 376 and 506 of I.P.C. was got registered at Police Station-Mirapur. This registration of case crime number was entered in General Diary entry at Report No.34 at 17.30 PM, by way of affixing a carbon beneath it and in one and common process, carbon copy prepared as an original one, by way of pasting carbon copy, beneath it, which is paper no. 7Ka on record and General Diary entry of this registration of case crime number is same one. Compared and verified from original one at the time of recording of evidence. This was proved as Exhibit Ka-2.

19. This witness has been cross-examined, wherein, reiteration of examination-in-chief is there. There is no material contradiction, exaggeration or embellishment. Hence, very contention about registration of case crime number, firstly, at Mahila Thana, Muzaffar Nagar, then, at Police Station, Mirapur, Muzaffar Nagar, has been duly corroborated by this witness and under above facts and circumstances, it was instant first information report.

20. PW-4 is Dr. Indra Singh, Senior Consultant, was posted at Muzaffar Nagar District Women Hospital, on 31.1.2010, on Emergency Duty, where, she had examined prosecutorix, brought by Constable Sudeshna and father of the

victim, i.e., Noor Mohammad, at about 2.00 PM. Mark of identification was black mole over left cheek and she was weight of about 30 Kilograms and a disabled girl, crippled to stand by herself, having teeth 14/14, no external mark of injury was there, except her disability. Upon internal examination, hymen was old torn and healed, permitting penetration of one figure, uterus was normal, no mark of injury was there, swab was taken for preparation of slide and examination of it in pathology. Her age determination test was referred. Medico legal report, under hand-writing and signature of this witness, on record, is proved and exhibited as Exhibit Ka-3.

21. In her cross-examination, no question about her answer, at above date, time and place or examination made by her of prosecutorix, as above, has been asked, rather, there is reiteration of the statement, made in examination-in-chief.

22. PW-5 is Dr. Anand Swaroop, who, in his examination-in-chief, has said that while, being posted at District Hospital, Muzaffar Nagar, on 6.2.2010, he got X-ray of Prosecutorix, conducted by X-ray Plate No. 659, made and reported by Senior Radiologist Dr. O.P. Bhargava and on the basis of this X-ray report and plate, she was held to be age of 17 years in ossification report. This report was prepared by him and in his hand-writing and signature and exhibited as Exhibit Ka-4. He was fully aware of hand-writing of Radiologist of Dr. O.P. Bhargava, who was posted with him. Hence, he has proved Exhibit Ka-5, under hand-writing and signature of Dr. O.P. Bhargava. X-ray report, on record as Exhibit -1, which was prepared on the basis of, X-ray Pate No.659 of prosecutorix, has been duly proved by this witness.

23. In cross-examination, he has said that the prosecutorix was brought by the Police Constable, Sri Pal. He had not conducted X-ray examination, rather, it was conducted by Dr. Bhargava and on the basis of X-ray prepared by Dr. Bhrgava, ossification report, about age of the prosecutorix, was made by this witness. The basis of determination of age has been elaborately replied by this witness, where there is no inconsistency.

24. PW-6 is Sub Inspector, Mitrapal Sen, who was the Investigating Officer of this Case Crime Number 64/2010, after it having been transferred from erstwhile Investigating Officer, Layak Ram and he has formally proved his investigation and, thereby, submission of chargesheet, Exhibit Ka-6, under his hand-writing and his signature. In cross-examination, there is no contradiction or exaggeration, rather, there is full reiteration of examination-in-chief.

25. PW-7, Constable, Ravita Gupta, is the Constable-Clerk, who has registered this case crime number at Police Station, Mahila Thana, Distrct Muzaffar Nagar. She, in her examination-in-chief, has said that, while, being posted as Constable-Clerk, at Police Station Mahila Thana, District Muzaffar Nagar, on 31.1.2010, she had registered Case Crime No. Nil/2010, under Sections 376/506 of IPC, on the basis of a typed application of informant/applicant, Noor Mohammad, presented before the Senior Superintendent of Police, Muzaffar Nagar, and order by him for its registration. Chik Report, Exhibit Ka-7, is on record and the same is under her handwriting and signature. This registration of case crime number was entered in the General Diary Entry of the Police Station, concerned, at 15.30 PM, at

report no.80. Carbon copy of the same prepared, under verification process, is on record, which was annexed with original General Diary Entry, brought before the court at the time of recording of evidence, which is exhibited as Exhibit Ka-8.

26. In cross-examination, she has said that this registration was made in compliance with the order of Senior Superintendent of Police and after registering this case crime number, prosecutorix was sent for medical examination by Sub Inspector, Omwati of Mahila Thana. This report was received at above Police Station. Since this case was of Police Station Mirapur, hence, this entire case was transferred to concerned Police Station, where, it was got registered and investigated.

27. There is no material contradiction of testimony of this witness. It is in corroboration of testimony of PW-1 on the point of registration of case crime number.

28. PW-8 is the erstwhile Investigating Officer, who was the first Investigating Officer, who has stated that, while, being posted as Sub Inspector, at Police Station Mirapur, District-Muzaffar Nagar, he was deputed with investigation of Case Crime No. 64/2010, under Sections 376/504 of IPC, State vs. Mohammad Abrar, on 31.10.2010, and on the basis of Chik FIR, medical reports, G.D. entry, statement of Constable, Subhash Chandra, he recorded statement of informant, Noor Mohammad and the prosecutorix, her mother, Ashida, in case diary. Thenafter, visited spot and prepared spot map, under the pointing of the prosecutorix, same is under hand-writing and signature of this witness and is Paper no. 8K, which has been proved as Exhibit Ka-9. Thenafter, raid was made on 3.2.1010 for arrest of accused, but arrest could not be made. In between, he was transferred from above Police Station.

29. In cross-examination, there is no material contradiction in his statement, except of trivial one, which has been asked in hair spiting cross-examination, but learned Additional Sessions Judge has rightly appreciated that those minor contradictions bound to occur in such type of hair splitting cross-examination. There was no material contradiction, rather, they make witness as a natural witness.

30. Regarding charge for offence of rape, punishable under Section 376 I.P.C., Section 375 of I.P.C. provides: "A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

(Firstly) -- Against her will.

(Secondly) --Without her consent.

(Thirdly) -- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) --With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly)-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and

consequences of that to which she gives consent.

(Sixthly) -- With or without her consent, when she is under sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) --Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

31. Section 376 I.P.C. provides for punishment of rape that:-

(1) "Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

32. In the present case, the crucial witness is prosecutorix and she has been examined as PW-2, who, in her examination-in-chief, has categorically said that she was of age of 17 years and a disabled since childhood because of being victim of Polio. Her both, upper and lower limbs were non-ambulatory, hence, she could not walk or even stand, but, she was being taken care of by her parents. She is illiterate. Three and half years to four years back, she was residing with her parents at Village Churiyala, in her house. Her father was suffering with Tuberculosis. He was under treatment at Delhi. He had been at Delhi with her mother. She was left, with a request to her maternal grand mother for her caring during absence of her parents. Her grand maternal mother deputed her maternal uncle, Abrar, for caring of her, during this period of absence of her parents. Abrar assured her father and mother that he will look after prosecutorix till they return back. He was residing at the house of prosecutorix. Those days were of cold. Prosecutorix was all alone at her home and was sleeping at her cot. Her maternal uncle was sleeping over another cot. None else was there. In the night at about 4 AM, while she was asleep, her maternal uncle, Abrar, tied her hands and feet by Scarf ***(Dupatta),*** as she was victim of paralysis, she could not perceive it, but when she felt pain in her urinary region, she had awakened. She found her hands and feet are tied and her maternal uncle, Abrar, committed rape with her. She was unable to protest because of her disability and knife put by her maternal uncle, Abrar, over her neck. Her mouth was tied by cloth. Abrar did penetration by his urinal part in her vaginal part. She felt pain, but she could not cry because of mouth being shut by Abrar. She was subjected to rape with a threat to face dire consequences, in case of opening of lips to her parents and her parents will also be killed. There was prayer of ***Fazir*** (that is a prayer at 4.00 AM, offered by Muslims to the Almight, Allah). Abrar came out of house, then, prosecutorix robed herself. On the next day, neither, Abrar, attended her nor gave meal to her. She was helpless. On the next day, her parents came back, then, she could have meal and she complained to her mother about this occurrence and trauma. Her father went for getting first

information registered at concerned Police Station, but inspite of repeated attempts, report could not be lodged. News was published in the news paper, thenafter, report was got lodged and she was medically examined. In examination-in-chief, each of ingredients, for constituting offences, punishable, under Section 376 of IPC, mentioned as above, has been made out. Offence, punishable, under Section 506 of IPC, has also been constituted by this testimony.

33. The veracity of testimony made by this witness was tested in her cross-examination, wherein, she has reiterated her statement. She has been put in hair splitting cross-examination on many dates by learned counsel for defence and a number of questions, including humiliating questions, too, about marriage of her mother with the informant, she, being step daughter of informant etc. etc. have been asked, but she has categorically replied in examination-in-cross that she was 17 years' of age and on this point there was no variation that she was minor as was held in her medical age determination. Accused, Abrar, is her real maternal uncle. He was deputed for her care, during the period of absence of her parents. He was at her house on that night on which date she was subjected to rape by him. Abrar made penetration by his genital part in her vagina. She was disabled from her childhood, having non-ambulatory upper and lower limbs. She always needed help of some-one for her routine works, which was being assisted by her parents. Her father, too, was under ailment, living in miserable condition. They were having no means of their livelihood and doing work of labourer for getting their two times meals. Suggestive questions were put to her that accused had given jewellery of his wife for keeping as bond for fetching money for construction of house and this money was not returned back because of which this false implication was made. This question may be a relevant question to be put to informant, but this may never be a relevant question to be put before this witness because she herself said to be a minor and may not be aware of those facts, which were said to have been entered into in between accused and the informant, but no such question has been asked cogently to informant, PW-1, and this witness has replied her ignorance about those facts. She could not tell exact date of occurrence, but, she has categorically said that those were days of cold and time was of ***Fazir Namaz,*** i.e., very cogent reply. She was subjected to rape by the convict-appellant, under threat of force. Regarding this material allegation, there is no contradiction, exaggeration or embellishment.

34. Delhi High Court by its Division Bench's judgment in the case of **Rajinder alias Lala and etc. vs. Stae, reported in 2010 CRL.L.J. 15,** has held that it is general handicap attached to all eye witnesses if they fail to speak with precision, their evidence is assailed as vague and evasive, but, on the contrary, if they speak of all the events very well and correctly, their evidence become vulnerable to be attacked as tutored. Both the approaches are dogmatic and fraught with lack of pragmatism. The testimony of a witness should be viewed from broad angles. It should not be weighed in golden scales, but with cogent standard. By and large, a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video taps is replayed on the mental screen. Apex Court, **in the case of**

Rajendra Prasad vs. Narcotic Cell, reported in AIR 1999 SC 2292, has propounded that after all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

35. In the present case, prosecutorix was subjected to rape by her real maternal uncle. She was a minor and crippled girl, suffering with trauma of being non-ambulatory, having upper and lower limbs polio affected. Her parents were poor persons and her father, who was looking after her, himself was suffering with, tuberculosis and was at Delhi for getting his medicine and has to arrange someone for taking care of his disabled minor girl. Thus, he requested her maternal grand mother, whom he trusted much more, than any one else, being mother of his wife, to look after this poor and physically disabled gird, who deputed her son, being real maternal uncle of the prosecutorix, for taking care of the prosecutorix, during the absences of his sister and brother-in-law, i.e., parents of the prosecutorix. He assured them for taking all care of the prosecutorix, but in that very fateful night, he, by breaking all relations and trust, reposed upon him by his sister and his brother-in-law, parents of the prosecutorix, as well as, his mother, committed this heinous offence of rape with his real maternal niece (his real sister's daughter), who is also a poor, minor and disabled victim, not able to move herself. She, herself, was a crippled girl and was subjected to rape, resulting her in trauma and mental agony. She was also not offered meal on the next day. When her parents came back, they found this poor girl in a miserable condition and came to know about this heinous offence, committed by the accused. They made a complaint to grand maternal mother, but, she became abusive. Accused, Abrar, was missing. Then, they went at Police Station for getting case lodged, but inspite of repeated attempts and due to apathy shown by the Police, report could not be lodged. Ultimately, he was left with no option, except to approach Senior Superintendent of Police, Muzaffar Nagar. By the grace of God, Senior Superintendent of Police, directed for lodging of the report and under his direction, this case crime number was got registered, firstly, at Mahila Thana, i.e., not at the Police Station, concerned, but, lateron, case was transferred to concerned Police Station, where, investigation was conducted by the concerned Police Station. It shows apathy of that Station House Officer, who was posted there at that time. Neither cloths of the victim were taken nor same were got examined in laboratory nor DNA test was got conducted. If these steps would have been taken by the Station House Officer, concerned, in time, it would have been much more helpful, in judicial proceeding and its decision making, but even then the prosecutorix, in her testimony, and other formal witnesses, discussed above, proved charges levelled against convict-appellant beyond reasonable doubt.

36. Learned Sessions Judge, by his analytic appraisal, analysed entire case, in the correct perspective of law and precedent, and concluded with conviction of convict-appellant for offence of rape, which was well in accordance with evidence on record.

37. Statement of Ikramulla, DW-1 and Abrar, DW-2, was of this fact that ornaments were given to Noor Mohammad and those ornaments were pledged for taking money to construct

house. Those ornaments were to be returned back, hence, this false case with false accusation.

38. Even if these facts were being admitted and proved, on record, then, also in view of statement of prosecutorix regarding rape committed with her, testimony of DW-1 and DW-2, may not going to give any reason, which may be of any probability for raising any benefit of doubt against the proved case of prosecution.

ORDER

The sentences awarded by the learned Sessions Judge, as above, are the sentence, given by the Legislature for above offences and this offence of rape, that too, with a minor, physically disabled girl, by real maternal uncle, comes in a category, where, a deterrent punishment is needed, which the learned Sessions Judge has rightly and cogently awarded in the impugned judgment.

39. There is no illegality or disproportion in the quantum of sentence.

40. Accordingly, on the point of sentence, too, Criminal Appeal merits its dismissal, and, thus, it stands dismissed as such.

41. In view of what has been discussed above, Criminal Appeal, being devoid of merits, deserves to be dismissed and, thus, Criminal Appeal stands dismissed in toto.

42. Let a copy of this Judgment, alongwith the Trial Court's record, be sent to the Trial court concerned, by the office within two weeks.

(2020)1ILR A148

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 2155 of 1983

Raghubir Singh & Ors.
...Appellants (In Jail)
Versus
State ...Respondent

Counsel for the Appellants:
Sri V.C. Singh, Sri Gaurav Singh Tomar, Sri Subhash Gosain, Sri V.S. Singh

Counsel for the Opposite Party:
A.G.A., Sri Ravindra Singh, Sri Shiv Sagar Singh, Sri Subhash Gosain

Criminal Law - Indian Penal Code - Section 302, read with Section 34, 394, 411 - Appeal against conviction.

Evidentiary value of dying declaration.
The legal position that a Dying Declaration possess great weight and an accused of a crime can very very be held guilty on basis of it only without further corroborations, but at the same time it has to be ensured thatsuch declaration must inspire full confidence of the Court in its correctness. (para 14)

The location of the place of occurrence too is not matching in both the pieces of evidence. True it is, the Dying Declaration was recorded by a Executive Magistrate after obtaining a fitness certificate from a medical practitioner who treated the deceased but the infirmities noticed above makes the Dying Declaration less reliable or to say looses reliability to rest upon the case of the prosecution entirely on that. In view of it, in our considered opinion, the Dying

Declaration in the instant matter deserves to be ignored. (para 15)

The evidence of PW-2 is son of deceased and three other independent witnesses produced by prosecution did not support the prosecution story. The evidence adduced by PW-2 is also in huge contradiction with the facts stated in the Dying Declaration. In entirety of the case, it was necessary to have some corroboration of the evidence adduced by PW-2, son of deceased, which is conspicuously absent. A reasonable doubt thus exists in accepting the prosecution case. (para 17)

Appeal is allowed. (E-2)

List of cases cited: -

1. St. of U.P. Vs. Madan Mohan & ors., AIR 1989 SC 1519

(Delivered by Hon'ble Govind Mathur, C.J.
Hon'ble Vivek Varma, J.)

1. By the judgment impugned dated 9th September, 1983, learned Special Judge/Additional Sessions Judge, Jalaun at Orai, recorded conviction of accused appellants Raghubir Singh, Himmat Singh, Sarnam Singh and Pheran Singh for commission of offence punishable under Section 302, read with Section 34 Indian Penal Code and sentenced them to undergo imprisonment for life term. The accused appellants have also been convicted for an offence punishable under Section 394 IPC and for that they have been sentenced to undergo rigorous imprisonment for ten years with fine of Rs. 1,000/- each and further to undergo six months rigorous imprisonment in default of payment of fine. Accused appellant Pheran Singh has also been convicted for an offence punishable under Section 411 IPC. During the pendency of the appeal, all the accused persons except Sarnam Singh, son of Raghubir Singh, have died and as such appeal has also been abated qua them.

2. The case of the prosecution is that on 15th December, 1980, at about 5.45 pm, Sri Gajendra Singh (PW-2) and his father Nathu Singh (deceased), were returning to their home after visiting Devi Temple situated in outskirts of their village. At a pond, on way, Pheran Singh armed with a knife, Sarnam Singh, Raghubir Singh, Himmat Singh and Makrand Singh armed with *lathis* along with four other unknown persons came from backside and attacked on Nathu Singh. They also snatched the pistol that was fastened by a belt on the robes of Nathu Singh. On arrival of certain other persons including Ram Das (PW-1), Hakim Singh (PW-3) and Hamir Singh (PW-4), who too were also coming from the temple, the accused persons fled from the spot of occurrence. Consequence to the attack, Nathu Singh received several injuries and, therefore, he was taken to the hospital at a Jalaun. Doctor present at Jalaun hospital provided first aid and also stitched the injuries received by Nathu Singh. Looking to the seriousness, injured was referred for further treatment at Government hospital Orai. Gajendra Singh while leaving Nathu Singh at Orai hospital for treatment went to the police station at Orai to lodge a First Information Report. At his instance, a case was lodged against accused appellants and one Makrand Singh for commission of offence punishable under Section 307, read with Section 149 IPC. At Orai hospital, after obtaining fitness certificate from Dr. D.S. Chauhan (PW-9), the Sub Divisional Magistrate, Orai Sri P.D. Srivastava (PW-12) recorded Dying Declaration (Exhibit Ka-6) of Nathu Singh. Sri Nathu Singh then was referred and moved for further treatment to Government Hospital, Kanpur and while in transit he died. After death of Nathu Singh, investigation was undertaken

for commission of offence under Section 302/149 IPC. It would be pertinent to mention that though the FIR was lodged at Police Station Orai but the investigation was transferred to Police Station Madhogarh having territorial jurisdiction for investigation of cases, at the place, where the alleged crime was committed.

3. During the course of investigation accused Pheran Singh was arrested and from him a pistol and certain live cartridges were recovered. As per the prosecution, the pistol was of deceased Nathu Singh that was snatched by the accused appellants while committing the crime. The Investigating Agency after completing the investigation filed a report along with a charge sheet before the competent court. The case being triable by the Court of Sessions was committed to it. The Sessions Court on basis of the material available framed the charges and on denial of the same trial commenced as desired.

4. The prosecution supported its case by citing several documents, including Dying Declaration (Exhibit Ka-6) and by getting ocular evidence of sixteen witnesses recorded. Out of the sixteen witnesses, four witnesses, namely, Ram Das (PW-1), Gajendra Singh (PW-2), Hakim Singh (PW-3) and Hamir Singh (PW-4) were cited as eye witnesses. Dr. R.G. Singh (PW-11) adduced medical evidence as he conducted autopsy on the corpus of the deceased Nathu Singh. Sri Dinesh Chandra Chaturvedi (PW-10) narrated all the steps taken by him during the course of investigation, being the Investigating Officer. Sri P.D. Srivastava (PW-12) affirmed the Dying Declaration (Exhibit Ka-6) and its contents as he recorded the same in the capacity of Sub Divisional Magistrate. The testimony of Dr. D.S. Chauhan (PW-9) was recorded as he granted fitness certificate of Sri Nathu Singh for getting his Dying Declaration recorded. After completing the prosecution evidence, opportunity was extended to the accused appellants for explaining adverse and incriminating circumstances existing against them in prosecution evidence. All the accused termed the entire evidence as false and concocted with an allegation that they have been falsely implicated in the case. No evidence in defence was adduced.

5. It would be appropriate to state that out of the four eye witnesses three, namely, Ram Das (PW-1), Hakim Singh (PW-3) and Hamir Singh (PW-4) did not support prosecution case in any manner and, therefore, they were declared hostile. Sri Gajendra Singh (PW-2) who also happens to be son of deceased Nathu Singh supported the prosecution story.

6. Trial Court after examining the entire evidence available on record while acquitting the accused Makrand Singh from all the charges, held the accused appellants guilty for offences mentioned in para 1 of the judgment and sentenced them accordingly.

7. In appeal, the argument advanced by learned counsel appearing on behalf of the appellant is that the evidence available on record is not adequate to arrive at a definite conclusion about involvement of the accused appellant Sarnam Singh in the crime and a reasonable doubt exist to accept the prosecution story. According to learned counsel, the Dying Declaration (Exhibit Ka-6) is not a reliable being having serious contradictions with the prosecution case. According to him, the narration of the incident by eye witness Gajendra Singh (PW-1) is in serious conflict with the facts given in Dying

Declaration. In such circumstance, as per learned counsel, the Dying Declaration deserves to be ignored. To substantiate the argument, he has placed reliance upon a judgment of the Supreme Court in ***State of Uttar Pradesh Vs. Madan Mohan and others., reported in AIR 1989 SC 1519.*** The other argument advanced by learned counsel is that even the evidence adduced by the eye witness is not reliable. According to him, lot of contradictions exists in the version of facts narrated by the eye witness. The eye witness is a witness interested being a son of deceased, as such, it was necessary to get his version of facts corroborated by independent witnesses, but in the case in hand, such witnesses have not supported the prosecution story. Hence, the accused appellant-Sarnam Singh deserves to be acquitted from the charges levelled against him.

8. Per contra, Km. Meena, learned Additional Government Advocate submits that the Dying Declaration is an important piece of evidence and that cannot be ignored for minor reasons. According to her, a Dying Declaration in itself is sufficient to record conviction of an accused. In the case in hand, as per learned Additional Government Advocate, the Dying Declaration made by deceased Sri Nathu Singh is very definite and that in quite unambiguous terms mentions for causing knife blows to him by Sarnam Singh. As per the medical evidence available on record, the stab wounds were the cause of death. Hence, the Trial Court rightly recorded the conviction.

9. Heard learned counsels and examined the record and considered the argument advanced.

10. At the threshold, it would be appropriate to state that as per the medical evidence available on record, there is not doubt about the homicidal death of Sri Nathu Singh. The question before us is with regard to culpability of the surviving accused Sarnam Singh. Suffice to state that deceased Nathu Singh had 21 injuries and his cause of death was shock and excessive bleeding due to injuries Nos. 6, 7, 8, 13 and 17. The injuries referred above are as follows:

"6. Punctured wound 2 ½ cm x 1cm x cavity deep, on left side of chest 10 cm above left nipple.

7. Stitched wound 1 cm long in epigastric region.

8. Stitched wound 1 cm long on left side of abdomen 8 cm above and lateral to the umblicus.

13. Stitched wound 2cm long on lateral aspect right side of chest 4 cm above sub coastal margin.

17. Punctured wound 2 cm x ½ cm x cavity deep on lateral aspect of left chest 13 cm below left axilla."

11. All these injuries could have been received by knife. As per the facts stated in the FIR, the knife was with accused Pheran Singh and he caused injuries to Nathu Singh by it. The fact relating to knife blows by Sarnam Singh came before the investigation agency in the Dying Declaration (Exhibit Ka-6). The Dying Declaration "Exhibit Ka-6" is an important piece of evidence in the instant matter and that reads as under:

"Question No. 1 *- What is your name and address?*

Answer - My name is Natthu Singh s/o Sri Gulab Singh r/o Gohani, Police Station Madhaugarh, District-Jalaun.

Question No. 2 *- Where, at what time and by whom the injuries were inflicted on you?*

Answer *- As I was coming towards the village from my agriculture fields and had reached near Hardev Singh s/o Chhote Singh's house, four persons had emerged out from the shop which used to be run from the room of his house, and had grabbed me on the way itself and had begun to assault me with knives. Sri Pheran Singh s/o Raghuraj Singh and Sarnam Singh s/o Raghuveer Singh were involved in assaulting with the knives while Raghuveer Singh s/o Chatur Singh and Himmat Singh s/o Chatur Singh kept holding me? It was around 7.00 in the evening and the date was 15.12.80. All the injuries suffered by me were knife injuries.*

Question No. 3 *- Why did they assault you?*

Answer *- All the accused harbour animosity against me due to the mutual legal battle, as I have emerged victorious in the case at every level.*

Question No. 4 *- Do you have anything else to state?*

Sir,

Immediate action against these people is needed otherwise they will attack other ones as they are history-sheeters. They had injured me with knife and had taken away my licesned pistol also."

The statement was heard, read and verified."

(Authorized translation of the original which is in Devnagari)

12. Before proceeding further, it would also be appropriate to quote the relevant part of the statement given by the eye witness Gajendra Singh (PW-2) and that reads as under:

"On15.12.80 at 5:45pm, it was very bright there. My father and I were returning after devi darshan. When we reached near the pond, which was on the path itself. Accused Feran Singh, Raghuvir Singh, Sarnam Singh, Himmat Singh and Makrand Singh were coming from ahead. Four outsiders were accompanying them whom I do not know. Feran Singh was armed with knife. Rest were armed with lathies. These persons came and surrounded my father. Feran Singh and four outsiders hit him to ground. At that time, Feran Singh started inflicting knife on my father. When I turned back and saw, the witness Hammir Singh, Ramdas, Kripal Singh and Hakim Singh were coming. Then, I raised alarm "Run! these persons are killing my father". When Feran Singh was inflicting knife on my father, rest of the accused persons were exhorting "Come on, kill the bastard, don't leave him alive". When the aforesaid witnesses reached at the scene of occurrence the accused immediately ran with challenge to see later on. On this, the accused escaped northwards. My father had a licensed pistol that he always keeping with him. Feran Singh took it away by cutting the belt with knife. He took it away with cover itself."

(Authorized translation of the original which is in Devnagari)

13. In absolute contradiction to the facts stated in the Dying Declaration, the eye witness stated that the knife injuries were caused by Pheran Singh. Beside that, in the Dying Declaration, it is stated that Nathu Singh was returning from his house but as per eye witness, he was coming from temple after Devi darshan. As per the Dying Declaration, the incident occurred near the house of Hardev Singh but as per eye witness, incident took place near a

pond situated on the way. From perusal of the site plan, it reveals that the incident occurred at the road in front of a pond. On other side of the road, house of Sri Syam Lal is situated. A primary school building is also shown close to the pond but no house of Hardev Singh is there in the site plan. As a matter of fact, no other building except the two mentioned above is situated in close vicinity of the pond and the place where the incident occurred.

14. On minute appreciation of evidence brought on record, it is apparent that the version of facts stated in the Dying Declaration are in enormous conflict with the facts stated by the eye witness and also locations shown in the site plan. With this background, we have measured evidentiary weight of Dying Declaration in the instant matter. We are aware of the legal position that a Dying Declaration possess great weight and an accused of a crime can very very be held guilty on basis of it only without further corroborations, but at the same time it has to be ensured that such declaration must inspire full confidence of the Court in its correctness. It is always required to be kept in mind that the Dying Declaration is accepted with a concept of human behaviour and tendency that a person dying will neither speak lie nor make any effort to implicate an innocent person in the crime. While relying upon a Dying Declaration, Court must be conscious to this fact that the accused would not be having any chance in cross examination. The primary effort of the Court while dealing with the Dying Declaration hence is to find out its truthfulness and to see that it must not suffer from any infirmity. If in a case the prosecution version of facts differs from the version of facts given in Dying Declaration, then such declaration suffers from serious infirmity and that cannot be acted upon.

15. In ***State of Uttar Pradesh Vs. Madan Mohan*** (supra), the Supreme Court refuse to accept the Dying Declaration which was in contradiction to the narration of facts by eye witness upon whom the prosecution relied. In the instant matter too out of the four eye witnesses sited by the prosecution, three did not support the prosecution story and whatever stated by Gajendra Singh (PW-2) is having huge difference in version of facts mentioned in the Dying Declaration. As per Dying Declaration, knife blows were given by the accused Pheran Singh as well as Sarnam Singh but the eye witness in quite specific terms assigns the role of causing knife blows to Pheran Singh only. The location of the place of occurrence too is not matching in both the pieces of evidence. True it is, the Dying Declaration was recorded by a Executive Magistrate after obtaining a fitness certificate from a medical practitioner who treated the deceased but the infirmities noticed above makes the Dying Declaration less reliable or to say looses reliability to rest upon the case of the prosecution entirely on that. In view of it, in our considered opinion, the Dying Declaration in the instant matter deserves to be ignored.

16. Learned Additional Government Advocate also relied upon the evidence adduced by eye witness Gajendra Singh (PW-2) with assertion that the participation of accused Sarnam Singh is definite and he was certainly sharing common intention with Pheran Singh in killing Nathu Singh, as such, his conviction under Section 302/34 is justified.

17. We do not find much force in this argument too. As already stated, Sri

Gajendra Singh (PW-2) is son of deceased Nathu Singh and beside that, three other independent witnesses produced in evidence by prosecution did not support the prosecution story. The evidence adduced by Gajendra Singh is also in huge contradiction with the facts stated in the Dying Declaration. In entirety of the case, it was necessary to have some corroboration of the evidence adduced by Gajendra Singh, son of deceased Nathu Singh, which is conspicuously absent. A reasonable doubt thus exists in accepting the prosecution case.

18. For the reasons given above, this appeal deserves acceptance. Hence is allowed. The conviction recorded and the sentence awarded in the judgment impugned dated 9th September, 1983 passed by learned Special Judge/Additional Sessions Judge, Jalaun at Orai, in Sessions Trial No. 68 of 1981 and Sessions Trial No. 6 of 1983 is set aside. The accused Sarnam Singh is acquitted from all the charges for which he was tried. He has already been released from State custody on furnishing bail bonds and sureties, the same are hereby discharged.

(2020)1ILR A154

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 2372 of 2013

Anil Kumar @ Dhulliya ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Atul Kumar Singh, Sri Archana Singh *(Amicus Curiae)*

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

Criminal Law - Indian Penal Code - Section 302 - Appeal against conviction.

It is settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal actual culprit and make allegation against an innocent person. (para 30)

The witness testimony and the consistency of the prosecution version as a whole. (para 35)

However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. (para 38)

So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. (39)

In view of facts and legal position discussed hereinabove, we find that Trial Court has rightly analyzed evidence led by prosecution and found accused guilty and convicted him for having committed murder. (para 48)

Appeal is rejected. (E-2)

List of cases cited: -

1. Dalip Singh Vs. St. of Punjab, AIR,1953, SC 364

2. Dharnidhar Vs. St. of UP (2010) 7 SCC 759

3. Ganga Bhawani Vs. Rayapati Venkat Reddy & ors., 2013(15) SCC 298

4. Bhagalool Lodh & anr. v. St. of UP, AIR 2011 SC 2292

5. Dhari & ors. Vs. St. of U. P., AIR 2013 SC 308

6. Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124

7. Sachin Kumar Singhraha Vs. St. of M.P. in Criminal Appeal Nos. 473-474 of 2019

8. Criminal Appeal No. 56 of 2018, Smt. Shamim Vs. St. of (NCT of Delhi)

9. State Represented by Inspector of Police Vs. Saravanan & anr., AIR 2009 SC 152

10. Arumugam Vs. State, AIR 2009 SC 331

11. Mahendra Pratap Singh Vs. St. of U.P., (2009) 11 SCC 334

12. Dr. Sunil Kumar Sambhudayal Gupta & ors. Vs. St. of Mah., JT 2010 (12) SC 287

13. Lokesh Shivakumar Vs. St. of Karnataka, (2012) 3 SCC 196

14. Namdeo Vs. St. of Mah. (2007) 14 SCC 150

15. Kunju @ Balachandran Vs. St. of T.N., AIR 2008 SC 1381

16. Jagdish Prasad Vs. St. of M.P., AIR 1994 SC 1251

17. Vadivelu Thevar Vs. St. of Madras, AIR 1957 SC 614

18. Yakub Ismailbhai Patel Vs. St. of Guj. (2004) 12 SCC 229

19. St. of Har. Vs. Inder Singh & ors. (2002) 9 SCC 537

20. Sumer Singh Vs. Surajbhan Singh and others, (2014) 7 SCC 323

21. Sham Sunder Vs. Puran, (1990) 4 SCC 731

22. M.P. Vs. Saleem, (2005) 5 SCC 554

23. Ravji Vs. St. of Raj., (1996) 2 SCC 175

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Present jail appeal has been directed by accused-appellant Anil Kumar @ Duhlliya against the judgement and order dated 07.10.2010 passed by Additional District & Sessions Judge, Fast Track Court No.1, Mainpuri in Session Trial No.127 of 2007 (State Vs. Anil Kumar @ Dhulliya) under Section 302 IPC, P.S. Kurra, District Mainpuri whereby Trial Court has convicted accused Anil Kumar @ Dhulliya under Section 302 I.P.C. and sentenced him to imprisonment for life with a fine of Rs.50,000/- under Section 302 IPC; and in default of payment of fine, five years additional simple imprisonment.

2. Brief facts of the case emerging in First Information Report (hereinafter referred to as "FIR") is that on the fateful day i.e. 30.01.2003 at about 5:00 PM, accused-appellant Anil Kumar @ Dhullia came to the house of Informant, PW-1 Ram Das with licensed gun of his maternal uncle Dafedar Singh of village Baghuia, Safai, District Etawah who was also with him. Anil Kumar @ Dhullia asked about Rajuwa son of Informant, whereupon, victim, Informant's wife Smt. Premwati standing nearby, questioned him as to why they wanted to kill his son. She said that Rajuwa is not in the house. Accused Dafedar Singh told that she was talking much and Anil Kumar @ Dhullia opened fire at her with the licensed gun which hit on her chest. As a result of gunshot she fell down on earth and died instantaneously. The incident was witnessed by Shiv Shanker and Jaipal also. Motive of the incident was said to be a quarrel between Informant and accused that took place over the matter of children prior to one year of the incident.

3. PW-1 Ram Das presented a written Tehrir of incident, Ex.Ka-1 in the

Police Station Kurra, District Mainpuri. On the basis of written Tehrir Ex.Ka-1, Chick F.I.R., Ex.Ka-12 was registered by PW-5 Constable Ganga Ram as Case Crime No. 19 of 2003, under Section 302 I.P.C. against accused-appellant and one Dafedar Singh (died during trial). Entry of case was made by him in General Diary, copy whereof is Ex.Ka-13.

4. S.I. Jagat Singh (not examined) held inquest over the dead body of Smt. Premwati and prepared inquest report Ex.Ka-8 and other papers relating thereto. Body was sealed

5. PW-3 Dr. P.K. Pathak, conducted autopsy over the dead body of Smt. Premwati on 31.01.2003 and prepared post mortem report Ex.Ka-2, expressing his opinion that death of victim was possible one day before the post mortem due to haemorrhage and coma on account of *ante mortem* firearm injuries. Doctor found four *ante mortem* injuries on the person of the deceased which read as under :-

(i) ***Fire arm wound of entry*** *size 3 cm x 2 cm x chest cavity deep on left upper chest. 8 cm below tip of shoulder.*

(ii) ***Fire arm wound of exit*** *size 1.5 cm x 1 cm x chest cavity deep x communicating to injury no. 1 on right side of chest, 9 cm below axilla in mid axillary line.*

(iii) ***Fire arm wound of entry*** *size 1.5 cm x 1 cm x bone deep on right upper arm lateral aspect, 9 cm above the elbow joint.*

(iv) ***Fire arm wound of exit*** *size 4 cm x 0.7 cm x bone deep & communicating to injury no. 3 inner aspect of right upper arm, 7 cm below axilla.*

6. PW-4 S.I. Ram Pratap Singh, undertook investigation of case; recorded statement of Informant PW-1 Ram Das; PW-2 Shiv Shanker and other witnesses; got prepared panchayatnama by S.I. Jagat Singh; recorded statement of inquest witnesses and visited spot; prepared site plan Ex.Ka-3; collected empty cartridge, blood stained and simple earth from spot; prepared memos thereof Ex.Ka-4 and 5 respectively and tried to search accused persons. On 31.01.2003, he arrested accused-appellant Anil Kumar @ Dhullia in injured position from his own house, recorded his statement and after compelting entire formalities of investigation, submitted charge sheet Ex.Ka-7 against accused persons in the Court of C.J.M. concerned.

7. Case, being exclusively triable by Court of Sessions, was committed by C.J.M. to Sessions Court for trial.

8. Trial Court charged accused-appellant Anil Kumar @ Dhulliya and Dafedar Singh on 11.5.2007 under Section 302/ IPC which reads as under :-

Charge

"I, Neeraj Nigam, Additional Sessions Judge Court No. 6, Mainpuri, hereby charge you :- 1. Anil Kumar @ Dhulliya and 2. Dafeydar Singh as follows :-

That you on 30.01.2003 at about 5 p.m. in the evening infront of the house of Girand Singh in village Mohanpur, Mauja Besak, under police station Kura, district Mainpuri, committed murder of complainant's wife Premwati intentionally and knowingly by firing, and thereby committed an offence punishable under Section 302 I.P.C. And within the cognizance of this Court.

And I hereby direct that you be tried upon the said charge by this Court."

9. Accused-appellant pleaded not guilty and claimed to be tried.

10. In order to substantiate its case, prosecution examined as many as five witnesses, out of whom PW-1 Ram Das and PW-2 Shiv Shanker are witnesses of fact whereas PW-3 Dr. P.K. Pathak, PW-4 S.I. Ram Pratap Singh and PW-5 Constable Ganga Ram are formal witnesses.

11. Subsequent to closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by Trial Court explaining entire evidence and other incriminating circumstances. In the statement under Section 313 Cr.P.C., accused-appellant denied prosecution story in toto. Entire prosecution story is said to be wrong and concocted. In response of question no. 7, he answered that victim was shot dead by Ram Das, Raju @ Ratnesh and he has been falsely implicated. Accused-appellant did not chose to lead any evidence in defence.

12. PWs-1 and 2 are the eye witnesses, who supported prosecution case deposing that they saw accused-appellant opening fire on victim Smt. Premwati due to which she fell down and died. PW-3 Dr. P.K. Pathak conducted post mortem and proved post mortem report, PW-4 S.I. Ram Pratap Singh is the Investigating Officer, who undertook investigation, collected empty cartridge, blood stained and simple earth from spot, prepared memos thereof and after completing entire formalities of investigation, submitted charge sheet against the accused. PW-5 Constable Ganga Ram registered chick F.I.R. and prepared G.D.

13. Trial Court, after hearing learned counsel for the parties and appreciating entire evidence oral and documentary, found accused-appellant guilty and convicted and sentenced him as stated above.

14. Feeling aggrieved and dissatisfied with impugned judgement and order of conviction, accused-appellant preferred present appeal through Jail.

15. We have heard Smt. Archana Singh, learned Amicus Curiae appearing for appellant and Sri Ratan Singh, learned A.G.A for State-respondent at length and have gone through the record carefully.

16. Learned counsel for appellant assailing impugned judgement and order of conviction of accused-appellant, advanced his general submissions in following manner in the :-

(i) PW-1 happens to be husband of victim Smt. Premwati and interested witness.

(ii) Presence of PW-2, alleged eye witness, on spot is not natural.

(iii) Medical evidence does not comform with the ocular evidence, hence, accused-appellant is entitled to benefit of doubt.

(iv) There are major contradiction and omission in the statement of prosecution witnesses rendering prosecution case doubtful.

(v) There is no motive to accused to commit murder of Smt. Premwati because there was no enmity between accused and victim.

(vi) Entire witnesses of prosecution have not been produced in evidence from the side of prosecution, hence presumption under Section 114 (g) Indian Evidence Act goes against it.

(vii) Trial Court has not appreciated the prosecution evidence in

right perspective. Prosecution could not succeed to prove its case beyond reasonable doubt and Trial Court erred in passing the impugned judgement.

17. Learned AGA vehemently opposed the arguments advanced by learned counsel for appellant and submitted that accused-appellant is named in F.I.R. He has sufficient motive to commit murder of victim. PW-2 is neighbour and his presence on spot at the time of incident is quite natural. There was no reason or occasion to PW-2 to give false evidence against accused. Accused-appellant put a different story that victim was murdered by Informant and his son but he gave no evidence in this regard. Prosecution succeeded to prove its case beyond reasonable doubt and Trial Court rightly convicted the accused-appellant.

18. Although, time, date, place of incident and murder of victim Smt. Premwati could not be denied from the side of defence but according to his Advocate, accused-appellant is not responsible to commit murder of Smt. Premwati. Even otherwise, from the evidence of PW-1, 2, 3 and 4, time, date and place of incident and murder of victim Smt. Premwati stand established.

19. Thus, only question remains for consideration of this Court is, "whether accused-appellant caused death of Smt. Premwati by fire arm injury and Trial Court has rightly convicted him?"

20. Now we may proceed to consider rival submissions of learned counsel for parties and evidence of prosecution as well as some important decisions.

21. PW-1 Ram Das deposed that his wife Smt. Premwati was murdered on 30.01.2003 at about 5:00 PM. At the time of incident, he was standing in front of a house towards north near the temple. His wife, victim Smt. Premwati, and his daughters-in-law were also standing there at that time. Accused-appellant Anil Kumar @ Dhullia having licensed gun of his maternal uncle Dafedar Singh and his maternal uncle (other accused) - Dafedar Singh came there abused and asked about his (Informant's) son Rajuwa, saying that they would eliminate him, whereupon victim inquired, what his son had done to them that they would eliminate him. On the provocation of co-accused Dafedar Singh, accused-appellant Anil Kumar @ Dhullia opened fire with the gun putting the same on the left side of chest of victim, due to which she fell down on earth and died. Incident was witnessed by PW-2 Shiv Shanker and Jaipal and his daughters-in-law also. He further deposed that there was a dispute between accused-appellant Anil Kumar @ Dhullia and his son Ratnesh @ Raju one year prior to incident and since then accused-appellant Anil Kumar @ Dhullia bore internal grudge with the family of Informant and for that reason, he murdered the victim. The witness proved written report as Ex.Ka-1.

22. PW-2 Shiv Shanker deposed that on 30.1.2003 at about 5:00 PM, he was standing on the Chabutara of his house and saw that accused-appellant Anil Kumar @ Dhullia having single barrel licensed gun of his maternal uncle Dafedar in his hand, came there along with his said maternal uncle. Both accused persons started abusing PW-1 Ram Das and his son. Victim, Smt. Premwati, was also standing near Ram Das. Both accused persons asked where Rajuwa son of Informant was and they would eliminate him. There-upon victim Smt. Premwati asked them what her son had done and why they wanted to kill

him and that he was not in the house. On this, accused-appellant got annoyed and on the provocation made by Dafedar Singh, accused-appellant Anil Kumar @ Dhullia opened fire on victim (wife of PW-1) with gun as a result of which victim fell down and died on spot. Accused-appellant Anil Kumar @ Dhullia ran away towards his house firing in air.

23. Both witnesses PWs-1 and 2 have withstood lengthy cross-examination but nothing material could be extracted in cross-examination so as to disbelieve their testimony. Certainly some minor contradictions occurred but they are not of such nature which may affect the root of prosecution story or render prosecution case doubtful.

24. PW-1 Ram Das is husband of victim and eye witness of case. Incident took place at about 5:00 PM on 30.01.2003 at the door of Informant where PW-1 and victim were standing. PW-2 is neighbour and he was also standing on Chabutara of his house at the time of incident. Presence of both the witnesses appears natural at the time of incident. PW-2 is independent eye witness. Accused-appellant suggested nothing as to why PW-2 deposed against him. Only suggestion was put before the witness from the side of accused that he was deposing falsely against him due to meeting with Ram Das and this suggestion was denied by the witness.

25. PW-4 S.I. Ram Pratap Singh recovered empty cartridge from the spot. Thus, from the evidence of PWs-1, 2 and 4, it is established that accused-appellant Anil Kumar @ Dhullia, on the provocation made by other co-accused Dafedar Singh (Now dead), opened fire on the victim which hit in her chest due to which she fell down and died on spot.

26. So far as other argument of learned counsel for the accused-appellant is that PW-1 is not an eye witness and being husband of victim, he is interested, is concerned, we are not convinced with the same for the reason that argument is totally and thoroughly misconceived. It is well-settled preposition of law that evidence of interested witness cannot be out rightly discarded on the ground that he is an interested witness. Mere relationship is not sufficient to discard otherwise trustworthy ocular testimony.

27. In **Dalip Singh v. State of Punjab, AIR,1953, SC 364.** Court held as under :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case

must be limited to and be governed by its own facts."

28. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

29. In ***Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,*** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: ***Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308)."***

30. It is settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

31. Next argument of learned counsel for the accused-appellant is that medical evidence is not compatible with the oral version and accused-appellant is entitled to benefit of doubt.

32. We have scrutinised oral evidence and medical evidence in this regard. PWs-1 and 2 are eye witnesses of incident, who supported prosecution case stating that they saw accused-appellant opening fire on victim who sustained serious fire arm injuries due to which she fell down and died on spot. There is no contradictions in the statement of PWs-1 and 2 which may dent their ocular version. A part from this, PW-3, conducted post mortem of victim and deposed that he found four ante-mortem fire arm injuries on the person of deceased, expressing his opinion that death was possible one day prior to the post mortem due to haemorrhage and coma on account of ante-mortem fire arm injuries. Thus, medical report is compatible with ocular version and we are not impressed with the argument advanced by learned counsel for the accused-appellant and reject the same.

33. In so far as discrepancies, variations and contradictions in prosecution case are concerned, we have analysed entire evidence in consonance

with submissions raised by learned counsel's and find that the same do not go to the root of case and accused-appellant are not entitled to benefit of the same.

34. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

35. In ***Sachin Kumar Singhraha v. State of Madhya Pradesh*** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

36. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi),** decided on 19.09.2018.

37. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy. Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

38. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition

inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].**

39. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

40. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court has held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

41. So far as non-examination of witnesses is concerned, in view of Section 134 of Indian Evidence Act,1872 (hereinafter referred to as 'Act,1872'), we do not find any substance in the submission of learned counsel for the appellant.

42. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

43. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150,** Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

44. In **Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381** a similar view has been taken placing

reliance on earlier judgments including **Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614.**

45. In ***Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,*** Court held that :-

"The legal position in respect of the testimony of a solitay eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it."

46. In ***State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,*** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court. entirety, we have no hesitation to state that accused-appellant Anil Kumar @ Dhullia committed murder of victim Smt. Premwati by opening fire on her chest with licensee gun.

47. Considering the entire facts and circumstances of the case, evidence of prosecution in entirety, we have no hesitation to state that accused-appellant Anil Kumar @ Dhullia commited murder of victim Smt. Premwati by opening fire on her chest with lecensee gun.

48. In view of facts and legal position discussed hereinabove, we find that Trial Court has rightly analyzed evidence led by prosecution and found accused guilty and convicted him for having committed murder of Smt. Premwati, an offence punishable under Section 302 IPC. Conviction and sentence awarded by Trial Court is liable to be maintained and confirmed. No interference is warranted by this Court. Jail appeal lacks merit and liable to be dismissed.

49. So far as sentencing of accused-appellant is concerned, it is always a difficult task requiring balance of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in individual cases.

50. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation upon court to constantly remind itself that right of victim, and be it said, on certain occasions or person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only

against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

51. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment awarded to accused-appellant by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no question arises to interfere in the matter on the point of punishment imposed upon him.

52. In view of above discussion, **the appeal lacks merit and is accordingly, dismissed.** Impugned judgement and order dated 07.10.2010, is maintained and confirmed.

53. Lower Court record along with a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

54. Before parting, we provide that Smt. Archana Singh, Advocate, who assisted as Amicus Curiae, appearing for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 11,500/- for her valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2020)1ILR A164

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.11.2019

BEFORE
THE HON'BLE SIDDHARTH, J.

Criminal Appeal No. 2642 of 2009

Lutawan ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri S.K. Pandey, Sri Gaurav Kumar Shukla, Sri Mirza Ali Zulfiquar

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

Criminal Law - Indian Penal Code-Section 304-I/34 -S.C./S.T. Act, 1989 - Section 3(2)(V) - Appeal against conviction.

Sections 304-I, 304-II, 299, 300, 302 & 34 I.P.C. are discussed.

All the witnesses of fact have clearly stated before the court below that the appellant exhorted his son and he caused the fatal blow by *sariya* on the head of the deceased. (para 18)

The leading feature of Section 34 I.P.C. is participation in action. It has to be established that participation was not merely in planning but also in doing the individual offender must have participated in the offence. His participation may be slight, but it should be there. (para 18)

In the present case there was meeting of minds of the appellant with his son in causing the injury to the deceased. (para 18)

There was certainly active participation of the appellant in exhorting his son which resulted into the death of the deceased on account of blow made by his son. (para 18)

Consideration of the fact situation and also time lag in between, the court is of the view that sentence of imprisonment of revisionist for offence under section 304-II/34 I.P.C. is reduced to the period already undergone to meet the ends of justice. (para 39)

Criminal Appeal partly allowed. (E-2)

List of cases cited: -

1. St. Vs. Saidu Khan, AIR, 1951 Alld. 21 (FB)

2. Afrahim Sheikh Vs. St. of Bengal AIR 1964, SC 1263

3. Dinesh @ Buddha Vs. St. of Raj., AIR 2006 SC 1267

4. Ramdas & ors. Vs. S. of Mah., (2007) 2 SCC 170

5. Hari Kishan Vs. Sukhbir Singh, (1988) 4 SCC 551

6. Ankush Shivaji Gaikwad Vs. St. of Mah. (2013) 6 SCC 770

7. K.A. Abbas H.S.A. Vs. Sabu Joseph, (2010) 6 SCC 230

8. Hazara Singh Vs. Raj Kumar & Ors. (2013) 9 SCC 516

9. St. of M. P. Vs. Babulal & Ors (2013) 12 SCC 308

10. George Pon Paul Vs. Kanagalet and others (2010) 1 SCC (Cri) 1070

11. Nasir Vs. St. of U. P. (2011) 2 SCC (Cri) 136

12. Labh Singh & ors. Vs. St. of Har. & Anr. (2013) 1 SCC (Cri) 1125

13. Jagpal Singh & ors. Vs. St. of U. P. 2004 (5) ACC 310

14. Raghuvera & ors. Vs. St. of U. P. 1991 (28) ACC 498

15. Satsen Vs. St. of U.P. 2014 (84) ACC 606

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Gaurav Kumar Shukla, learned counsel for the appellant, Sri Nishant Singh, learned A.G.A. for the State and perused the lower court record.

2. This criminal appeal is directed against the judgment and order of conviction dated 25.04.2009 passed by Additional Sessions Judge, Fast Track Court, No. 3, Basti in Special Sessions Trial No. 12 of 1995, whereby appellant has been convicted and sentenced for committing offence under Section 304-I/34 I.P.C. for a period of 10 year rigorous imprisonment and a fine of Rs. 10,000/- and under Section 3(2)(V) of S.C./S.T. Act for a period of 10 years rigorous imprisonment and a fine of Rs. 20,000/- along with default clauses.

3. The prosecution case is that the first informant, Dhobi, gave an application dated 24.04.1995 before Kotwali, Khalilabad stating that his wheat crop was harvested and kept; that its thrashing was required and he went to the machine of appellant, Lutawan, with 4-5 bundles of wheat on 23.04.1995 at about 10:00 p.m along with his father and brother, Pramod; that appellant and his son, Tara Lal Nishad, stated that first you pay the cost of thrashing of wheat and only then they will do the same; that first informant stated that he will pay the cost and asked them to do his work; that appellant got annoyed and after abusing the informant and others accompanying him, exhorted his son, Tara

Lal Nishad, who caused injury by *sariya* (rod) on his brother, Pramod, and he got injured; that informant took Pramod to Medical College, Gorakhpur, for treatment and he died in the Medical College, Gorakhpur; that after post-mortem of the deceased he went to the police station and lodged the report at 24.04.1995 at 20:30 hours; that the aforesaid F.I.R. was registered as Case Crime No. 140 of 1995, under Section 304 I.P.C. and Section 3(2)(V) of S.C./S.T. Act.

4. Co-accused, Tara Lal Nishad, was declared juvenile during the trial and he was sent for trial before the Juvenile Justice Board. The appellant was tried by the Sessions Court.

5. The appellant was charged for offences under Section 304-I/34 I.P.C. and Section 3(2)(V) of S.C./S.T. Act to which the appellant denied and sought trial.

6. Before the trial court the first informant was examined as P.W.-1; Ram Pyare, father of the deceased, was examined as P.W.-2; Sri Ram, eye-witness was examined as P.W.-3; Vinay Krishna Biswas, the doctor, who first treated the injured proved that he first attended the injured and stitched his wound; that P.W.5, the Dr. Prakash Chandra, was examined as P.W.-5, and he proved that on 24.04.1995, he conducted medical examination of the deceased at 06:50 a.m; P.W.-6, Dr. A.K. Srivastava, who conducted the post-mortem of the deceased, proved the ante-mortem injury of the deceased. He found stitched wound of 10 cm on left parietal bone of the deceased and found his parietal bone fractured. Another wound of 3 cm x 2 cm was found on left cheek of the deceased. He found blood clot in the brain membrane of the deceased. He testified that the death of the deceased took place due to shock and hemorrhage and he stated that such an injury can be caused by falling on a hard object, collision or assault; P.W.-7, Vijay Bahadur Mall, the scribe of F.I.R., was examined and he proved the F.I.R. lodged by the informant; that the Investigating Officer, Ram Krishna, was examined as P.W.-8, who proved the investigation record and charge sheet submitted before the court.

7. The statement of the accused-appellant was recorded under Section 313 Cr.P.C. who stated that he was not present at the scene of occurrence, when the incident took place and he has no knowledge about the same; that he admitted that he accompanied the deceased, Pramod, to the doctor and the injury was caused by the handle of the machine; that he denied the other allegations and stated that the statements of the witnesses against him are false; that he further stated that only to get compensation from the government false case has been lodged against him by the informant.

8. D.W.-1, Ram Bhajan, stated that on the date of incident the informant and others came with their wheat crop on the machine of the appellant and he informed them that appellant has gone to take his dinner; that despite his instructions to the contrary, Pramod, started the machine and the handle of the engine got struck in the machine; that as a result of the shock from the machine Pramod could not maintain his balance and fell down and suffered head injury; that on hearing the noise the appellant came and took Pramod to the doctor along with his family members; that in his cross-examination he admitted that he used to work as labour on daily wages

on the machine of the appellant but he denied any influence of the appellant on his statement.

9. The witnesses of fact, P.W.-1, P.W.-2 and P.W.-3, have proved the prosecution case to the hilt. This court has gone through their evidence and has found that there is nothing in their statements which may suggest that the witnesses have not deposed truly before the trial court. The findings recorded by the trial court regarding consideration of their evidence does not suffers from any error. The trial court has also considered the statements of the other witnesses correctly and has arrived at correct conclusion of the guilt of the appellant. It has found that the delay in the F.I.R. has been properly explained by the prosecution. Cogent findings have been recorded regarding the arguments raised on behalf of the appellant before the court below, like non-recovery of rod allegedly used for causing injury to the deceased, non-examination of the eye-witnesses shown in the FIR, absence of appellant from the scene of occurrence as stated by D.W.-1, non-production of original injury report, etc. The trial court has found that the prosecution has succeeded in proving its case against the appellant beyond all reasonable doubt and has convicted and sentenced the appellant.

10. Counsel for the appellant has submitted that the appellant has not been assigned any role of causing any injury to the deceased and he has been falsely implicated only on the allegation that he exhorted his son, Tara Lal Nishad, who caused single blow by sariya on the head of the deceased which resulted in his death. It has further been submitted that there was no common intention shared by the appellant in causing the death of the deceased, Pramod. In the first information report and in the statements of the witnesses, it has not been mentioned that the appellant ordered his son to cause death of the deceased. P.W.-1, has only stated that the appellant directed him to beat and we will see what happens. P.W.-2 and P.W.-3, have also not made any specific allegation that the appellant exhorted his son to cause the murder of the deceased. It appears that only abuses were hurled by the appellant and his son and on sudden provocation the son of the appellant, who was a juvenile, caused single blow on the head of the injured which proved fatal. He has submitted that the implication of the appellant for committing the offence under Section 304-1 I.P.C. with the aid of Section 34 I.P.C. is not warranted in this case.

11. The common intention should be inferred from the whole conduct of all the persons concerned and not merely from an individual act of an individual accused. A criminal act cannot be assumed to be in furtherance of the common intention. It is not to be inferred exclusively from the criminal act done. The criminal act done is only one of the factor to be taken into consideration, but it should not be taken as sole factor. The common intention ought to be determined from the facts and circumstances which existed before the commencement of the criminal act since the criminal act committed is in furtherance of such an intention.

12. The inference aforesaid may be drawn from the conduct of the accuseds for their participation in the commission of crime, circumstances and character of attack, the nature of injuries inflicted and the nature of weapons used.

13. If the assault is not sudden, common intention may be easily

presumed, unless there is something to show that there was no opportunity for the accused to have a prior concert. When several persons inflict several injuries, common intention can be safely presumed. However in a case where there is sudden provocation and a single blow by one of the accused is only found to have been caused on the deceased, only on the mere allegation that such a blow was caused to the deceased on the exhortation of the only other accused cannot be easily presumed. A mere direction from one accused to the other to carry out that direction by the other may be only instigation and not a case of a joint act falling under Section 34 I.P.C.

14. In the present case the allegation is that when the informant, P.W.-1, his father, P.W.-2 and the deceased, Pramod, went with their stalks of wheat on the machine of the appellant, the appellant directed them along with his son to first make payment for thrashing of the wheat stalks by their machine. The informant and his companion stated that they will make the payment and asked them to start the work which resulted in hurling of abuses by the appellant and his son and finally he exhorted his son to beat them and his son picked up a rod and caused injury to Pramod, which proved fatal. Counsel has stressed that there was no common intention to cause the injury or death of the deceased on behalf of the appellant along with his son. It was under the heat of the moment that he is alleged to have ordered his son to beat and he caused injury to the deceased, Pramod. He has submitted that there was no pre-planning or prior concert on the part of the appellant with his son to commit such an act which would result in the death of the deceased. Their common intention was not to permit the informant to put his stalks wheat in the machine of the appellant and his son without prior payment of the cost of the machine. They opposed the request of the informant and other to put their stalks wheat in the machine without payment of money and when they did not relent he is alleged to have abused them and ordered his son to beat them. The son complied his command and it resulted into the fatal blow on the head of the deceased.

15. He has submitted that it is a case of sudden provocation and the prosecution has failed to prove that the appellant exhorted his son to cause the injury to the deceased. Infact it was the individual act of his son who got annoyed by the conduct of the informant and others and when he caused the injury to Pramod, the appellant repented and went to the doctor along with the injured as admitted by him in his statement under Section 313 Cr.P.C. P.W.-1, has admitted that the appellant had accompanied them to clinic of Dr. Biswas, soon after the incident but he did not went with him when he took the deceased to Gorakhpur Medical College.

16. Learned A.G.A. has opposed the argument advanced on behalf of the counsel for the appellant. He has submitted that the appellant shared common intention with the co-accused, who was his son, in causing the death of the deceased. The argument that there was no element of Section 34 I.P.C. involved in the act of the appellant is without any substance. The initial hurling of abuses by the appellant and his son proved beyond doubt that both had common intention of causing injury to the deceased. The conviction and sentence of the appellant under Section 304-I/34 I.P.C. is fully justified and this appeal deserves to be dismissed.

17. After hearing the rival contentions, it appears that the common intention of causing death of the deceased is discernible from the material on record but the conviction and sentence of the appellant under Section 304-I/34 I.P.C. does not appears to be justified.

18. All the witnesses of fact have clearly stated before the court below that the appellant exhorted his son and he caused the fatal blow by sariya on the head of the deceased. The only circumstance pointed out by the counsel for the appellant is that the appellant accompanied the deceased to the doctor would not mitigate his role of exhorting his son to cause the alleged act. To convict the appellant constructively under Section 34 I.P.C. it is not necessary to find that he actually struck the fatal blow, or any blow, but there must be clear evidence of some action or conduct on his part to show that he shared in the common intention of causing the alleged crime. The leading feature of Section 34 I.P.C. is participation in action. It has to be established that participation was not merely in planning but also in doing their the individual offender must have participated in the offence. His participation may be slight, but it should be there. In the present case there was meeting of minds of the appellant with his son in causing the injury to the deceased. It resulted into the offence of culpable homicide not amounting to murder. The intention was only to cause beating and in execution of such an intention the appellant exhorted his son. The Section 34 I.P.C. requires participation, it may be active or passive. For conviction with the help of this Section, it is not necessary that every accused should himself commit the offence or take active part in it. Admittedly, the son of the appellant was a juvenile on the date of incident and had the appellant, his father not ordered him to cause the crime alleged, he would not have committed the same. Being boy of tender age he proceeded to cause the injury only after getting command from his father. Had the father not permitted him to exceed his limits he would have not cause the same. There was certainly active participation of the appellant in exhorting his son which resulted into the death of the deceased on account of blow made by his son.

19. However, this court finds that at the most the appellant could have been convicted and sentenced for committing offence under Section 304-II I.P.C. and not under Section 304-I I.P.C. read with Section 34 IPC. A full bench judgment of this High Court in ***State vs. Saidu Khan, AIR, 1951 Allahabad 21 (FB)*** has held that the common intention of Section 34 I.P.C. is not necessarily confined to an intention to commit the very crime with which the accused is charged. A number of persons may act in pursuance of common intention and can be shown to have a knowledge of that act either singly or jointly with others which is likely to cause death and every such person would be punishable under Section 304-II I.P.C. There is no conflict between the kind of knowledge contemplated by Section 304-II I.P.C. and the common intention contemplated by Section 34 I.P.C. If any one or more of them is proved to have the requisite kind of intention, e.g., the intention expressed in the earlier part of Section 299 I.P.C., he will be punishable either under Section 302 I.P.C. or under Section 304-I I.P.C., as the case may be. If, however, there is only guilty 'knowledge' as distinct from guilty 'intention', i.e.,

knowledge that the act which is being performed may result in death, he will be punishable under Part -II of Section 304 I.P.C. There is no difficulty in applying Section 34 I.P.C. so interpreted to a case which falls under Section 304-II I.P.C. The common intention in the one case and the knowledge that the act is likely to bring about death in the other, do not come into conflict at all. The result is that it is possible to convict an accused person of an offence under Section 304-II I.P.C. read with Section 34 I.P.C., provided the Court is of the opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death. The Apex Court had approved the full bench judgment of this court in ***Afrahim Sheikh vs. State of Bengal AIR 1964, SC 1263.***

20. Consequently, this court finds that the conviction and sentence of the appellant under Section 304-I/ 34 I.P.C. is not justified and the same is converted into Section 304-II/34 I.P.C.

21. The conviction of the appellant for committing the offence under Section 3(2)(V) of SC/ST Act is not justified since there is no evidence on record that the offence against the deceased was committed on the ground that he was a member of Scheduled Caste and Scheduled Tribe.

22. For appreciation of the commission of the offence under Section 3 (2) (5) SC/ST Act, it would be appropriate to have a glance over the judgment in the case of ***Dinesh @ Buddha v. State of Rajasthan, AIR 2006 SC 1267.*** The observation of the Hon'ble Apex Court are reproduced here below:-

"15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

16. In view of the finding that Section 3(2)(v) of the Atrocities Act is not applicable, the sentence provided in Section 376(2)(f), IPC does not per se become life sentence."

23. Hon'ble Supreme Court in ***Ramdas and Ors. v. State of Maharashtra, (2007) 2 SCC 170*** has held as under :-

"11. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the

basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside." .

24. The Appellant was aged about 60 years on 25.03.2008 when his statement was recorded under Section 313 Cr.P.C. Now, he must be aged about 71 years. The incident in dispute took place in the year 1995.

25. The Hon'ble Supreme Court has urged all the Courts time and again to exercise the power under Section 357 Cr.P.C. liberally which was intended to reassure the victim that he or she is not forgotten in the criminal justice system and to meet the ends of justice in a better way.

26. In ***Hari Kishan v. Sukhbir Singh, (1988) 4 SCC 551*** the Supreme Court urged all courts to exercise their power under Sec. 357 Cr.P.C. liberally to safeguard the interests of the victim. In this case, the victim and his relatives were attacked by seven persons in the field. The victim received severe head injuries which impaired his speech permanently. The accused were convicted by trial court under Sec.s 307, 323 and 325 of IPC read with Sec. 149 and sentenced to imprisonment for three to four years. On appeal, the High Court acquitted two accused and quashed the conviction of other five accused under Sec. 307/149 IPC, but maintained their conviction under Sec. 325/149 IPC. The accused persons were granted probation and each was directed to pay compensation of Rs.2500/- to victim. On appeal, the Supreme Court did not disturb the sentence of imprisonment but ordered the accused persons to jointly pay a total compensation of Rs.50,000/- to the victim under Sec. 357(3) Cr.P.C. recording following reasons :-

It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

27. In ***Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6 SCC 770,*** the Supreme Court went a step further and observed that the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case.

28. While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a

mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order Under Sec. 357 Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

29. In ***K.A. Abbas H.S.A. v. Sabu Joseph, (2010) 6 SCC 230*** the Apex Court made it clear that the whole purpose of the provision is to accommodate the interests of the victims in the criminal justice system. Sometimes the situation becomes such that no purpose is served by keeping a person behind bars. Instead directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice. Therefore, this grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment.

30. As regards sentencing policy a Bench of 3-Hon'ble Judges of the Apex Court in the case of ***Hazara Singh Versus Raj Kumar & Ors. (2013) 9 Supreme Court Cases 516*** has highlighted the 'sentencing policy' after taking note of its earlier decisions. Relevant para-13 of the report, reads as under:

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

31. Almost same principles on sentencing were propounded by the Apex Court in the case of ***State of M. P. vs Babulal & Ors (2013) 12 Supreme Court Cases 308,*** in the following terms :

"19. In view if the above, the law on the issue can be summarised to the effect that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the gravity and nature of the crime and manner in which the

offence is committed. The most relevant determinative factor of sentencing is proportionality between crime and punishment keeping in mind the social interest and consciousness of the society. It is a mockery of the criminal justice system to take a lenient view showing mis-placed sympathy to the accused on any consideration whatsoever including the delay in conclusion of criminal proceedings. The Punishment should not be so lenient that it shocks the conscious of the society being abhorrent to the basic principles of sentencing."

32. It would be useful to note down certain cases where the Court has considered the period of pendency of appeal and the date of incident in converting the custodial sentence into fine.

33. ***George Pon Paul Vs. Kanagalet and others (2010) 1 SCC (Cri) 1070-*** in this case, the appellant was found guilty for the offence punishable u/s 326 and 452 IPC. He was sentenced to confinement till rising of the Court and fine with default stipulation. The High Court on revision by the victims enhanced the sentence, however, the Apex Court did not interfere in the sentence awarded by the trial Court due to long passage of time.

34. ***Nasir Vs. State of U. P. (2011) 2 SCC (Cri) 136*** - The appellant was found guilty for the offence punishable u/s 399/402 IPC and 25 (1)(a) Arms Act and was sentenced to five years' imprisonment u/s 399/402. The occurrence had taken place about 29-years ago and the appellant remained in custody for more than six months, therefore, the sentence awarded to the appellant was reduced to the period already undergone by him.

17. State of U. P. Vs. Siyaram and another (2013) 2 SCC (Cri) 137 - in this case appellant Jiya Lal was found guilty for the offence punishable u/s 307/34 IPC, however considering the fact that the incident had taken place in the year 1988, appellant has now become an aged person and there is nothing on record to show that he is either habitual offender or previous convict, his sentence was reduced to already under gone but fine was increased to Rs. 10,000/-. In State appeal, the Apex Court did not approve the reduction of sentence, however refused to interfere because the prosecution had been initiated in the year 1988, but fine was enhanced to Rs. 25,000/-.

35. ***Labh Singh & others Vs. State of Haryana & Anr. (2013) 1 SCC (Cri) 1125*** - in this case the appellants were found guilty for the offences punishable u/s 326/324/323 r/w Section 34 IPC. The appellants were very old I. e. 82, 72 and 62 years respectively, incident was 27-years old and they had undergone part of the sentence, therefore, the Apex Court directed each appellant to pay Rs. One lakh compensation to the complainant/injured persons and their sentence was reduced to period already undergone by each of them.

36. ***Jagpal Singh & others Vs. State of U. P. 2004 (5) ACC 310*** - this Court vide judgment dated 26.6.2004 found that the incident had taken on 1.9.1977, the appellants were convicted on 23.4.1981 u/s 325/34 and 324 IPC and so each was sentenced to pay fine of Rs. 2,000/- u/s 324 IPC and Rs. 4,000/- u/s 325/34 IPC.

37. ***Raghuvera & Ors Vs. State of U. P. 1991 (28) ACC 498***, - the trial Court and the appellate Court have convicted the five revisionists for the offences punishable u/s 147 and 307/149 and were sentenced to

R.I. for one year u/s 147 and five years' R.I. u/s 307/149 IPC. In revision this court converted the conviction into sections 147, 323/149, 324/149 and 325/149 IPC and observed that all the offences were committed in the same transaction, so separate sentences need not be recorded. The revisionists were sentenced to period of imprisonment already under gone by each of them with fine of Rs. 500/- each. It was further observed that the incident took place about 8-years ago and injured can be compensated with fine. It was held that short term sentences now are not likely to serve any useful purpose.

38. ***Satsen Vs. State of U. P. 2014 (84) ACC 606***, - in this case the appellant was convicted for the offence punishable u/s 307 IPC, but considering the fact that the incident is 33 years' old, appeal came up for hearing after 32-years and the appellant is also ill, the sentence of three years' R.I. awarded by the trial Court was converted into fine of Rs. 30,000/-, out of which Rs. 25,000/- was to be paid to the injured, if he is alive or his legal heirs.

39. Having an overall consideration of the fact situation and also time lag in between, the court is of the view that sentence of imprisonment of revisionist for offence under section 304-II/34 I.P.C. is reduced to the period already undergone to meet the ends of justice. The fine of Rs. 2,00,000/- is directed to be paid to the legal heirs of the deceased, Pramod Kumar, as compensation. The appellant, Lutawan, is directed to deposit Rs. 2,00,000 (Two lakhs) before the trial court within two months and on receipt of the amount same shall be released in favour of the legal heirs of the deceased, Pramod. Any amount deposited towards fine by the appellant shall be adjusted. This amount shall be paid to the mother of the deceased or if she is not alive to her legal heirs. In case of failure of deposit of the amount by the appellant he shall be taken into custody forthwith and required to serve out the remaining sentence as per the order of the trial court except for offence under Section 3(2)(V) of SC/ST Act.

40. The judgment and order of the trial court is set aside. The appellant is on bail his bail bond and sureties are discharged.

41. The office is directed to send back the record of the court below along with copy of this judgment and order for compliance.

42. This criminal appeal is ***partly allowed.***

(2020)1ILR A174

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 3136 of 1983

Dhurandher Singh ...Appellant(In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri T. Rathore, Sri Kamal Kumar, Sri Namit Srivastava, Sri Rakesh Kumar Singh

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

A. Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Section 302 & Juvenile Justice (Care and Protection of Children) Act, 2015 -

Section 2(35),18, 21 - Claim to be juvenile - upon enquiry of juvenile justice board it was found that as per high school certificate, appellant was 17 years 2 months and 14 days at the time of incident- sentence imposed is modified to the period already undergone. (Para 6 to 16)

No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any offence, either under the provisions of this Act or under the provisions of the Indian Penal Code (45 of 1860) or any other law for the time being in force. (Para 11)

Criminal Appeal partly allowed. (E-6)

List of cases cited: -

1. Mahesh and Ors. Vs. St. of Raj. & ors, reported in 2019(3) Crimes 60 (SC)

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

1. Heard learned counsel for the appellant and learned A.G.A., for the State.

2. This appeal has been filed against the judgment and order dated 26.11.1983 passed by Sessions Judge, Ballia in Sessions Trial No. 96 of 1983, whereby the appellant Dhurandhar Singh has been convicted for offence punishable under Section 302 IPC and has been sentenced to undergo imprisonment for life and was further convicted under Section 25 Arms Act and sentenced to one year R.I. Both the sentences were directed to run concurrently.

3. At the outset, learned counsel for appellant submitted that an application was filed on 22.05.16 to decide the appeal of the appellant as a juvenile in conflict with law. The said application was supported by an affidavit in which class - V and VII school leaving certificate of the appellant issued by the Headmaster of the Primary Vidalaya, Ibrahimabad, Ballia, as well as High School Examination 1986 Certificate issued by the Board of High School and Intermediate Education, U.P. studied from Sudisthi Baba Inter College, Ballia, was enclosed disclosing the date of birth of the appellant as 03.01.66. It was contended that from the above material it is ascertainable that on the date of commission of the crime, that is 17.03.83, the appellant was below 18 years in age and therefore was entitled to the benefit of the provisions of Juvenile.

4. By an order dated 28.07.16, the learned AGA was granted three weeks time to obtain instructions and to file counter affidavit in response to the application filed by the appellant.

5. Pursuant to the above order, a counter affidavit was filed on behalf of the State. Thereafter, by order dated 22.08.16, the Juvenile Justice Board, Ballia was directed to consider and decide the claim of juvenility set up by the appellant, after affording opportunity of hearing to both the parties, in accordance with Rules, preferably within a period of two months from the date of receipt of record.

6. A report of the Juvenile Justice Board, Ballia dated 6.11.16 is placed before us. From a perusal of record it reveals that accused-appellant was aged about 17 years 02 months and 14 days on the date of incident i.e.17.03.83. The Juvenile Justice Board, while conducting inquiry on the claim of juvenility, had issued notice to the informant. However, neither the informant appeared nor he submitted any objection with regard to the age of the appellant. In the inquiry so

conducted, the statement of Srikrishna Ram *(paricharak)* and representative of the Principal of Sri Sudisthi Baba Inter College, Ballia was recorded. He had produced the scholar register and cross list of the institution. In the cross list, roll number was entered as 1443545 and the date of birth is mentioned as 03.01.66. The witness was also cross examined. The statement of Santosh Kumar (Assistant Teacher) of Primary Vidalaya, Ibrahimabad, Balia was also recorded and he was also cross examined.

7. The inquiry by the Juvenile Justice Board had been conducted as per Rules. Opportunity was given to complainant as well as accused-appellant to lead evidence and thereafter on the basis of date of birth recorded in educational certificate, it had come to a definite conclusion that the appellant was 17 years 2 months and 14 days old at the time of the incident.

8. Further, no appeal/revision has been filed against the order dated 16.11.2016 passed by Juvenile Justice Board declaring accused-appellant Juvenile, and that no objection on behalf of State had also been filed challenging the report dated 16.11.2016 passed by Juvenile Justice Board. Thus, we accept the report and hold that the appellant was a juvenile as defined by Section 2(35) of the Juvenile Justice (Care and Protection of Children) Act, 2015, on the date of the incident.

9. Now, since the appellant was a Juvenile in conflict with law, on the date of incident, and presently he has crossed 63 years age, and further no other ground of appeal having been raised before us, therefore, at this stage the Court has to take into consideration provisions of Section 18 and 21 of Juvenile Justice (Care and Protection of Children) Act, 2015 and to pass appropriate orders.

10. For ready reference section 18 of Juvenile Justice (Care and Protection of Children) Act, 2015 is extracted below.

"18. Orders regarding child found to be in conflict with law.-

(1). Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,-

a. allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

b. direct the child to participate in group counselling and similar activities;

c. order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

d. order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

e. direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or

fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

f. direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

g. direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

2. If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to-

i. attend school; or

ii. attend a vocational training centre; or

iii. attend a therapeutic centre; or

iv. prohibit the child from visiting, frequenting or appearing at a specified place; or

v. undergo a de-addiction programme.

3. Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."

11. It is also relevant to quote section 21 of the Act.

"21. Order that may be passed against a child in conflict with law:

No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any offence, either under the provisions of this Act or under the provisions of the Indian Penal Code (45 of 1860) or any other law for the time being in force."

12. From the perusal of the aforesaid provisions it is noticed that a juvenile in conflict with law cannot be sentenced to undergo life imprisonment, and further the maximum period for which a juvenile may be sent to a special home is only three years.

13. Further, the accused appellant because of his age, as on today cannot be sent to special home. However, as is evident from record that the appellant has already undergone about 9 months of imprisonment as un under trial and partly as convict.

14. At this juncture, it would be appropriate to look into the ratio laid down by Apex Court while dealing with the similar situation like in the case in hand.

15. The Hon'ble Supreme Court in ***Mahesh and others vs. State of Rajasthan and others,*** reported in 2019(3) Crimes 60 (SC) has held as follows:

"5. The position in law in this regard is somewhat unsettled as has been noticed and dealt with by this Court in Jitendra Singh alias Babboo Singh and another versus State of Uttar Pradesh1 wherein in paragraphs 24 to 27 four categories of cases have been culled out where apparently different approaches had been adopted by this Court. The net result is summed up in paragraph 28 of the aforesaid report which explains the details of the categorization made in the earlier paragraphs of the said report. Paragraph 28 of the said report, therefore, would require a specific notice and is reproduced below:

"28. The sum and substance of the above discussion is that in one set of cases this Court has found the juvenile guilty of the crime alleged to have been committed by him but he has gone virtually unpunished since this Court quashed the sentence awarded to him. In another set of cases, this Court has taken the view, on the facts of the case that the juvenile is adequately punished for the offence committed by him by serving out some period in detention. In the third set of cases, this Court has remitted the entire case for consideration by the jurisdictional Juvenile Justice Board, both on the innocence or guilt of the juvenile as well as the sentence to be awarded if the juvenile is found guilty. In the fourth set of cases, this Court has examined the case on merits and after having found the juvenile guilty of the offence, remitted the matter to the jurisdictional Juvenile Justice Board on the award of sentence."

6. The validity of the conviction in respect of the incident which occurred almost two decades back, in our considered view, ought to be decided in these appeals and the entire of the proceedings including the punishment/sentence awarded should not be interfered with on the mere ground that the accused appellants were juveniles on the date of commission of the alleged crime. Judicial approaches must always be realistic and have some relation to the ground realities. We, therefore, adopt one of the possible approaches that has been earlier adopted by this Court in the four categories of cases mentioned above to examine the correctness of the conviction of the accused appellants under the provisions of the IPC, as noticed above.

7. In this regard, having perused the materials on record we find no ground whatsoever to take a view different from what has been recorded by the learned trial Court and affirmed by the High Court. The conviction of the accused appellants under Sections 323, 324, 325, 427, 455 read with Section 149 IPC accordingly shall stand affirmed.

8. This will bring us to a consideration of the sentence to be awarded. Here again,in the four categories of cases that have been noticed in Jitendra Singh (supra) and in several subsequent decisions of this Court in Abdul Razzaq vs. State of Uttar Pradesh, Mohd. Feroz Khan alias Feroz vs. State of Andhra Pradesh, Mumtaz alias Muntyaz vs. State of Uttar Pradesh and Mahendra Singh vs. State of Rajasthan different approaches have been adopted. In some cases, the question of punishment has been left to be determined by the Juvenile Justice Board in view of the provisions of Section 20 of the Act of 2000. In other cases, the issue of punishment has been dealt with by the Court having regard to the fact that on the date when the Court had considered the issue the juvenile(s) have advanced in age.

9. The present is a case where the accused appellants though juveniles on

the date of commission of the alleged crime are, as on today, middle aged persons. The accused appellant - Mahesh in Criminal Appeal arising out of Special Leave Petition (Criminal) No.2934 of 2015 had undergone the custody for a period of nearly one year whereas the accused appellant - Arjun in Criminal Appeal arising out of Special Leave Petition (Criminal) No.5370 of 2015 had suffered custody for about eight (08) months. The maximum sentence, as already noted, is three years. Having regard to the long efflux of time we are of the view that it will not be necessary, in the facts of the present cases, to cause a remand of the matter to the Juvenile Justice Board for a decision on the quantum of sentence for the reason even if such a remand is made and the Juvenile Justice Board comes to a decision that in addition to the period of custody suffered by the accused appellants they need to suffer a further period of custody, such custody can only be in a remand home or a protection home to which places the accused appellants, because of their age as on today, cannot be sent.

10. On the contrary, having regard to the period of custody suffered; the age of the accused appellants as on date; the efflux of time since the date of occurrence and all other relevant facts and circumstances we are of the view that while maintaining the conviction of the accused appellants the sentence imposed should be modified to one of the period undergone. We order accordingly."

16. In light of the above legal position and having regard to the facts and circumstances of the case, period of imprisonment, the age of the accused appellant as on date, the efflux of time since the date of occurrence, we are of the view that the while maintaining the conviction of the accused appellant the sentence imposed is modified to the period already undergone.

18. Accordingly, the appeal is allowed in part. The accused appellant is availing the benefit of bail by furnishing adequate sureties and bonds, the same stands discharged.

19. Lower Court record along with a copy of this judgement be sent back immediately to District Court concerned for compliance and further necessary action.

(2020)1ILR A179

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE HARSH KUMAR, J.
THE HON'BLE UMESH KUMAR, J.

Criminal Appeal No. 4855 of 2015

Dharmendra Kumar ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajeev Kumar Saxena, Sri Rajesh Kumar Singh, A.C., Sri Satya Dheer Singh Jadaun

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

Criminal Law - Indian Penal Code - Sections 498A, 304-B & 302 -Dowry Protection,1961 - Section 4 - Appeal against conviction.

Section 106 of Evidence Act discussed.

Section 106 of the Evidence Act and Burden of proving facts especially within knowledge of such person, – In a case of unnatural death of wife of accused in a room occupied only by both of them and in absence of evidence of anybody else entering the room and facts

relevant to the cause of death being only known to accused who was not explaining them. (para 24)

Accused-appellant has failed to prove facts especially within his knowledge and discharge his burden, rather tried to deny homicidal death of his wife by pretending it to be suicidal death and setting up an alibi, unsuccessful.(para 37)

The prosecution has successfully proved its case beyond reasonable doubt. The attendant circumstances lead to irresistible conclusion of guilt of accused. (para 37)

Appeal is rejected. (E-2)

List of cases cited: -

1. Prithipal Singh Vs. St. of Punj. (2012) 1 SCC 10(L)

2. Joshinder Yadav Vs. St. of Bihar (2014) 4 SCC 42

3. Trimukh Maroti Kirkan Vs. St. of Mah. (2006) 10 SCC 681

4. Ganeshlal Vs. St. of Mah. (1992) 3 SCC 106

5. Dnyaneshwar Vs. St. of Mah. (2007) 10 SCC 445

6. St. of Raj. Vs. Thakur Singh (2014) 12 SCC 211

7. Lal Singh Vs. St. of Guj. (2001) 3 SCC 221

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

1. The instant Criminal Appeal has been filed against judgment and order of conviction passed by Sessions Judge, Auraiya in Sessions Trial No.52 of 2015 (State Vs. Dharmendra Kumar), Case Crime No.16 of 2015 under Sections 498A, 304-B & 302 I.P.C. and Section 4 D.P. Act P.S. Phaphund District Auraiya whereby the Sessions Judge acquitted the appellant of the charges under Sections 498-A, 304-B I.P.C. and Section 4 D.P. Act and convicted him for the offence under Section 302 I.P.C. and sentenced with life imprisonment and fine of Rs.20,000/- and in case of default in payment of fine with rigorous imprisonment for an additional period of one year.

2. The brief facts relating to the case are that Vikram Singh lodged F.I.R. at P.S. Phaphund on 9.1.2015 at 8.3.0 a.m. against appellant and 5 members of his family with the averment, that "he had solemnized marriage of his sister Laxmi hereinafter referred as "deceased" with appellant Dharmendra Kumar on 21.4.2008 with all dowry according to his capacity but thereafter she was being harassed and treated with cruelty for non-fulfillment of demand of a motorcycle & gold chain and on 8.1.2015 her husband Dharmendra Kumar, *Sasur* Ram Dayal, two *Jeths* Sunil and Anil, *Sas* Shanti Devi and Nanad Rani harassed her and after committing *marpeet* at about 4.00 p.m. strangulated her to death". On the F.I.R. Case Crime No.16 of 2015 was registered at police station Phaphund and during investigation, after preparing inquest report, getting the postmortem of body of deceased conducted, preparing site plan and collecting evidence, the Investigating Officer submitted charge sheet only against appellant Dharmendra Kumar, husband of deceased. The C.J.M. after taking cognizance of the offence committed the case to sessions and the Sessions Judge on 11.4.2015 framed charges against appellant under Section 498-A, 304-B I.P.C. and Section 4 D.P. Act and on 14.5.2015 framed alternate charge against him on 14.5.2015 under Section 302 I.P.C. for causing death of his wife Smt. Laxmi by strangulation. The

accused appellant denied the charges and demanded trial.

3. The prosecution in order to prove its case produced Vikram Singh, first informant the brother of deceased as P.W.-1, Santosh Kumar relative of deceased as P.W.-2, Sarvesh, brother of deceased as P.W.-3, Shiv Kumar *Chacha* of accused as P.W.-4 and Panchilal neighbour of deceased as P.W.-5, all of whom did not support prosecution case and were declared hostile. After completion of prosecution evidence Dr. Sushil Yadav who conducted postmortem examination of body of deceased, was summoned and examined as C.W.-1. Thereafter statement of accused was recorded under Section 313 Cr.P.C. wherein he stated that "deceased, his wife Laxmi was suffering from fits of epilepsy due to which she was mentally disturbed and on the day of incident she committed suicide in his absence". The accused appellant produced Harish Chand and Subhash Chand as D.W.-1 and D.W.-2 in his defence. The trial court after hearing parties counsel, perusal of record and analization of evidence on record passed impugned judgment and order of conviction, hence this appeal.

4. We have heard Shri S.D.Singh Jadaun, Advocate for appellant and Sri Anil Kumar Kushwaha, learned A.G.A. for State and perused the record, paper book as well as trial court record summoned in appeal.

5. Learned counsel for appellant contends that appellant has been falsely implicated; that appellant had no motive to cause death of his wife; that the allegations of demand of a motorcycle and gold chain as dowry from deceased as well as her harassment for non-fulfillment of above demand are absolutely false and incorrect; that prosecution utterly failed to prove above charges of demand of dowry or harassment of deceased for non-fulfillment of demand of dowry as all the prosecution witnesses have denied from any such demand or harassment; that in absence of any evidence regarding alleged demand of dowry or harassment there may be no motive to appellant for causing dowry death of his wife; that deceased, the wife of appellant was suffering from fits of epilepsy since before marriage (as has also been stated by prosecution witnesses) due to which she was mentally disturbed and committed suicide in absence of appellant; that at the time of incident appellant was not at home and he may not be considered to be the author of strangulation resulting in her death; that appellant is an innocent person and has been acquitted of the charges under Section 498A, 304B I.P.C. and Section 4 of Dowry Prohibition Act and is also entitled for acquittal from the charges of offence under Section 302 I.P.C; that the impugned judgment and order of conviction is liable to be set aside and appellant is liable to be acquitted.

6. Per contra, learned A.G.A. supported the impugned judgment and order of conviction and contended that it is fully proved from the evidence on record that appellant is the main culprit; that it is absolutely wrong to say that deceased was suffering from fits of epilepsy since before marriage or after marriage or was living under mental tension due to alleged ailment or committed suicide after 6 years and 9 months of marriage in absence of appellant; that there is no evidence on record to suggest that deceased was ever treated for alleged ailment of fits of epilepsy in her *maika* or *Sasural,* before or

after marriage; that the prosecution witnesses of fact including the first informant were won over by accused-appellant and consequently resiled from the allegations of demand of dowry and harassment of deceased for non-fulfillment of demand of dowry due to which trial court very rightly acquitted the appellant of the charges of offences under Section 498-A, 304-B I.P.C. and Section 4 D.P. Act; that it is clear from the evidence on record that prosecution witnesses having been won over by appellant did not dare to depose truth before Court and went saying falsely that deceased was suffering from fits of epilepsy since before marriage and committed suicide due to tension on account of alleged ailment; that postmortem report of deceased duly proved by C.W.-1 clearly states that there was continuous ligature mark of 29 cm x 2 cm over neck of deceased with an abrasion over her chin and death of Laxmi deceased did take place due to asphyxia as a result of strangulation; that it is absolutely wrong to say that she committed suicide rather it is a clear case of homicide; that the appellant has failed to prove facts specially within his knowledge, that the appellant also failed or to take or prove any specific plea of alibi; that it is also not the case of appellant that some unknown persons or miscreants entered in his house in his absence and during loot, strangulated his wife; that learned trial court has categorically discussed entire evidence on record; that appellant has failed to prove the facts especially within his knowledge as death of his wife Laxmi did take place within his dwelling house and he has failed to show that he was not at home; that there are material contradictions in the statement of defence witnesses; that from the evidence on record the charges under Section 302 I.P.C. stands fully proved against appellant beyond any shadow of reasonable doubt; that the trial court has rightly convicted appellant for the offence under Section 302 I.P.C; that appeal has been filed with wrong and baseless allegations and is liable to be dismissed.

7. Upon hearing parties counsel and perusal of lower court record as well as paper book and before proceeding further, we find that in view of arguments advanced by both side, following points for determination arises in this appeal :-

(1) Whether despite turning hostile of prosecution witnesses of fact and acquitting appellant from the charges of offences under Section 498A & 304B I.P.C. and Section 4 D.P. Act, trial Court was justified in convicting him for offence under Section 302 I.P.C.?

(2) Whether prosecution succeeded in establishing charges of offence under Section 302 I.P.C. against appellant ?

(3) Whether provisions of Section 106 of Indian Evidence Act, were attracted in this case and appellant was required to prove facts especially within his knowledge, but failed to discharge his burden?

8. It will not be unnecessary to mention that it is settled principle of law that in criminal cases until by any express provision of law with regard to presumption of guilt of an offence, such as under Section 113 B of Evidence Act for the offence under Section 304B I.P.C., there is presumption of innocence of accused, unless his guilt is proved beyond reasonable doubts. In cases based on circumstantial evidence it is required that circumstances from which inference of guilt of accused is sought to be drawn

must be cogently and firmly established, unerringly pointing towards guilt of accused and chain of circumstances should be so complete that there can be no escape from the conclusion that within all human probability crime was committed by accused and none else and circumstances must also be incapable of explanation to any other hypothesis than that of guilt of accused and such evidence should not only be consistent with the guilt of accused but should also be inconsistent with his innocence.

9. Undisputedly, the instant case is not based on ocular/ direct evidence. According to F.I.R., lodged under Sections 498-A, 304-B, I.P.C. and 3/4 D.P. Act deceased Smt. Laxmi, the sister of first informant was married to appellant in April, 2008 and her dowry death was committed within 7 years of marriage on 08.01.2015 in her matrimonial house by strangulation. During trial, all prosecution witnesses of fact turned hostile, so charges under Section 498-A I.P.C. were found to be not proved and consequently presumption of dowry death under Section 113-B of Indian Evidence Act was not available to prosecution for the presumptive guilt of accused under Section 304-B I.P.C. In absence of any such presumption the burden to prove charges under Section 302 I.P.C. against appellant was on prosecution. Since the case is not based on ocular evidence and there is no eye witness account of the incident of murder of Smt. Laxmi, the prosecution case is to be treated as one based on circumstantial evidence.

10. Now it is to be seen as to whether in view of the evidence on record, prosecution has succeeded in proving the chain of circumstances completely, leaving no possibility of any other hypothesis except guilt of appellant.

11. Though the burden of proving the guilt of an accused always lies on prosecution, but there may be certain facts and circumstances pertaining to a crime that can be especially known only to the accused, or are virtually impossible for the prosecution to prove. The law does not enjoin a duty on prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on prosecution is to lead such evidence which is capable of being lead, having regard to the facts and circumstances of each case. Certain facts and circumstances which are especially within knowledge of accused, are required to be explained by him and if he does not do so, then it may be a strong circumstance for drawing inference of his guilt.

12. The first informant P.W.-1 has not supported the allegations of dowry death and has turned hostile but in his examination in chief he has proved F.I.R. Ext. A-1 having been lodged by him. It is settled principle of law that if the F.I.R. registered under Section 154 Cr.P.C. is proved, it will not be proper for the Court to ignore its evidentiary value. In the case of Bafle vs. State of Chattisgarh AIR 2012 SC 2621 the Apex Court has held that

"merely for the reason that first informant turned hostile, it cannot be said that F.I.R. would lose all of its relevancy and cannot be looked into."

13. From postmortem report Ex. A-9 of deceased duly proved by statement of C.W.-1 Dr. Sushil Yadav, it is very much clear that cause of death of Smt. Laxmi

was asphyxia as a result of strangulation which is a definite case of homicidal death. A death by strangulation may only be homicidal death and may not be suicidal death under any imagination. The postmortem report of deceased states that there was ligature mark 29 cms x 2 cms below thyroid all around the neck of deceased which was horizontal and continuous while her thyroid bone was fractured and trakia was congested.

14. As per medical jurisprudence fracture of thyroid bone is very strong indication of violent asphyxia death by compression of neck by use of external force.

15. In lengthy cross examination with autopsy surgeon, Dr. Sushil Yadav, nothing material has come out to disbelieve prosecution case and even no suggestion was put to him about death of deceased being suicidal as a result of hanging, rather to the contrary it was suggested that there was no ligature mark at all around her neck.

16. It is clearly and fully established from above discussed evidence on record that death of Smt. Laxmi was caused due to asphyxia as a result of ante mortem strangulation, undisputedly inside dwelling house of appellant. It is also proved from the evidence on record that death of Smt.Laxmi is a case of homicidal death and may not be a case of suicidal death (as claimed by hostile prosecution witnesses of fact as well as accused and his defence witnesses). The appellant has not denied to be residing alone with deceased in the same house where she died and his defence witnesses have stated on oath that only appellant and deceased were living together in the house. Hence it is also fully proved from the evidence on record that deceased was living with accused appellant in the same house (in which homicidal death of his wife Smt. Laxmi did take place as a result of asphyxia due to strangulation), since before the incident. In view of circumstantial evidence on record, appellant must be having especial knowledge of the facts relating to incident and manner in which and by whom she was strangulated to death, while circumstances indicates that her death could have been caused only by appellant and none other than appellant. In these circumstances, the provisions of Section 106 of Evidence Act are attracted in instant case.

17. Section 106 of Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving such fact is upon him. When an offence like murder is committed inside a room of dwelling house, no doubt , the initial burden to establish charges would be on prosecution, but in such type of cases, the nature and amount of evidence to be led to establish the charges, can not be expected of same degree as in any other case of circumstantial evidence. In instant case since the prosecution has succeeded in proving that death **of Smt.Laxmi** was homicidal one under unnatural and suspicious circumstances inside the dwelling house of accused, it will be deemed that prosecution has discharged its burden which now shifts on inmates of house to give a cogent explanation as to how her homicidal death did take place.

18. Before proceeding further the law relating to Section 106 of Indian Evidence Act, in cases of death within dwelling house, as laid down in number of

judgments by Apex Court is being reproduced as under.

19. In the case of ***(2012) 1 SCC 10(L) - Prithipal Singh Vs. State of Punjab*** the Apex Court held that

"Section 106 is designed to meet certain exceptional cases in which it would be impossible for prosecution to establish certain facts which are particularly within knowledge of accused. It does not relieve prosecution of its burden to prove guilt of accused beyond reasonable doubt and applies to cases where prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding existence of certain other facts, unless accused by virtue of his special knowledge regarding such facts offer any explanation which might drive court to draw a different inference."

20. In the case of ***(2014) 4 SCC 42 - Joshinder Yadav Vs. State of Bihar*** where by circumstantial evidence murder was established by poisoning, even though viscera report from F.S.L. was not brought on record - but considering corroborative evidence of father and brother of deceased to be credible, the 3 Judges Bench of Apex Court confirming conviction of husband and 5 of his relatives under Section 302/149, 498-A and 201 I.P.C. held that

"the attendant circumstances lead to irresistible conclusion of guilt of accused - How the body of deceased was found in the river, was within the special and personal knowledge of husband and his relatives - burden under Section 106 Evidence Act not discharged by accused - rather false explanation given. - Adverse inference was warranted."

21. In the case of **(2006) 10 SCC 681 Trimukh Maroti Kirkan vs. State of Maharashtra** Apex Court has held that,

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together ***or the offence takes place in the dwelling home where the husband also normally resided,*** *it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is strong circumstance which indicates that he is responsible for commission of the crime."*

22. In the case of **(1992) 3 SCC 106 Ganeshlal vs. State of Maharashtra** where the husband was prosecuted for murder of his wife inside his house, the Apex Court held that,

"since death had occurred in his custody, he was under obligation to give an explanation for the cause of death in his statement under Section 313 Cr.P.C. A denial of prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of accused, but consistent with the hypothesis that the appellant was prime accused in the commission of murder of his wife."

23. In the case of **(2007) 10 SCC 445 Dnyaneshwar vs. State of Maharashtra** the Apex Court held that

"since deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing

the offence, it was for the husband to explain the grounds for the unnatural death of his wife."

24. In the case of **(2014) 12 SCC 211 State of Rajasthan vs. Thakur Singh** considering scope of Section 106 of the Evidence Act and Burden of proving facts especially within knowledge of such person, - In a case of unnatural death of wife of accused in a room occupied only by both of them and in absence of evidence of anybody else entering the room and facts relevant to the cause of death being only known to accused who was not explaining them, - the Apex Court held that

"Principles under Section 106 are clearly applicable - to the case with strong presumption that accused murdered his wife - holding that High Court erred in not applying Section 106, reversing conviction of accused and allowing appeal - at restored the Conviction under Section 302 I.P.C. passed by trial court."

25. The mere fact that all the prosecution witnesses turned hostile clearly gives room for suspicion and creates an impression that there is much more to the case than meets the eyes. Even the complainant Vikram Singh brother of deceased, who squarely blamed Dharmendra in F.I.R. for the murder of his wife, not only turned hostile denying demand of dowry and harassment but also falsely charged his sister Laxmi deceased for committing suicide due to long ailment of epilepsy since before marriage.

26. It is pertinent to mention that the prosecution witnesses of fact have not only resiled from the allegations of demand of dowry and cruelty for non-fulfillment of such demand as well as of dowry death, rather by way of improvement falsely stated that deceased was suffering from epilepsy since before marriage and due to mental tension committed suicide. It indicates that prosecution witnesses have made an attempt to show that (i) deceased was suffering from long ailment of fits of epilepsy and (ii) she committed suicide.

27. The accused-appellant in his statement under Section 313 Cr.P.C. in answer to question no.7 has stated that ''मेरी पत्नी लक्ष्मी को मिर्गी के दौरा आते थे इसलिए वो मानसिक रूप से परेशान रहती थी, घटना वाले दिन मैं घर पे मौजूद नहीं था। पत्नी ने **स्वयं आत्म हत्या** कर ली।''

28. The contention of prosecution witnesses and explanation of appellant about suicidal death of Smt. Laxmi due to tension on account of long ailment of epilepsy is absolutely wrong and incorrect and appears to have been falsely developed in furtherance of winning over of prosecution witnesses by accused-appellant, because **Istly,** there is nothing on record in the shape of any medical evidence to show that at any point of time deceased was suffering from or was treated for epilepsy before or after marriage and **IIndly,** it is fully proved from evidence on record that it is a case of homicidal death and death of Smt. Laxmi may not be considered to be suicidal death of any imagination. Hence the improvised version of hostile witnesses is found to be false and concocted and may not be relied.

29. In order to support above version as well as to discharge his burden under Section 106 of Evidence Act, accused-appellant has also produced two witnesses Harish Chandra and Subhash Chandra as D.W.-1 and D.W.-2 who are neighbours of

appellant and have stated on oath that appellant Dharmendra was living together with his wife Smt. Laxmi while other brothers were living separately, and at about 5.00 p.m. on 08.01.2015 when they were working in fields and appellant Dharmendra was grazing cattle in nearby fields, villagers informed about suicide by his wife but they do not know about manner or reason of suicide as to whether she committed suicide by immolating herself or by consuming poison or by hanging herself. It is also noteworthy that neither the name of such villager, who allegedly informed death of wife of appellant to appellant, D.W.-1 and D.W.-2 in fields has been disclosed, nor such villager has been produced to corroborate.

30. It is pertinent to mention that there is nothing on record to show that deceased was having any cattle. Moreover he could not dare to say that he was grazing his cattle in fields with or near D.W.-1 and D.W.-2 and got information from villagers about suicidal death of his wife (as has been contended by his partisan witnesses D.W.-1 & D.W.-2). The statements of D.W.-1 and D.W.-2 are not in consonance with contention of appellant and are also contradictory to each other as D.W.-1 says that appellant was walking at a distance from him in his field, while D.W.-2 says that he was grazing cattle in another field.

31. It is not the case of accused appellant that some miscreants had entered his house and strangulated his wife to death or he had informed the police about unnatural death of his wife by someone else.

32. The accused appellant was the only person residing in the same house with deceased and was having especial knowledge of facts relating to and manner of homicidal death of his wife taken place inside his house and was required to prove such especial facts within his knowledge. The bald statement of accused appellant that he was not at home at the time of incident is not sufficient to prove his plea of alibi as he could not dare to state that (i) where and when he came back home (ii) where and from whom he got knowledge of death of his wife (iii) how he came to know that his wife has committed suicide (iv) upon finding his wife fully unconscious whether he contacted any doctor to confirm as if she is alive and if not, how he was sure that she has died (v) whether he informed family members of mayaka of deceased (vi) whether he informed police of unnatural death of his wife.

33. In absence of any such explanation and not proving of the facts especially within the knowledge of appellant, (who alone was living with deceased), there can be no reason to disbelieve the prosecution case and hold appellant to be an innocent.

34. In the instant case in view of evidence on record, under any imagination no inference can be drawn that at the time of homicidal death of deceased, her husband, the accused appellant would have been roaming outside, and someone else would have entered and strangulated his wife to death, inside his house, for absolutely no reason. It is not the case of accused appellant that some miscreants entered his house and committed loot during which upon protest his wife was strangulated by them. Even in such a case he would have reported the matter to police in ordinary course and his conduct

in not reporting the matter to police and opting to abscond, speaks much that how he managed to win over the prosecution witnesses and pressurized them to tell a lie regarding alleged suicidal death of his wife.

35. As far as benefit of doubt is concerned the prosecution has proved its case beyond all reasonable doubts. In ordinary prudence when husband and wife were living together there is presumption of accused being inside home, unless proved otherwise and no inference of his being outside home may be drawn in order to give him unreasonable benefit of doubt.

36. In the case of Lal Singh Vs. State of Gujarat (2001) 3 SCC 221 the Apex Court held that

"concept of benefit of doubt is vague. The doubt must be reasonable one which occurs to a prudent men and not to a weak or duly vacillating or confused mind. In spite of presumption of innocence, it is to be judged on the basis of a reasonable prudent men. Smelling doubts for the sake of giving benefit of doubt is not the law of land."

37. In view of the discussions made above the points mentioned in para 7 above, are required to be answered as under :-

(1) The prosecution has proved chain of circumstances from the evidence on record which is so complete as incapable of explanation of any other hypothesis than the guilt of accused and is not only consistent with the guilt of accused but is also inconsistent with his innocence. The prosecution has successfully proved its case beyond reasonable doubt. The attendant circumstances lead to irresistible conclusion of guilt of accused.

(2) Provisions of Section 106 of Indian Evidence Act are attracted to the facts and circumstances of instant case. Accused-appellant has failed to prove facts especially within his knowledge and discharge his burden, rather tried to deny homicidal death of his wife by pretending it to be suicidal death and setting up an alibi, unsuccessfully.

(3) The trial Court rightly analyzed the evidence on record and was not incorrect in convicting appellant for the change of offence under Section 302 I.P.C.

38. In view of the discussions made above, we are of the considered view that there is no illegality, incorrectness or perversity in the impugned judgment and order of conviction. The learned counsel for appellant has failed to prove any incorrectness, perversity or illegality in impugned conviction order and there is no sufficient ground for interfering with or setting it aside the impugned judgment and order of conviction of appellant as well as for reversing it to an order of his acquittal under Section 302 I.P.C.

39. The appeal is devoid of merits and is liable to be dismissed.

40. The appeal is dismissed. The impugned judgment and order of conviction is affirmed.

41. Office is directed to send back the lower court record alongwith copy of judgment for necessary action, if any.

(2020)1ILR A189

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 5969 of 2011

Shyam Bihari & Ors.
...Appellants(On Interim Bail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri I.B. Yadav

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

Criminal Law - Indian Penal Code - Sections 323/34, 504 - Appeal against conviction.

In present case the place, time and date of occurrence was undisputed. Injured and their injuries were not disputed. The cause and motive of this quarrel was undisputed. Construction of chak road on the place of occurrence. (para8)

The pelting of stones from both sides has been admitted by this witness, but it has been said that it was used in right of self defence for saving themselves. (para 8)

Medical evidence was against oral testimony, which was with all inconsistencies and contradictions. No specific motive was assigned for commission of alleged offence. Impugned judgment was based on surmises and conjectures. (para 2)

Accused persons were not aggressor. Rather, they were victim of that aggression, wherein they had exercised their right of self defence by pelting stones and bricks. Under above facts, who was aggressor and who suffered that aggression is to be seen and in present case aggression was by present complainant side. Hence, certainly trial court failed to appreciate facts and evidence placed on record. (para 8)

Appeal is allowed. (E-2)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal under Section 374(2) of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') has been filed by Shyam Bihari, Ram Shiroman, Dharm Nath and Madan against judgment of conviction and sentence made therein in Sessions Trial No. 98 of 2005, State of U.P. Versus Shyam Bihari and others, arising out of N.C.R. No. 14 of 2004, under Sections 323/34, 504 I.P.C., Police Station Durgaganj, District Sant Ravidas Nagar, Bhadohi, passed by court of Additional Sessions Judge, Court No. 3, Bhadohi-Gyanpur, wherein convicts-appellants have been sentenced with six months' simple imprisonment and fine of Rs.500/- and in case of default one month's additional simple imprisonment for offense punishable under Section 323/34 I.P.C. and one year simple imprisonment with fine of Rs.1,000/- each and in default one month's additional simple imprisonment under Section 504 I.P.C. with a direction for concurrent running of sentences.

2. The memo of appeal contends that trial court failed to appreciate facts and law placed before it. Prosecution story was fabricated. According to evidence on record, no case was made out against appellants. Even then, they have been convicted and sentenced, as above. Medical evidence was against oral testimony, which was with all inconsistencies and contradictions. No specific motive was assigned for

commission of alleged offence. Impugned judgment was based on surmises and conjectures. Hence, this appeal is with a prayer for setting aside impugned judgment of conviction and sentence dated 17.09.2011 with a further prayer for grant of acquittal against charges levelled against appellants.

3. From the very perusal of record of trial court and impugned judgment, it is apparent that a report of non-cognizable offence bearing No. 14 of 2004, under Sections 323/34, 504 I.P.C. was got registered at Police Station Durgaganj, District Sant Ravidas Nagar, Bhadohi against Shyam Bihari, Ram Shiroman, Dharm Nath and Madan, upon report of informant Ram Sajivan Harijan, S/o Banshiram Harijan, R/o Gangarampur, P.S. Durgaganj, District Sant Ravidas Nagar, Bhadohi on 12.07.2004 at 10.30 A.M. for the occurrence of 9.30 A.M. of the same day by detailed narration that chak road was being constructed over spot for use of complainant and his family members, but this was being obstructed and damaged by accused persons. It was protested. They assaulted informant and other members of his family by lathi-danda, therein Ram Ujagir, Shyamlal, Hubraji, Udairaj and Pintu were badly injured. This was Ext.Ka-1. In compliance of order of Court under Section 155 Cr.P.C. (Ext.Ka-2), matter was investigated, wherein Site Map (Ext.Ka-3) was prepared and after recording statement of witnesses, under Section 161 Cr.P.C., Charge Sheet (Ext.Ka-4) was filed. Magistrate took cognizance over it and held that above occurrence was a cross case version of Case Crime No. 162 of 2004, under Sections 147, 304, 149, 325, 323, 504 I.P.C., Police Station Durgaganj. Learned Judicial Magistrate-I, Bhadohi-Gyanpur vide order dated 15.07.2005, committed this file to the court of Sessions for trial as cross-case of above sessions trial, from where this file was transferred to Court of Additional Sessions Judge, Court No. 3 Bhadohi at Gyanpur. After hearing learned Public Prosecutor as well as learned counsel for defence, accused Shyam Bihari, Ram Shiroman, Dharm Nath and Madan were charged for offences punishable under Sections 323/34, 504 I.P.C. It was read over and explained to accused persons, who pleaded not guilty and claimed for trial.

4. The prosecution examined PW-1 informant Ram Sajivan, PW-2 injured witness Shyamlal, PW-3 injured witness Udairaj Singh, PW-4 injured witness Ram Ujagir, PW-5 Constable Moharrir 193 Chandrabhan Singh, PW-6 Sub Inspector S.P. Chandra, Investigating Officer, PW-7 Nagendra Prasad Mishra, Chief Pharmacist, PW-8 Head Constable Jiyalal, PW-9 Sub Inspector Radhey Shyam Pushkar and PW-10 Dr. Shri Prakash Singh.

5. With a view to have explanation over incriminating materials, produced by prosecution, against accused persons and for getting the version of accused persons they were examined under Section 313 Cr.P.C., wherein each accused said the accusation to be false and fabricated and falsely implicated in counter blast of cross-case, wherein accused side were injured by the assault made by complainant side and one Ravindra had died in it. This quarrel occurred on 12.07.2004 at about 9.30 A.M. when chak road was being constructed, wherein Shyamlal, Kallu @ Ram Ujagir, Udal @ Udairaj, Bachai @ Ram Sajivan, Awadhraj, Sudama Prasad and Girdhari gave assault by pelting of

stones and bricks coupled with lathi-danda, wherein Ravindra died out of above injury and informant, Madanlal, Sursatti Devi, Sunita Devi, Shrinath, Balraji, Kamla Devi, Photo Devi and Chhabbi Devi were having injuries of lathi-danda. Pelting of stones were made by accused side for getting themselves saved from assailants and out of this, they could be saved. This false cross-case has been got registered in it. The papers of cross case in certified copies were filed in defence of accused persons. Those were first information report of Case No. 108 of 2004, arising out of Case Crime No.162 of 2004; State Vs. Shyamlal and others, Police Station Durgaganj, copy of charge sheet of Case Crime No. 162 of 2004, copy of autopsy examination report of deceased Ravindra Kumar, copy of medico legal injury report of Balraji, wife of Ram Manorath, copy of injury report of Photo Devi, copy of Site Map of Case Crime No. 162 of 2004 coupled with copies of injury reports of Shrinath, Sursatti Devi, Kamla Devi and Chhabbi Devi. Learned Sessions Judge after hearing learned counsel for both sides passed judgment of conviction against each of accused appellants for offences punishable under Sections 323/34 and 504 I.P.C. After hearing over quantum of sentence, each of convicts-appellants Shyam Bihari, Ram Shiroman, Dharm Nath and Madan were sentenced with six months simple imprisonment and fine of Rs.500/- in default one month additional simple imprisonment for offence punishable under Section 323/34 I.P.C. with further sentence of one year simple imprisonment and fine of Rs.1,000/- and in default one month additional imprisonment under Section 504 I.P.C with a direction for concurrent running of sentences, against which this appeal.

6. Learned counsel for appellants argued that it was a cross-case of Case Crime No. 162 of 2004, of which certified copy of first information report, charge sheet, inquest proceeding, autopsy examination report, injury reports of accused persons were filed on record in defence and this was said by accused persons that on the same date, time and place quarrel regarding construction of chak road took place, wherein present prosecution side gave assault by lathi-danda, bricks and stones pelting, wherein deceased Ravindra had sustained injuries. Other family members have also sustained injuries. Investigation resulted submission of charge sheet and this trial was conducted with present trial, wherein accused persons have been convicted for charges levelled in it including culpable homicide not amounting to murder. The accused side, who have been convicted in above cross-case, were held to be aggressor, whereas it has been specifically said by prosecution witnesses in above trial that in personal defence of person and property, the pelting of stone was made by present accused side and in it present prosecution side were injured. Injuries were of trifling nature and the conviction is for offence punishable under Sections 323/34 and 504 I.P.C., which were for simple hurt. Injuries were brought in existence in exercise of right of self defence. Moreso, present accused side were not aggressor. Rather complainant side were held aggressor and have been convicted and sentenced for other offences including offences of culpable homicide not amounting to murder for ten years rigorous imprisonment and fine. Hence, trial court in utter failure to analyze facts and evidence placed on record has convicted and sentenced on the basis of surmises and conjectures, which is apparently against facts on record. Hence, this appeal with above prayer.

7. Learned A.G.A. has vehemently opposed the appeal and argued that it was a case of free fight, wherein one side sustained injuries including injury to Ravindra Nath, resulting his death and other side sustained injuries, for which this trial. The trial court has convicted both sides holding that it was a case of free fight in which no side took care of law and order situation. Rather, they became offensive and gave assault to each other resulting injuries to both sides. Hence, this conviction and sentence was based on evidence placed on record.

8. Admittedly, it was tried as a cross-case with Session Trial No. 108 of 2004, arising out of Case Crime No. 162 of 2004, under Sections 147, 304/149, 325/149, 323/149 I.P.C., wherein vide detailed and elaborate judgment passed by Session Judge as well as present Court in appeal has held that those convict-appellants were aggressor, who committed above offences under furtherance of common intention for commission of assault by lathi-danda, for which offences punishable under Section 323/149 as well as 147 I.P.C. i.e. affray has been proved against all the members of unlawful assembly and beside being in common object of that unlawful assembly, three of them i.e. Kallu, Bachai and Shyamlal did assault over Ravindra by riding over his chest and causing injuries, resulting his death for which, they have been separately punished for offence punishable under Section 304 I.P.C. In present case the place, time and date of occurrence was undisputed. Injured and their injuries were not disputed. The cause and motive of this quarrel was undisputed. Construction of chak road on the place of occurrence, resulting this quarrel, was also undisputed fact. PW-1 Ram Sajivan informant in his statement has said that on 12.07.2004 at about 9.30 A.M., this quarrel occurred towards north of house of Shyam Bihari, where chak road was being constructed and the land of Jagannath and Sudama was taken by Gram Sabha under their consent for construction of this chak road. One day before i.e. on 11.07.2004 soil was thrown for construction of chak road. On the date of occurrence at about 7 A.M. Shyam Bihari, Ram Shiroman, Dharm Raj and Madanlal, armed with lathi-danda and spade, went there and started cutting that chak road. This was reported at Police Station Durgaganj. At about about 9.30 A.M., police of Durgaganj reached on spot. Awadhraj and Sobhnath were taken at police station for this quarrel, but after police left the place, Ram Shiroman, Shyam Bihari, Madan and Dharm Raj again reached at above chak road and started cutting it. This was protested by informant side and this resulted quarreling, wherein many persons rushed and this occurrence took place. The pelting of stones from both sides has been admitted by this witness, but it has been said that it was used in right of self defence for saving themselves. Both sides sustained injuries. They were got medically examined. Same is the testimony of PW-2 injured Shyamlal, who too has said that there was no road for the community of this witness at their village and for their conveyance this chak road was proposed to be constructed under the resolution of Gram Sabha, wherein Sobhnath, Shrinath, Shyam Bihari, Jagarnath, Jainath, Sudama and many other persons were present. The land of Jagarnath and Sudama was taken for construction of this chak road and they were ready for it. Soil was to be thrown over this chak road, thereafter, it was to be constructed and one day before, this was done. On the date of occurrence, on

12.07.2004 this quarrel took place and the place of occurrence was that chak road. Prior to it, Shyam Bihari, Ram Shiroman, Dharm Raj and Madan, armed with lathi-danda and spade, had gone at above chak road and they were damaging the same. When police was reported and it reached on spot, Sobhnath and Awadhraj were taken at police station, but after this both side entered in this quarrel, wherein they were injured. The same is the testimony of PW-3 Udairaj Singh and PW-4 Ram Ujagir. Other witnesses PW-5 Constable Moharrir 193 Chandrabhan Singh, PW-6 Sub-Inspector S.P. Chandra, PW-7 Nagendra Prasad Mishra, Chief Pharmacist, PW-8 Head Constable Jiyalal, PW-9 Radhey Shyam Pushkar and PW-10 Dr. Prakash Singh are formal witnesses, who have proved prosecution case formally regarding registration of case crime number, occurrence of above date, time and place, registration of both cases, investigation being made, injury suffered by both sides, their medico legal examination reports on record. Hence, from the appreciation of those evidence, it is apparent that this occurrence took place at about 9.30. A.M. of 12.07.2004 and this was owing to construction of chak road on spot. Both sides had rushed at above chak road, where this quarrel occurred, wherein both sides were armed with lathi-danda, which is very usual in village life. The dispute had arisen because of abuse being extended from both sides to each other. Subsequently, brick pelting started, which resulted injuries to both sides. Thereafter, overt act by three of prosecution side were made, which was not the purpose of common object of that unlawful assembly, wherein they ride over chest of Ravindra and caused injury, resulting his death. Hence, the aggressor were held to be those, who caused above offence, for which they have been convicted in cross-case. In present case, accused persons were not aggressor. Rather, they were victim of that aggression, wherein they had exercised their right of self defence by pelting stones and bricks, resulting injuries to other side, which have been proved by PW-10 Dr. Prakash Singh. Moreso, accused persons from both sides were present on spot. They were pelting stones over each other. These injuries occurred and this was by aggression made by present complainant side. Under above facts, who was aggressor and who suffered that aggression is to be seen and in present case aggression was by present complainant side. Hence, certainly trial court failed to appreciate facts and evidence placed on record.

9. Accordingly, this appeal succeeds and is allowed. The impugned judgment and order of conviction dated 17.09.2011, passed by the Trial Court, is hereby set aside and the appellants Shyam Bihari, Ram Shiroman, Dharm Nath and Madan are acquitted of all the charges. They are on bail. They need not to surrender. Their sureties are discharged.

10. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties each in the like amount to the satisfaction of trial Court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

11. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

(2020)1ILR A194

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJEEV MISHRA, J.

Criminal Appeal No. 6270 of 2009

Subodh Awasthy ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Kamal Krishan, Sri Phool Singh Yadav, Sri R.K. Srivastava

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code - Sections 307 & 302 - Arms Act, 1959- Sections 25/27 Arms Act - Appeal against conviction.

Testimony of a family member cannot be discarded merely on ground that he is a family member of deceased. However, in such a situation testimony of such witness has to be examined with care and caution. Object of the Court is to find out that when testimony of such witness is considered as a whole, it has a circle of truth or not. (para 80)

The various deficiencies in statement of P.W.-1 and P.W.-2 and on that basis he has tried to dislodge the two prosecution witnesses of fact. Whether a witness can be discarded on the basis of evidence of another witness has already been considered. (para 81)

The testimony of witnesses of fact must prove basic prosecution case and little disparity or contradiction in their testimony are liable to be discarded as being natural. Therefore, what has to be assessed in present case is whether P.W.-1 and P.W.-2 have been consistent in their testimony and whether their testimony proves basic prosecution case. (para 83)

The scrutinize the oral testimony of P.W.-1 and P.W.-2 and find that contradictions, inconsistencies and omissions in oral testimonies of prosecution witnesses of fact as alleged are present. In view of aforesaid, this Court has no other option but to discard prosecution witnesses of fact i.e. P.W.-1 and P.W.-2 as incredible. Consequently, their testimonies are not worthy of trust. In view of above the present criminal appeal is liable to succeed. (para 93)

Appeal is allowed. (E-2)

List of cases cited: -

1. Saghir and others Vs. St. of U.P., 2018 (4) ADJ 286 (DB)

(Delivered by Hon'ble Rajeev Mishra, J.)

1. By means of present criminal appeal, appellant Subodh Awasthy is challenging validity and legality of judgement and order dated 06.10.2009 passed by Additional District and Sessions Judge (Court no.2), Kanpur Dehat in Sessions Trial No. 298 of 2008 (State Vs. Subodh Awasthy) under Section 302 I.P.C. P.S. Shivli, District-Kanpur Dehat, arising out of Case Crime No. 331 of 2007, under Sections 307 and 302 I.P.C., P.S. Shivli, District, Kanpur Dehat and connected Sessions Trial No. 299 of 2008 (State Vs. Subodh Awasthy) under Sections 25/27 Arms Act, arising out of Case Crime No. 02 of 2008, under Sections 25/27 Arms Act, P.S. Shivli, District, Kanpur Dehat, whereby and where-under accused appellant has been convicted under Section 302 I.P.C. and consequently, sentenced to life imprisonment alongwith fine of Rs. 20,000/-. In default regarding payment of fine, accused appellant is to undergo additional imprisonment of one year. Accused appellant has also been convicted under Section 27 Arms Act. Accordingly, he has been sentenced to two

years rigorous imprisonment alongwith fine of Rs. 2,000/-. In case of default in payment of aforesaid fine, accused-appellant is to undergo additional imprisonment of two months. All sentences are to run concurrently.

2. We have heard Mr. Kamal Krishna, learned Senior Counsel assisted by Mr. P. S. Yadav, learned counsel for appellant and Mr. Ajit Ray, learned A.G.A. for State.

3. Facts giving rise to this criminal appeal are that an incident is alleged to have occurred on 31.12.2007 at 8.30 PM, in which Sanjay Awasthy is alleged to have sustained gun shot injury caused by Subodh Awasthy. A written report dated 31.12.2007 (Ext. Ka.-1) was submitted by Dinesh Chandra Awasthy, first informant-brother of deceased at P.S. Shivli, District-Kanpur Dehat regarding aforesaid occurrence. The said written report is scribed and signed by P.W.-1 Dinesh Chandra Awasthy.

4. Head Constable 29, Munesh Shankar Dwivedi (P.W.-4) entered written report dated 31.12.2007 in General Diary vide report No. 45. He thereafter scribed the F.I.R. dated 31.12.2007 (Ext. Ka.-3), which was registered as Case Crime No. 331 of 2007 under Section 307 I.P.C. P.S. Shivli, District-Kanpur Dehat.

5. Perusal of aforesaid F.I.R. (Ext. Ka.-3) shows that same has been lodged by Dinesh Chandra Awasthy, first informant/brother of deceased Sanjay Awashti on 31.12.2007 at 8.30 PM. Accused-appellant Subodh Awasthy has been nominated as solitary named accused. The date, time and place of occurrence as mentioned in F.I.R. is 31.12.2007 at 8.30 PM. in front of house of first informant at Village Bada Gaon, District-Kanpur Dehat. Distance between place of occurrence and Police Station has been mentioned as 7 Kms. F.I.R. has been registered on 31.12.2007 at 9.25 PM i.e. 55 minutes after occurrence.

6. As per prosecution story as unfolded in F.I.R., Sanjay Awasthy, younger brother of first informant had a scuffle with one Subodh Awasthy, resident of same Village. Both were challaned under Section 151 Cr.P.C. Five to six days before date of occurrence, battery of Tractor belonging to Subhodh Awasthy was stolen when same was parked in front of house of Subodh Awasthy. As a result of aforesaid, Subodh Awasthy used to frequently indulge in abusing others. On the fateful day i.e. 31.12.2017 at around 8.00 PM, Sanjay Awasthy was returning home from Aunaha Market. He was stopped by Subodh Awasthy and thereafter, he started abusing him. Subsequently, Babu Ram Awasthy, father of Sanjay Awasthy and his daughter Bitti reached on spot and brought Sanjay Awasthy home. After a short-time, Subodh Awasthy again came to the house of first informant-Sanjay Awasthy and started abusing him. On this, Sanjay Awasthy requested Subodh Awasthy to stop abusing him whereupon Subodh Awasthy fired at Sanjay Awasthy. The same struck Sanjay Awasthy on his chest. Alongwith Sanjay Awasthy one Naresh @ Sallar Shukla was also present at the place of occurrence. After having shot Sanjay Awasthy, both accused persons fled away from spot. On account of firearm injury, Sanjay Awasthy the injured, fell on the spot. Subsequently, Bitti, sister of Sanjay Awasthy (injured) and his father Ram Nath Awasthy came on spot. Injured was carried on Marshal

Vehicle and brought at Police-Station, Shivli, District-Kanpur Dehat.

7. Aforesaid F.I.R. dated 31.12.2007 (Ext. Ka.-3) was registered, Police of Police-Station, Shivli came into motion. P.W.-8, Subh Suchit, the Station Officer, Police-Station Shivli was appointed as Investigating Officer. He accordingly proceeded with investigation of Case Crime Number 331 of 2007. On same day, he entered written report dated 31.12.2007 (Ext. Ka.-1) and F.I.R. dated 31.12.2007 (Ext. Ka.-3) in case diary. Injured Sanjay Awasthy died on 31.12.2017 while being taken to Hallet Hospital, Kanpur Nagar by S. I. Rakesh Chandra and Constable Raj Bali. Accordingly, first informant Dinesh Chandra Awasthy submitted an application dated 31.12.2007 (Ext. Ka.-22) at P.S. Shivli, District-Kanpur Dehat informing Police regarding death of Sanjay Awasthy. The same was entered in General Diary vide G.D. report No. 47 timing 23.55 hours dated 31.12.2007 (Ext. Ka.-5). In view of above, Investigating Officer added Section 302 I.P.C in concerned Case Crime Number on 01.09.2008.

8. On same day i.e. 01.01.2008, P.W.-8, S.I., Subh Suchit, Investigating Officer, recorded statement of first informant-Sanjay Awasthy under Section 161 Cr.P.C. He then reached place of occurrence and inspected it. He thereafter noted Inspection Memo in case diary. He also prepared Site Plan dated 01.01.2008 (Ext. Ka.-13) of place of occurrence on pointing of first informant.

9. Upon death of injured Sanjay Awasthy at Hallet Hospital, Kanpur Nagar, information regarding same was given by one Santu ward boy in aforesaid Hospital at Police-Station Swaroop Nagar, District-Kanpur Nagar. Accordingly, S. I. Iqbal Singh, P.S.-Swaroop Nagar, District-Kanpur Nagar proceeded to conduct panchayatnama/inquest of deceased. He appointed Panch witnesses namely, Subhash Chandra, Ram Ganesh, Vinod Kumar Tiwari, Majoj Mishra and Santosh Dwivedi. Upon completion of inquest proceedings, he prepared inquest report dated 01.01.2008 (Ext. Ka.-8).

10. Perusal of Panchayatnama/inquest report dated 01.01.2008 (Ext. Ka.-8) shows that same was conducted on 01.01.2008 at Hallet Hospital, Kanpur Nagar. Inquest proceedings commenced at 11.40AM on 01.01.2008 and concluded on the same day at 12.45PM. Place of inquest proceedings is mentioned as Hallet Hospital, P.S.-Swaroop Nagar, District-Kanpur Nagar. In the opinion of Panch witnesses, death of deceased-Sanjay Awathi was held to be homicidal. Panch witnesses also noted that cause of death of deceased was gun shot injury. One gun shot injury was found on the body of deceased situate on left side of abdomen and was surrounded by blackening. Inquest report, however, does not contain description of Case Crime Number 331 of 2007 under Sections 307, 302 I.P.C., P.S.-Shivli, District-Kanpur Dehat.

11. Body of deceased Sanjay Awasthy was recovered by SSI, Rudra Pal Singh on 01.01.2008 itself. He then prepared detailed Police scroll i.e. Ext. Ka.-9- letter to C.M.O., Ext. Ka.-10-Specimen Seal, Ext. Ka.-11-Photograph of dead body, Ext. Ka.12-Police Form No.33.

12. P.W.-4, Dr. Bipul Singh, conducted postmortem of the body of deceased. He found following antemortem injuries on the body of deceased:-

"Firearm wound of entry 1.5 cm.X1.00 cm. present on part of left abdomen, 11cm. Front below left nipple at 5 o' clock position, surrounded by blackening, tattooing and scorching in an area of 5cm x 6cm, margins of wound are lacerated ecchymosed and inverted, direction of wound is found towards right side and backward. Spleen liver and intestine with omentum found lacerated. About 1500 ml. blood mixed fluid present in abdominal cavity. A single metallic bullet recovered from abdominal cavity sealed in and handed over to accompanying constable."

13. After completion of post-mortem of body of deceased (P.W.-8), S.I. Subh Suchit, Investigating Officer, recovered clothes worn by deceased at the time of occurrence. He sealed them and dispatched same to Forensic Science Laboratory. An F.S.L. report dated 14.02.2008 (Ext. Ka.-20) was submitted. As per aforesaid report, blood on the clothes of deceased was disintegrated and therefore, insufficient for classification.

14. On 02.01.2008, P.W.-8, Subh Suchit, Station Officer, P.S. Shivli District-Kanpur Dehat/Investigating Officer arrested the accused Subodh Awasthy. He physically examined the accused but nothing was recovered from his person. He then recorded statement of accused. Accordingly, he took accused to the place from where country made pistol (katta) used in commission of offence was hidden. Accused took Investigating Officer to Shivam Road and from a place behind the Mazar situate on Pitched Road, accused Subodh Awasthy got the country made pistol (Katta) used in commission of crime recovered. Same was sealed by P.W.-8. A Memo of Recovery dated 02.01.2008 (Ext. Ka.-14) was prepared. Aforesaid recovery is witnessed by Constable Ram Autar Singh and first informant-Subodh Kumar Awasthy.

15. On the basis of recovery of country made pistol (katta) on pointing of accused Subodh Awasthy, an F.I.R. dated 02.01.2008 (Ext. Ka. 6) was lodged by P.W.-8, Subh Suchit, Station Officer P.S. Shivli District-Kanpur Dehat and also Investigating Officer against accused. Same was registered as Case Crime No. 02/2008 under Sections 25/27 Arms Act. According to aforesaid F.I.R., occurrence took place on 02.01.2008 at 15.40 hours, i.e 3.00 PM. near Ram Ganga Canal behind the Mazar and same was lodged on 18.03.2008 at 18.30 hours.

16. After completion of statutory investigation of Case Crime No. 331 of 2009 in terms of Chapter XII Cr.P.C. (P.W.-8) S.I., Subh Suchit Investigating Officer, on basis of material collected during course of investigation opined to submit a charge-sheet. Accordingly charge-sheet dated 15.02.2008 (Ext. Ka.-15) was submitted in Case Crime No.331 of 2007 under Sections 307 and 302 I.P.C., P.S.-Shivli, District-Kanpur Dehat. Upon submission of aforesaid charge-sheet C.J.M. Kanpur Dehat took cognizance upon same vide cognizance taking order dated 26.03.2008. Thereafter case was committed to Court of Sessions vide committal order dated 15.09.2008 passed by C.J.M. Kanpur Dehat. Consequently, S.T. No. 298 of 2008 (State Vs. Subodh Awasthy) under Section 302 I.P.C. P.S. Shivli, District-Kanpur Dehat came to be registered.

17. Court-below vide order dated 05.03.2009 framed charge under Section

302 I.P.C. against accused Sanjay Kumar Awasthy to the following effect:-

"आरोप

मै, सी0 एम0 दीक्षित अपर सत्र न्यायाधीश (कोर्ट संख्या–2), कानपुर देहात आप सुबोध अवस्थी पर निम्न आरोप लगाता हूँः–

प्रथमः यह कि दिनांक 31.12.2007 ई0 को समय करीब 8.30 बजे रात स्थान दरवाजा मकान वादी बाहद ग्राम बड़ा गॉव औनहा अन्तर्गत थाना शिवली कानपुर देहात में पूर्व रंजिश के कारण आपने वादी के मकान के दरवाजे पर जाकर गााली गलौज की और जब वादी के भाई संजय ने गाली देने से मना किया तो आपने संजय के ऊपर तमंचे से गोली चला दी जो मृतक के सीने में लगी और इस प्रकार आपने आशय पूर्वक गोली मार कर मृतक संजय की हत्या कारित की इस प्रकार आपने भारतीय दण्ड संहिता की धारा–302 के अधीन दण्डनीय अपराध कारित किया है जो इस न्यायालय के प्रसंज्ञान में है।

एतद्द्वारा मैं आपको निर्देशित करता हूँ कि उपरोक्त आरोप में आपका विचारण इस न्यायालय द्वारा हो।

दिनांकः 05.03.2009 ई0

(सी0 एम0 दीक्षित)

अपर सत्र न्यायाधीश (कोर्ट संख्या–2),

कानपुर देहात।

आरोप अभियुक्त को पढ़ कर सुनाया व समझाया गया जिससे इंकार कर विचारण की याचना की।

दिनांकः 5.3.2009 ई

(सी0 एम0 दीक्षित)

अपर सत्र न्यायाधीश (कोर्ट संख्या–2),

कानपुर देहात।"

18. During pendency of S.T. No. 298 of 2008 (State Vs. Subodh Awasthy) under Section 302 I.P.C., investigation of Case Crime No. 02 of 2008 under Sections 25/27 Arms Act, P.S. Shivli Road, District-Kanpur Dehat was also completed. On the basis of material collected during course of investigation, Investigating Officer submitted a charge-sheet dated 25.01.2008 (Ext. Ka.-12) under Section 25/27 Arms Act against accused Subodh Awasthy.

19. C.J.M. Kanpur Dehat vide congnizance taking order dated 25.02.2008 took cognizance upon the charge-sheet dated 25.01.2008.

20. Subsequently, District Magistrate, Kanpur-Dehat accorded sanction in terms of Section 39 of Arms Act to launch prosecution against accused Subodh Kumar Awasthy under Section 25 Arms Act vide sanction order dated 10.03.2008.

21. After completion of aforesaid formalities, C.J.M., Kanpur Dehat committed case to Court of Sessions vide committal order dated 15.09.2008. Accordingly S.T. No. 299 of 2008 (State Vs. Subodh Awasthy) under Sections 25/27 Arms Act came into existence.

22. S.T. No. 299 of 2008 (State Vs. Subodh Awasthy) under Sections 25/27 Arms Act was transferred to Court of 2nd Additional District and Sessions Judge, Kanpur Dehat. Court-below vide order dated 05.03.2009 framed charge under Sections 25/27 Arms Act against accused Subodh Awasthy to the following effect:-

"आरोप

मै, सी0 एम0 दीक्षित अपर सत्र न्यायाधीश (कोर्ट संख्या–2), कानपुर देहात आप सुबोध अवस्थी पर निम्न आरोप लगाता हूँः–

प्रथमः यहकि दिनांक 2.1.2008 ई0 को समय करीब 15.40 बजे बाहद ग्राम देवीपुर के

निकट खेतों से आपको थाने शिवली की पुलिस द्वारा गिरफतार किया गया और आपकी निशांदेही पर संजय अवस्थी की हत्या में प्रयुक्त तमंचा नहर के किनारे बनी मजार के पीछे से बरामद किया गया जिसको रखने का कोई लाइसेन्स आपके पास नहीं था, इस प्रकार आपने शस्त्र. अधिनियम की धारा–25/ 27 के अधीन दण्डनीय अपराध कारित किया है जो इस न्यायालय के प्रसंज्ञान में है।

एतद्द्वारा मैं आपको निर्देशित करता हूँ कि उपरोक्त आरोप में आपका विचारण इस न्यायालय द्वारा हो।

दिनांकः 05.03.2009 ई0

(सी0 एम0 दीक्षित)

अपर सत्र न्यायाधीश (कोर्ट संख्या–2),

कानपुर देहात।

आरोप अभियुक्त को पढ़ कर सुनाया व समझाया गया जिससे इंकार कर अपने विचारण की याचना की।

दिनांकः 5.3.2009 ई

(सी0 एम0 दीक्षित)

अपर सत्र न्यायाधीश (कोर्ट संख्या–2),

कानपुर देहात।"

23. The country made pistol (material exhibit no.1) recovered on pointing of accused-appellant and also the bullet recovered from body of deceased by P.W.-3, Dr. Bipul Singh, who conducted autopsy on body of deceased, were sent to Forensic Science Laboratory. According to FSL report dated 23.02.2008 (Ext. Ka-21), bullet recovered from body of deceased was not fired from the weapon recovered on pointing of accused.

24. Both of the above mentioned trials were consolidated and accordingly, they were tried together by Court-below.

25. Accused-Sanjay Awasthy denied the charges so framed and demanded trial. Consequently, trial commenced. Burden to bring home the charges was upon prosecution. Accordingly, prosecution adduced following witnesses to establish the same:-

P.W.-1, Dinesh Chandra Awasthy

P.W.-2, Babu Ram

P.W.-3, Dr. Bipul Singh

P.W.-4, Munesh Shankar Dwivedi, Head Constable 29, P.S.-Shivli, District-Kanpur Dehat.

P.W.-5, Ashok Kumar Singh, S.I.S., Police Office, Kanpur Dehat

P.W.-6, Pradeep Kumar Tiwari, Constable Moharrir P.S. Baraur, District-Kanpur Dehat.

P.W.-7, Rudra Pal Singh, Sub-Inspector, P.S. Kandhai, District-Pratapgarh

P.W.-8, Subh Suchit, Sub-Inspector, P.S.- Bhognipur, District-Kanpur Dehat

P.W.-9, Rakesh Chandra, Sub-Inspector, P.S. G.R.P. District-Kanpur Nagar.

P.W.-10, Jagdev Prasad, Sub-Inspector, Akbarpur Chauki Incharge, P.S.-Akbarpur, District-Kanpur Dehat.

26. Apart from relying upon aforesaid prosecution witnesses, prosecution also relied upon following documentary evidence:-

Ext. Ka.-1 is written report submitted by P.W.-1, Dinesh Chandra Awasthy, first informant / brother of deceased and was proved by him.

Ext. Ka.-2 is post-mortem report dated 01.01.2008 prepared by P.W.3 Dr. Bupil Singh and was proved by him.

Ext. Ka.-3 is check F.I.R. dated 31.12.2007 lodged by P.W.-1, Dinesh Chandra Awasthy, first informat/brother of deceased registered as Case Crime No. 331 of 2007 under Section 307 I.P.C., P.S.-Shivli, District-Kanpur Dehat. It was proved by P.W.-4, Head Constable 29, Munesh Shanker Dwivedi.

Ext. Ka.-4 is Carbon Copy of General Diary Report No. 41 timing 23.55 dated 31.12.2007, prepared by P.W.-4, Head Constable 29, Munesh Shanker Dwivedi and was proved by him.

Ext. Ka.-5 is Carbon Copy of General Diary Report No. 47 timing 23.55 dated 31.12.2007, prepared by P.W.-4, Head Constable 29, Munesh Shanker Dwivedi and proved by him

Ext. Ka.-6 is Check F.I.R. dated 02.05.2008 pertaining to Case Crime No. 02 of 2008 under Section 25/27 Arms Act lodged by P.W.-8, S.I. Subh Suchit, Investigatin Officer. The same was proved by P.W.-6,Constable Moharrir 558, Pradeep Kumar Tiwari.

Ext. Ka.-7 is Carbon Copy of General Diary Report No. 38 timing 18.30 dated 02.01.2008, prepared by P.W.-6., Constable Moharrir 558, Pradeep Kumar Tiwari and proved by him.

Ext. Ka.-8 is Panchayatnama/Inquest Report dated 01.01.2008 pertaining to deceased Sanjay Awasthy. The same was prepared by P.W.-7, S.I., Rudra Pal Singh and proved by him.

Ext. Ka.-9 is Letter Dated 01.01.2008 sent by P.W-7, S. I. Rudra Pal Singh addressed to C.M.O., Kanpur Nagar for getting postmortem of deceased conducted. Same was proved by P.W.-7, S.I., Rudra Pal Singh himself.

Ext. Ka.-10 is Specimen of Seal on packed dead body of deceased. Same was prepared and proved by P.W.7, S.I., Rudra Pal Singh.

Ext. Ka.-11 is Police Form No. 371 (Photo Nash) of the deceased. Same was prepared and proved by P.W.-7, S.I., Rudra Pal Singh.

Ext. Ka.-12 is Police Form No. 33, prepared and proved by P.W.-7, S.I., Rudra Pal Singh.

Ext. Ka.-13 is Site Plan dated 01.01.2008 prepared by P.W.-7 , Rudra Pal Singh and proved by P.W.-8, S.I., Subh Suchit, Investigating Officer.

Ext. Ka.-14 is Memo of Arrest and Recovery of country made pistol (katta) from accused Subodh Awasthy. Same was prepared by P.W.-7, Rudra Pal Singh and proved by P.W.-8, S.I., Subh Suchit, Investigating Officer.

Ext. Ka.-15 is Charge-sheet dated 15.02.2008 submitted by P.W.7, Rudra Pal Singh in Case Crime No. 331 of 2007 under Section 302 I.P.C. Same was proved by P.W.-8, S.I. Subh Suchit, Investigating Officer.

Ext. Ka.-16 is Site Plan dated 04.01.2008 prepared by P.W.-9, S.I. Rakesh Chand regarding place of arrest of accused on 04.01.2008. Same was proved by P.W.-9, S.I. Rakesh Chandra

Ext. Ka.-17 is Site Plan regarding place of recovery of country made gun, which was recovered on pointing of accused. Same was proved by P.W.-9, S.I. Rakesh Chandra.

Ext. Ka.-18 is charge-sheet dated 25.01.2008 submitted by P.W.-10, S. I., Jagdeo Prasad in Case Crime No. 02 of 2008 under Section 25/27 Arms Act. Same was proved by P.W.-10, S.I. Jagdev Prasad..

Ext. Ka.-19 is Order dated 10.03.2008 passed by District Magistrate, Kanpur Dehat according Sanction under Section 39 Arms Act for launching

prosecution against accused Subodh Awasthy.

Ext. Ka.-20 is Report of Forensic Science Laboratory dated 01.02.2008.

Ext. Ka.-21 is Report of Forensic Science Laboratory dated 23.02.2008.

Ext. Ka.-22 is application dated 13.12.2007 submitted by P.W.-1, Dinesh Chandra Awasthy at P.S.-Shivli, District-Kanpur Dehat regarding death of Sanjay Awasthy. Same was proved by P.W.-1, Dinesh Chandra Awasthy.

27. The country made pistol (Katta) recovered on pointing of accused, was also relied upon by prosecution and was marked as **Material Ext.-1.**

28. P.W.-1, Dinesh Chandra Awasthy is first informant and also brother of deceased. This witness in his statement in chief alleges himself to be an eye-witness of the occurrence and has supported prosecution story.

29. P.W.-2, Babu Ram is father of deceased. According to this witness, he has seen the occurrence, which took place in front of his house. He has also tried to support prosecution case in his statement in chief.

30. P.W.-3, Dr. Bipul Ram conducted autopsy on body of deceased. He has proved postmortem report dated 01.01.2008 (Ext. Ka.-2). According to this witness, cause of death of deceased was ante-mortem fire arm injury sustained by him. At the time of autopsy, this witness recovered a bullet from body of deceased, which was sent to Forensic Science Laboratory for examination. In the opinion of this witness, injury found on body of deceased could have been caused by firearm.

31. P.W.-4, Head Constable, Munesh Shankar Dwivedi was posted as Head Constable at P.S.-Shivli, Kanpur Dehat, on the date of occurrence. He entered written report dated 31.12.2007 (Ext. Ka.-1) in General Diary and thereafter, prepared check F.I.R. dated 31.12.2007 registered as Case Crime No. 221 of 2007 under Section 302 I.P.C. He also prepared check F.I.R. dated 02.01.2008 registered as Case Crime No. 02 of 2008 under Sections 25/27 Arms Act. This witness has proved check F.I.R. (Ext. Ka.-3), Carbon Copy of G.D. pertaining to entry of written report dated 02.01.2008 (Ext. Ka.-4) and also amended copy of G.D. (Ext. Ka.-5). This witness was cross-examined by defence but he remained firm.

32. P.W.-5, SSI Ashok Kumar Singh was posted at P.S.-Shivli, District-Kanpur Dehat. On 02.01.2008, this witness headed the police team which went out to arrest accused-Subodh Awasthy. At around 3.40 P.M. this witness arrested accused-Subodh Awasthy. On the pointing of accused, this witness recovered the country made pistol (Katta), used in the commission of crime, from a place near the Mazar. He accordingly prepared recovery memo of weapon alleged to have been used in commission of crime. This witness has proved the recovery i.e. Material Ext. -1 which is country made pistol of .315 bore.

33. P.W.-6, Constable Moharir 558, Pradeep Kumar Tiwari was posted as Head Constable at P.S.-Shivli, District-Kanpur Dehat. On 02.01.2008, this witness prepared Check F.I.R. registered as Case Crime No.02 of 2008 under Section 25/27 Arms Act, P.S.-Shivli, District- Kanpur Dehat. He proved original F.I.R. dated 02.08.2008 and accordingly, same was marked as Ext. Ka.-6. He further proved

G.D. Entry No. 38 timing 18:30 hours by producing carbon copy as well as Original G.D. Carbon Copy of G.D. Entry No. 38 was accordingly marked as Ext. Ka.-7. This witness was cross-examined but prosecution failed to dislodge his testimony.

34. P.W.-7, S.I. Rudra Pal Singh was posted as SSI, P.S.-Swaroop Nagar, District-Kanpur Nagar on 01.01.2008. This witness had got conducted the panchayatnama/inquest of deceased Sanjay Awasthy at Hallet Hospital, Kanpur Nagar on 01.01.2008. After completion of panchayatnama/inquest of deceased, he prepared panchayatnama/inquest report of deceased dated 01.01.2008. He proved the same and accordingly, panchayatnama/inquest report was marked as Ext. Ka.-8. Upon completion of aforesaid exercise, this witness prepared detailed police scroll i.e. letter to C.M.O. with a request to conduct postmortem of body of deceased, Specimen Seal, Photograph of dead body, Police Form No.33. He proved aforesaid documents and accordingly, they were exibited as Ext. Ka.-9, Ext. Ka.-10, Ext. Ka.-11, Ext. Ka.12. This witness was cross-examined. A suggestion was made to him doubting the proceedings of inquest. However, this witness remained firm and categorically stated that inquest was conducted on information received from ward body of Hallet Hospital, Kanpur Nagar. Further, none of the Panches disclosed to this witness as to who committed the crime or how and when the occurrence took place. This witness has also stated that he did not receive any F.I.R., which explains the absence of detail regarding Case Crime No. 221 of 2007 in the inquest report. Consequently, this witness could not be dislodged by prosecution.

35. P.W.-8, S.I. Subh Suchit was posted as Sub-Inspector at P.S.-Shivli, District-Kanpur Dehat on 31.12.2007. This witness was nominated as Investigating Officer and accordingly, he took up investigation of Case Crime No. 221 of 2007 under Section 307 I.P.C. P.S.-Shivli, District-Kanpur Dehat. This witness in his statement in chief has stated that on 31.12.2007, he entered the written report and the F.I.R. in Case Diary. On 01.01.2008, he added Section 302 I.P.C. in above-mentioned case crime number by making necessary endorsement in the case diary. On the pointing of first informant, he inspected place of occurrence and prepared site plan himself under his signature on 01.01.2008. He proved Site Plan dated 02.01.2008, which was accordingly marked as Ext. Ka.-13. On same day i.e. 02.01.2008, this witness arrested accused. On pointing of accused, this witness recovered country made pistol (Katta) used in commission of crime and accordingly, prepared a recovery memo of same. He proved recovery memo dated 02.01.2008 and accordingly, same was exhibited as Ext. Ka.-14. On 02.01.2008 entry regarding aforesaid fact was got made in G.D. and thereafter, this witness incorporated the same in Case Diary. On 02.01.2008, this witness lodged an F.I.R. against accused-Subodh Awasthy, which was registered as Case Crime No. 02 of 2008 under Sections 25/27 Arms Act, P.S.-Shivli, District-Kanpur Dehat. This witness has further stated that on 06.01.2008, he recorded statement of Babu Ram Awasthy, father of deceased. On 07.01.2008, this witness received panchayatnama/inquest report and postmortem report of deceased. On 10.01.2008, this witness recorded the statement of Bitti, sister of deceased and other witnesses. On 11.01.2008, this

witness recorded statement of another named accused, namely, Naresh @ Jhallar Shukla. On 13.01.2008, this witness recorded statements of Panch Witnesses. On 16.01.2008, this witness obtained remand of accused and on 18.01.2008, this witness recorded statements of remaining Panch witnesses and also statement of Police Sub-Inspector, namely, Rudra Pal Singh, who got the postmortem conducted and also the statement of Constable Dharam Pal. On 03.02.2008, this witness recorded statements of witnesses Vinod Kumar and Constable Rajendra Singh. He submitted charge-sheet dated 15.02.2008 and proved the same. Accordingly, same was exhibited as Ext. Ka.-15. This witness was cross-examined by defence. In his cross-examination, this witness has stated that information regarding the occurrence was received by him at about 8.45 PM on R.T. Set, when he was away from police-station. According to this witness, upon receipt of aforesaid information, he proceeded to village Aunaha, the place of occurrence. On way to Village-Aunaha, he met family members of injured, who was being carried by his family members. This witness further states that he had himself seen the injured with his eyes and had instructed his family members to go to police-station and lodge an F.I.R. He further states that prior to lodging of F.I.R., there is no information entered at P.S.-Shivli, District-Kanpur Dehat regarding firing having taken place. This witness also states that he did not make an entry in G.D. regarding information received by him that was transmitted through R.T. Set. This witness further states that when he reached village at around 9.00PM, he did not meet any family member of deceased. Injured was carried to Hospital by father, sister and other villagers, whom he had met while coming to village Aunaha. This witness stayed at place of occurrence the whole night but did not meet any person, who was residing near place of occurrence. This witness further states that it was a dark night but there was no necessity of light for him. He stayed near place of occurrence in village the whole night. According to this witness, even upon inspection of place of occurrence, he could not locate any such circumstance denoting happening of occurrence as alleged. This witness has also stated that he did not find any blood on spot. He has also stated that he did not notice any blood on clothes of family members of injured. During course of investigation this witness could not ascertain ownership as well as Registration Number of Jeep on which injured was taken. This witness has not explained the absence of Majroobi Chitthi even when injured is alleged to be taken to Police-Station first and then to Hallet Hospital. This witness was cross-examined by prosecution but his testimony does not corroborate the prosecution story.

36. P.W.-9, S.I. Rakesh Chandra was posted as Sub-Inspector at P.S.-Shivli, District-Kanpur Dehat on 03.01.2008. This witness was entrusted with investigation of Case Crime No. 02 of 2008 under Sections 25/27 Arms Act, P.S.-Shivli, District-Kanpur Dehat. This witness during course of investigation, inspected place of recovery from-where weapon i.e. country made pistol (Katta) used in commission of crime was recovered. He also prepared a site plan of the same. He duly proved inspection-memo as well as Site-Plan prepared by him which were exhibited as Exts. Ka.-16 and Ka.-17. This witness was cross-examined by defence but nothing adverse to prosecution case could be culled out from him. This witness was

further recalled. However, even on further cross-examination this witness remained firm.

37. P.W.-10, S.I. Jagdeo Prasad was posted as Sub-Inspector on 18.01.2008. He was nominated as Investigating Officer of Case Crime No. 02 of 2008 under Sections 25/27 Arms Act. Upon completion of investigation of aforesaid Case Crime Number, this witness prepared charge-sheet dated 25.01.2008 and submitted same before Court. The charge-sheet was proved by him and accordingly, same was marked as Ext. Ka.-18. This witness was also cross-examined by defence but he remained firm.

38. After prosecution witnesses were examined, all the incriminating material and circumstances were disclosed to accused to have his version of occurrence as per the mandate of Section 313 Cr.P.C. Accused denied the questions put to him one by one by repeatedly saying that either it is false or it has been engineered maliciously. However, in reply to the last question, accused stated that he is innocent and occurrence has taken place out side the village.

39. Prosecution pleaded before court-below that there is no delay in lodging F.I.R. inasmuch as occurrence has taken place at 8.30PM and F.I.R. had been lodged at 9.25PM. Accused has not been falsely implicated. First informant has alleged that it is accused alone who caused gun shot injury on deceased and all prosecution witnesses have been consistent in narrating the aforesaid story. Had it been a case of false prosecution, then other family members of accused could also have been nominated in F.I.R. Naresh @ Jhallar Shukla was nominated as an accused in F.I.R. on account of his presence near place of occurrence. However, no criminality was conducted by him, therefore, no role was assigned to him in commission of offence. Police upon investigation excluded his name in charge-sheet. Prosecution did not file any application under Section 319 Cr.P.C. to summon aforesaid accused. There is no dispute regarding place of occurrence as same has taken place near house of first informant. Even if place of occurrence has not specifically been specified in F.I.R. same will not make much difference. Panchayatnama/Inquest of deceased was got conducted by Police of Swaroop Nagar. But, that by itself will not make any difference as Panchayatnama/Inquest report and postmortem report have duly been proved in evidence and exhibited. There is only one firearm injury on body of deceased caused by accused himself. As such, there can be no doubt regarding manner of occurrence. Accused was arrested two days after occurrence and on his pointing out, weapon used in commission of crime, i.e. country made pistol (Katta) was got recovered. Failure to recover any empty cartridge from place of occurrence will not make any dent in prosecution case. Testimony of P.W.-1, Dinesh Chandra Awasthy, first informant/ brother of deceased and P.W.-2, Babu Ram Awasthy cannot be discarded on grounds that they are brother and father of deceased. Testimony of even one eye-witness is sufficient to convict an accused. No benefit can be derived by defence from FSL report dated 23.02.2008 (Ext. Ka.-21). Occurrence is of night and therefore, it is not necessary that blood might have fallen on the ground. It may also be possible that winter clothing worn by deceased may have absorbed blood, which explains absence of blood on spot. Failure

to mention source of light in F.I.R. will not make any difference as deceased and accused are neighbours residing in same village and therefore, well known to each other. Absence of Majroobi Chitthi on record, will not weaken prosecution case as there is clear recital in Ext. Ka.-4 that Majroobi Chitthi was handed over to Constable Raj Bali and S.I., Rakesh Chandra. If same has been misplaced by aforesaid two police personnel, prosecution cannot be made to suffer on account of their laxity. If there is defect in investigation, same cannot be a ground for acquittal of accused. Even though it is alleged that deceased was a man of criminal antecedents but no certified copy of F.I.R. or charge-sheet against deceased has been filed to substantiate aforesaid. There is strong motive for commission of crime as there is previous enmity and suspicion in mind of accused that deceased has stolen battery of his tractor. Absence of any independent witness at time and place of occurrence is attributable to the fact that occurrence took place at around 8.30PM on a cold winter night. Even if there are minor contradictions in statements of eye-witnesses yet prosecution case cannot be termed improbable or doubtful on that ground. No videography of occurrence is possible. Therefore, merely on basis of minor contradictions in testimony of prosecution witnesses, it cannot be said that accused has been falsely implicated. Lastly, it was urged that accused himself has not given any evidence to prove his innocence.

40. On behalf of accused, it was pleaded before Court-below that place of occurrence is not definite. The prosecution witnesses of fact as well as Investigating Officer have pointed place of occurrence differently. As such, prosecution case is doubtful. It was next contended that P.W.-1, Dinesh Chandra Awasthy is not an eye-witness as he was not present at the place of occurrence. This witness has not seen the occurrence but he arrived only after receiving information regarding happening of occurrence. This witness has falsely implicated accused on account of enmity. As such, F.I.R. is false. P.W.-2, Babu Ram was also not present on spot as such he did not witness the occurrence. It was also contended that deceased Sanjay Awasthy was a man of criminal antecedents and therefore, he had enmity with large number of people. As such, deceased might have been killed by some unknown person at an unknown place. Defence in support of its case also pleaded that there is clear contradiction in testimony of P.W-1 and P.W.-2. As such, they cannot be treated as reliable and independent witnesses. They are the brother and father of deceased and have deposed as interested witnesses. In continuation of its defence, it was urged on behalf of defence that there is no motive behind alleged occurrence. In absence of any strong motive or otherwise, it is impossible to believe that a man will commit ghastly act of murder. Pointing out to loopholes in prosecution case, it was urged that according to prosecution injured was first brought to P.S.-Shivli, District-Kanpur Dehat from-where he was taken to Hallet Hospital, Kanpur Nagar. However, there is no Majrubi Chitthi in respect of injured/deceased. Injured Sanjay Awasthy was brought to Hallet Hospital, Kanpur Nagar by S.I. Rakesh Chandra and Constable Raj Bali. Their entry in Hospital was made at 11.55 PM, whereupon Doctor declared that patient has been brought dead. Accordingly, an information was given at P.S.-Swaroop Nagar. Thus, deceased was not brought to Hallet Hospital by Dinesh Chandra Awasthy nor

any family member of deceased was present at Hallet Hospital. On aforesaid factual premise, it was then urged that deceased Sanjay Awasthy was shot at an unknown place and from that place, S.I. Rakesh Chandra and Constable Raj Bali recovered the injured and brought him to Hallet Hospital. Pointing out deficiencies in investigation, it was submitted by defence that the inquest and postmortem of the deceased were got conducted by Police of Swaroop Nagar whereas F.I.R. had already been registered at P.S.-Shivli, District-Kanpur Dehat for which there is no explanation. In continuation of aforesaid, it was also urged that Investigating Officer did not investigate S.I. Rakesh Chandra and Constable Raj Bali. As such, without collecting sufficient evidence, Investigating Officer submitted charge-sheet against accused. Pointing out the inherent fallacy in prosecution case, it was also urged that no independent and impartial witness has been adduced by prosecution. The occurrence is of night and there is no mention of source of light at the time and place of occurrence. The F.I.R. has been lodged after panchayatnama/inquest had taken place. Upon investigation, the presence of another named co-accused namely Jhallar Shukla was found to be false and therefore his name was excluded in the charge-sheet which makes the prosecution story doubtful. As per FSL report (Ext. Ka.-21), bullet recovered from body of deceased was not fired from weapon recovered at pointing of accused. The investigation of case under Section 25 Arms Act is fallible and on that basis, accused cannot be held guilty. There is no independent witness of recovery of country made pistol on the alleged pointing of accused. Accused has been falsely implicated as there was previous litigation between the parties as they were challanned under Section 151 Cr.P.C. There is no recovery of blood from spot i.e. place of occurrence, and therefore, Investigating Officer has not recovered ordinary earth or earth mixed with blood from spot. The statements of witnesses as given in Court are contradictory to their statements recorded under Section 161 Cr.P.C. Prosecution has failed to prove its case beyond doubt. Motive behind occurrence is theft of battery of tractor belonging to accused but there is no investigation in that regard. Brother of deceased never went to Police-Station, as such F.I.R. is ante-timed.

41. None of the arguments advanced on behalf of accused were found cogent enough by Court below to disbelieve prosecution case. To the contrary Court-below disbelieved the defence put forward by accused. The two prosecution witnesses of fact who claim themselves to be eye witnesses of occurrence were held to be credible and reliable. Their presence at the time and place of occurrence was not doubted by Court below. As such, their testimony was relied upon. There was no such circumstantial evidence to out weight ocular version. Accordingly, Court-below by means of impugned judgement and order convicted appellant for offences punishable under Section 302 I.P.C. and also under Section 25/27 of Arms Act. Feeling aggrieved by conviction awarded by court below, accused-appellant has now approached this Court by means of present Criminal Appeal.

42. Mr. Kamal Krishana, learned Senior Counsel in challenge to the conviction awarded by Court-below to appellant has pointed out the following circumstances, which according to him when considered cumulatively have the

effect of making the prosecution case wholly doubtful. According to learned Senior Counsel aforesaid circumstances fall in the category of such circumstances which are adverse to the prosecution case and therefore, prosecution was duty bound to explain the same. The prosecution has miserably failed to do so.

Adverse Circumstances:

43. P.W.-1, Dinesh Chandra Awasthy is brother of deceased and P.W.-2 Babu Ram is father of deceased. As per prosecution story they are inimical and their evidence is partisan in nature. P.W.-1 in his examination-in-chief does not state that he has seen the incident. P.W.-2 Babu Ram also does not state in his examination-in-chief that P.W.-1 has seen the incident. P.W.-1 Dinesh Chandra Awasthy, who is the informant of the case, has admitted that except P.W.-2 Babu Ram and his sister Smt. Bitti, no one else has seen the incident. This part of cross-examination of P.W.-2, Babu Ram Awasthy, therefore leaves no room to believe that P.W.-1 has seen the incident.

44. P.W.-1 has admitted in clear terms (at page 20 of paper-book in fourth paragraph) that incident has taken place in front of iron gate of his house. A perusal of site plan (at page 91 of paper-book) will go to show that incident has taken place at the points X and Z, which have been shown in front of house of first informant. Distance between points X and Z is only 40 steps from place of occurrence. Thus evidence of P.W.1 stands contradicted by site plan, which has been prepared at instance of P.W.-1, who is informant of present case.

45. No blood nor any empties were recovered by Investigating Officer from place of occurrence.

46. Investigating Officer, P.W.-8, S.I. Shubh Suchit has admitted in clear terms (at page 41 of paper-book) that he inspected place of occurrence but he did not notice any sign, which is suggestive of the fact that occurrence as alleged has taken place in front of door of house of first informant. It is also noteworthy that Investigating Officer in his testimony (at page 41 of paper book) has stated that he did not find any blood at place of occurrence nor he recovered any blood from place of occurrence.

47. P.W.-2 in his deposition (at page 29 of paper-book) has stated that when deceased was surrounded, P.W.-1 was not present. According to prosecution case, P.W.-2 was present in the village of occurrence namely Aunaha and at no point of time, he went to Kanpur. He thus remained present in village Aunaha throughout night. In this connection, it is relevant to point out that P.W.-8, S.I. Shubh Suchit, who is Investigating Officer of present case, has investigated the case for an offence under Section 302 I.P.C. He has admitted in clear terms (at page 41 of his deposition) that when he visited house of first informant soon after occurrence, he did not find any family member of deceased. This important deposition of P.W.-8 goes to show that P.W.-1 and P.W.-2 both were not present at the time and place of incident.

48. According to testimony of P.W.-2 (at page 29 of paper-book) after deceased fell down on open floor of the house i.e. Chabutara, he was made to lie on a hard bed. P.W.-1 does not state these facts in his deposition and therefore, evidence of P.W.-1 and P.W.-2 sharply contradict each other.

49. P.W.-1 has stated (at page 19 of paper-book) that statements of P.W.-2

Babu Ram and Smt. Bitti were recorded soon after registration of F.I.R. on the same day at 11.00P.M whereas Investigating Officer in his deposition (at page 39 of paper-book) has clearly stated that statement of Babu Ram was recorded on 06.01.2008 and statement of Smt. Bitti was recorded on 10.01.2008 in terms of Section 161 Cr.P.C. Aforesaid is suggestive of the fact that P.W.-1 was not present at time of incident. It is also important to mention that P.W.-1 in his testimony (at page 19 of paper-book) has stated that his statement was not recorded on date of incident whereas Investigating Officer, S.I. Shubh Suchit, P.W.-8 has admitted in first paragraph of his deposition that statement of first informant was recorded on date of incident itself and site plan was prepared at instance of P.W.-1.

50. P.W.-1 and P.W.-2 both were cross-examined and suggestion was made by defence that deceased was involved in number of criminal cases. Both witnesses have vehemently denied suggestion so made, which is evident from their testimony (at pages 21 and 25 of paper book). However, P.W.-8, S.I. Shubh Suchit, Investigating Officer in his testimony (at page 42 of paper-book) has admitted in clear terms that number of applications were given by villagers on several dates addressed to Senior Police Officers and High Ups that deceased had committed rape upon numerous ladies of the village. In this connection Investigating Officer has clearly mentioned (at page 42 of paper-book) that in Case Crime No. 804 of 2008, papers have been filed by villagers making accusation against deceased and Investigating Officer has taken out those papers of Case Crime No. 804 of 2008, which are at Serial No. 38 to 47.

51. According to prosecution case, immediately after incident took place, injured Sanjay Awasthy was picked up by first informant and other witnesses but no blood stained clothes of P.W.-1, Dinesh Chandra Awasthy were given to Investigating Officer, which is suggestive of the fact that P.W.-1 has not seen the incident.

52. As per prosecution case, immediately after incident, injured was taken to Police Station on a Marshal Jeep and P.W.-1, Dinesh Chandra Awasthy, brother of injured, lodged a report on 31.12.2007 at 09: P.M., at Police Station Shivli. Thereafter he proceeded on a Jeep to Hallet Hospital Kanpur Nagar but injured died on the way. However, paper no. 28 Ka/13 issued by Hallet Hospital shows that deceased was brought dead to Hallet Hospital by S.I. Rakesh Chandra and Constable Raj Bali on 31.12.2007 at 11:55 P.M. Accordingly information was given by ward boy of Hallet Hospital to Police Station Swroop Nagar for holding inquest. P.W.-1 has clearly admitted in his testimony in clear terms that he does not remember names of Police personnel who took injured to Hallet Hospital, Kanpur Nagar.

53. P.W.-1, Dinesh Chandra Awasthy in his deposition has not stated at all as to how deceased reached Hallet Hospital at Kanpur Nagar. In view of specific documentary evidence that deceased was taken to Hallet Hospital vide paper no. 28Ka/13, presence of P.W.-1 at the place of incident is completely ousted.

54. According to case of prosecution, P.W.-1 went to Police Station Shivli alongwith written report. P.W.-1 has nowhere stated in his deposition that after registration of F.I.R. a free copy of same was handed over to P.W.-1. It is also relevant to point out that P.W.-4 Head Moharrir, Munesh Shanker Dwivedi has

not stated in his deposition (at page 42 of paper-book) that copy of F.I.R. was handed over to first informant.

55. In check F.I.R. there is a column that if copy of F.I.R. is handed over to first informant then it is duty of Head Moharriar to take signature of first informant on Check F.IR. At the time of cross-examination of P.W.-4, Head Moharrir, Munesh Shanker Dwivedi, was specifically questioned regarding above and he has admitted in clear terms that he did not take signatures of first informant on Check F.I.R.

56. In Check F.I.R. there is no mention as to when copy of Special Report was sent to Magistrate as required under Section 157 Cr.P.C.

57. Section 154 (2) stipulates that a free copy should be handed over to first informant after registration of F.I.R. But aforesaid provision has been blatantly violated in present case.

58. The case was registered under Section 307 I.P. C. as Case Crime No. 331/2007 at Police Station Shivli vide Report (Rapat) No. 45 dated 31.12.2007 at 9.25PM. Aforesaid report contains a recital that alongwith first informant his two brothers namely Subhash Chandra and Santosh Kumar were also present at Police Station Shivli at time of registration of F.I.R. In this connection, it is also important to mention that P.W.-1 in his testimony (at page 17 of paper-book) has admitted in clear terms that information regarding incident was given to Santosh, Subhash and other relatives on phone. He met Santosh and Subhash at the mortuary of Hallet Hospital. In aforesaid circumstances, it can not be conceived by any stretch of imagination that Santosh and Subhash were present at the time of registration of F.I.R. In these circumstances, the only inference that can be drawn is that F.I.R. is an ante-timed document.

59. P.W.-4 in his deposition (at page 32 of paper-book) has admitted that he prepared a Chitthi Majrubi, which was given to Constable Raj Bali but same is not available on record.

60. P.W.-8, S.I. Subh Suchit, Investigatin Officer, has admitted in his deposition (at page 41 of paper-book) that he never interrogated S.I. Rakesh Tiwari or constable Rajbali.

61. Prosecution did not adduce S.I. Rakesh Tiwari or Raj Bali nor filed any application for their summoning so that they be examined during course of trial.

62. P.W.-8. S.I. Subh Suchit, Investigating Officer of case has admitted in his testimony (at page 40 of paper-book) that while he was on patrol duty he received information on R.T. Set from Police Station Shivli regarding incident at 8.45 PM. He has categorically stated that upon receiving aforesaid information, he proceeded to Aunaha Village, i.e., place of occurrence and on way he saw injured being carried by his relatives and Villagers. He has further stated that he instructed P.W.-2 Babu Ram that before proceeding to Kanpur he should lodge a report at Police Station Shivli. He has further admitted that up to that time, no F.I.R. was lodged at Police Station Shivli regarding the incident. He has also clearly admitted that information regarding incident flashed on R.T. Set was also not entered in the General Diary of Police Station Shivli.

63. P.W.-8, Subh Suchit, Investigating Officer in his testimony (at page 41 of paper-book) has clearly admitted that he never inquired from Rakesh Tiwari and Rajbali as to where they had taken injured for medical treatment.

64. According to the case of prosecution the deceased was taken in an injured condition at Police Station Shivli on a Marshal Jeep. Head Moharrir Munesh Shanker Dwivedi has admitted at page 33 that General Diary entries of the registration of the F.I.R. namely Ext. Ka.-4 does not contain recital to the effect that the deceased was brought in injured condition to Police Station Shivli by P.W.-1 on a Marshal Jeep.

65. According to the case of the prosecution, a metallic bullet was recovered from body of deceased and same was sent to ballistics to match with country made pistol (Katta) i.e. weapon of assault, which according to case of prosecution, same was recovered at this pointing out on 02.01.2000 from near 'Mazar'. It is respectfully submitted that report of ballistic dated 23.02.2008 at page 13 would show that same was not fired from country made pistol (Katta), which is allegedly recovered at pointing out of appellant.

66. On the strength of adverse circumstances as detailed above, learned Senior Counsel contends that when aforesaid adverse circumstances are considered cumulatively, they make the prosecution case improbable.

67. According to learned Senior Counsel, case in hand is of direct evidence. Prosecution can succeed only if it is able to establish that eye-witnesses of occurrence are credible and trustworthy. When aforesaid issue is examined in light of adverse circumstances noted above, P.W.-1, first informant/ brother of deceased and P.W.-2, Babu Ram Awasthy, father of deceased cannot be said to be credible or reliable.

68. It is lastly urged by Mr. Kamal Krishana that testimony of P.W.-1 and P.W.-2 has to be considered in the light of proposition as to whether circumstantial evidence belies the prosecution case and therefore, accused appellant is liable to be acquitted of the charges alleged against him.

69. As a corollary to the issues that have been noted herein above, this Court will of necessity has to deal with another issue that is whether a Court of Appeal in criminal matters can reverse the judgement and order passed by Trial Court only if there is an error apparent in the judgement or it can itself re-appraise and re-appreciate the evidence to arrive at an independent conclusion.

70. For the sake of convenience we take up the third issue first.

71. A Division Bench of this Court in **Saghir and others Vs. State of U.P., 2018 (4) ADJ 286 (DB)** while considering nature and scope of jurisdiction exercised by Court of Criminal Appeal, has observed as follows in paragraphs, 31 to 40 and 42:

"31. To begin with, in the case of Rama and Others Vs. State of Rajasthan, as reported in 2002 (4) SCC 571, the Apex Court has observed as follows in paragraph 4 of the judgement:-

"4. The impugned judgment has been challenged on the sole ground that

the High Court has not disposed of the appeal in the manner postulated under law inasmuch as it does not appear from the impugned judgment as to how many witnesses were examined on behalf of the prosecution and on what point. The High Court has not even referred to any evidence much less considered the same. In our view, it is a novel method of disposal of criminal appeal against conviction by simply saying that after re-appreciation of the evidence and re-scrutiny of the records, the Court did not find any error apparent in the finding of the trial court even without reappraising the evidence. In our view, the procedure adopted by the High Court is unknown to law. It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused which cannot be permitted under law. Thus, we are of the view that on this ground alone, the impugned order is fit to be set aside and the matter remitted to the High Court."

32. Similarly, in para 3 of the judgement in the case of Mohd. Shahid Vs. State of Madhya Pradesh, as reported in 2002 (9) SCC 731, the Apex Court has made the following observations:-

"3. This appeal is directed against the judgment of the Division Bench of the Madhya Pradesh High Court disposing of a criminal appeal and affirming the conviction and sentence recorded by the Sessions Judge. The appellant stood charged under Section 302 for having given knife-blow on the abdomen and chest of the deceased. There were as many as 4 eyewitnesses PWs 5, 8, 10 and 11. The learned Sessions Judge relying upon the evidence convicted the accused-appellant under Section 302 and sentenced him to imprisonment for life. On an appeal being carried, the Appellate Authority, instead of examining and reappreciating the evidence of all these eyewitnesses, disposed of the matter by holding that it is not necessary to give detailed reasons as the Court agrees with the conclusion of the trial Judge in convicting and sentencing the accused-appellant. This, in our view, cannot be held to be a consideration of the evidence by an appellate court in a criminal appeal. We, therefore, set aside the impugned judgment and sentence and remit the criminal appeal to the High Court for redisposal in accordance with law. The appeal being an old one, the High Court would do well in disposing of the same at an early date."

33. In Badam Singh Vs. State of M.P., as reported in 2003 (12) SCC 792, the Apex Court in paragraph 16 of the judgement has issued the following caution to a Court of Appeal:-

"16. The learned Sessions Judge after considering the evidence on record and accepting the evidence of the eye witnesses found the appellant guilty of the offence under Section 302 I.P.C. and sentenced him to imprisonment for life. The High Court by its impugned judgment dismissed the appeal preferred by the appellant. We have perused the impugned judgment of the High Court. The High Court which was the first Court of Appeal did not even carefully appreciate the facts of the case. It mentions that the FIR was lodged by PWs-5 and 6 whereas the fact is that the FIR was lodged by PW-4, the Forest Officer. Without subjecting the

evidence on record to a critical scrutiny, the High Court was content with saying that the three eye witnesses having deposed against the appellant, the prosecution had proved its case beyond reasonable doubt. In our view, the High Court has not approached the evidence in the manner it should have done being the first Court of Appeal. The mere fact that the witnesses are consistent in what they say is not a sure guarantee of their truthfulness. The witnesses are subjected to cross-examination to bring out facts which may persuade a Court to hold, that though consistent, their evidence is not acceptable for any other reason. If the Court comes to the conclusion that the conduct of the witnesses is such that it renders the case of the prosecution doubtful or incredible, or that their presence at the place of occurrence as eye witnesses is suspect, the Court may reject their evidence. That is why it is necessary for the High Court to critically scrutinize the evidence in some detail, it being the final court of fact. We have therefore gone through the entire evidence on record with the assistance of counsel for the parties."

34. The sum total of the aforesaid observations of the Apex Court lead to the inescapable conclusion that the High Court while hearing a criminal appeal is the last court of fact. As such, the High Court cannot decide a criminal appeal in a casual and cryptic manner. The High Court has to itself examine the evidence and scrutinize the testimony of the witnesses relied upon by the prosecution with caution and then come to a definite conclusion.

35. In the case of State of Uttar Pradesh Vs. Krishna Master and Others, as reported in 2010 (12) SCC 324, the Apex Court has cautioned the court of appeal in the matter relating to the reappraisal and reappreciation of evidence of a witness in the following words contained in paragraph 16 of the judgement, which is extracted herein below:-

"16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it."

36. This brings us to the issue relating to the appreciation of evidence by the appellate court as decided by the Apex Court in the Case of State of Uttar Pradesh Vs. Krishna Master and Others, as reported in 2010 (12) SCC 324. Paragraphs 15, 16, 17, 24 of the aforesaid judgement clearly deal with the manner in

which the evidence of the eye-witnesses is to be evaluated in a criminal case. Paragraphs 15, 16, 17 and 24 are reproduced herein below:-

15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case albeit foolishly. Therefore, it is the duty of the Court to separate falsehood from the truth. In sifting the evidence, the Court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eye-witnesses examined in this case proves the prosecution case.

24. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes

from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness."

37. In the case in hand, there is the eye witness account of P.W. 1 and P.W. 2 which not only describes the occurrence but also the manner of assault. Apart from the above, there is also on record the post-mortem report given by the doctor (Ext. Ka-10). How the medical evidence and the ocular version have to be weighed in a criminal case, has been carefully dealt with by the Apex Court in the Case of Ram Bali Vs. State of U.P. as reported in 2004 (10) SCC 598. Paragraphs 10 and 11 of the aforesaid judgement deal with the issue referred to above. As such, the same are quoted herein below:-

"10. Even otherwise, the plea that the medical evidence is contrary to the ocular evidence has also no substance. It is merely based on the purported opinion expressed by an author. Hypothetical answers given to hypothetical questions, and mere hypothetical and abstract opinions by textbook writers, on assumed facts, cannot dilute evidentiary value of ocular evidence if it is credible and cogent. The time taken normally for digesting of food would also depend upon the quality and quantity of food as well, besides others. It was required to be factually proved as to the quantum of food that was taken, atmospheric conditions and such other relevant factors to throw doubt about the correctness of time of occurrence as stated by the witnesses. Only when the ocular evidence is wholly inconsistent with the medical evidence the Court has to consider the effect thereof. This Court in Pattipati Venkaiah v. State of Andhra Pradesh (AIR 1985 SC 1715) observed that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerized or mathematical fashion so as to be accurate to the last second. The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when exactly the deceased had his last meal and what that meal consisted of. In Nihal Singh and Ors. v. State of Punjab (AIR 1965 SC 26), it was indicated that the time required for digestion may depend upon the nature of the food. The time also varies according to the digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors.

11. Factors were also noted by HWV Cox in his book referred to by learned counsel for the appellant. (See Seventh Edition, at pages 300 to 302). An author's view which is opinion based on certain basic assumptions only cannot be a substitute for evidence let in to prove a fact - which invariably depends upon varied facts, and according to the peculiar nature of a particular case on hand. The only inevitable conclusion is that the plea is without any substance, apart from the fact that the said plea pertaining to mere

appreciation of facts was not raised before the High Court."

38. Section 145 of the Indian Evidence Act deals with the contradictions in the statement of the witness. The issue as to whether a witness can be contradicted by referring to the testimony of the other witness or by referring to his own previous statement, has been considered in the case of Mohan Lal Ganga Ram Gehani Vs. State of Maharashtra, reported in 1982 (1) SCC 700 which has been followed in the case of Chaudhri Ramjibhai Narsanghbhai Vs. State of Gujarat and Others, reported in 2004 (1) SCC 184. Paragraph 11 of the aforesaid judgement is relevant for the issue in hand. Accordingly, the same is reproduced herein below:-

"11.Coming to the plea that the contradictions noticed by the trial Court were ocular vis-a-vis the medical evidence, we find on reading of the judgment it is not to be so, Section 145 of the Indian Evidence Act, 1872 (in short the " Evidence Act") applies when same person makes two contradictory statements. It is not permissible in law to draw adverse inference because of alleged contradictions between one prosecution witness vis-a-vis statement of other witnesses. It is not open to Court to completely demolish evidence of one witness by referring to the evidence of other witnesses. Witnesses can only be contradicted in terms of Section 145 of the Evidence Act by his own previous statement and not with the statement of any other witness. See Mohanlal Gangaram Gehani v. State of Maharashtra, AIR (1982) SC 839. As was held in the said case, Section 145 applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under Section 145 of the Evidence Act only. Section 145 has no application where a witness is sought to be contradicted not by his own statement but by the statement of another witness."

39. However, testimony of a witness can be assessed with the testimony of another to find out if there is any disparity in between the same for arriving at the conclusion as to whether the witness is reliable and credible or not.

40. Admittedly, P.W. 1 and P.W. 2 are related witnesses as P.W. 1 is the elder brother of the deceased whereas, P.W. 2 Smt. Kubra is the widow of the deceased. There is no other eye-witness of the occurrence. As such, the evidence of such witnesses has to be examined with caution and circumspection as held by the Apex Court in the case of Shyam Sunder Vs. State of Chhattisgarh, as reported in 2002 (8) SCC 39. Paragraph 8 of the judgement deals with the issue as stated above and accordingly, the same is extracted herein below:-

"8. The conviction rests on the ocular evidence of Baldau Ram(PW-2) and Punni Bai (PW-6). We have, in the light of the submissions made by the learned Amicus Curiae, carefully examined the testimony of Baldau Ram. It is true that the relationship between this witness and his family members on the one hand and the accused and his family members on the other was strained and criminal litigation was also pending between the two. The testimony,therefore, needs to be subjected to careful scrutiny. Having done so,we are satisfied to hold that Baldau Ram (PW-2) is a witness of truth. The factum of his having gone to his field for performing agricultural

operations and engaging labour is something natural to do as he had gone to his field from early morning, at about 5.30 a.m., accompanied by his cattle to be left for grazing in or near the field. At about 7.30a.m., on the arrival of Kamta (PW-4) on the field he was returning to his home. Having been intercepted by the appellant he returned back to his field and told his brother Kamta (PW-4) of what had happened with him. Kamta (PW-4) supports this part of the version. The subsequent part of the story of his having seen the assault on his brother Radhey Shyam and thereafter, that is, his having reached the house of Kartik Ram to save himself from a likely assault by the appellant on him finds support from the testimony of Kartik Ram(PW-3). The fact that Punni Bai (PW-6) has also her field close to the place of the incident has not been disputed by the defence by making any suggestion to the contrary during her cross-examination. She could have seen the assault on Radhey Shyam by Shyam Sunder from her field situated near the place of occurrence. On alarm being raised by Baldau Ram (PW-2), she reached near the place of the incident.

42. Thus the oral testimony of P.W. 1 and P.W. 2, cannot be discarded on the ground that they are related to the deceased Salamat. However, the Court has to adopt a careful approach and analyse the evidence to find out whether it is reliable and credible. If the defence wants that the evidence of related witness should not be believed, it has to lay down a strong factual foundation for the same and if necessary prove by leading impeccable evidence in respect of false implication by evidence."

72. Thus from aforesaid discussion, what is discernible is that High Court while hearing criminal appeal has to independently weigh evidence on record and thereafter, record a finding of guilt or acquittal as the case may be. High Court is not bound by findings recorded by Court below nor appellate jurisdiction of High Court while hearing criminal appeals is circumferenced by findings recorded by court-below.

73. Having outlined the nature and scope of jurisdiction of High Court while deciding criminal appeal, we now take up the first and second issues involved in this appeal together, since both the issues are inter-linked and inter-wined.

74. P.W.-1, Dinesh Chandra Awasthy and P.W.-2, Babu Ram Awasthy have been adduced by prosecution as they are alleged to be eye-witnesses of occurrence. It is well settled that eye-witnesses account can be relied upon only if the witness is credible and his testimony is worthy of trust. Therefore, this Court in order to rely upon testimony of P.W.-1 and P.W.-2 has of necessity to record a finding that P.W.-1 and P.W.-2 are credible and reliable witnesses and therefore, their testimony is worthy of trust.

75. As a corollary to the principle regarding credibility and reliability of witnesses another issue of importance is whether circumstantial evidence belies prosecution case. We shall now deal with the circumstances refer to by learned Senior Counsel appearing for appellant, on the basis of which it is urged that prosecution case is impossible or that circumstantial does corroborate prosecution case.

76. It is basic prosecution case that occurrence took place in front of door of

house of deceased. After occurrence had taken place, injured Sanjay Awasthy fell on ground from where he was picked up and laid on hard-bed. Further, it is also case of prosecution that P.W.-1, Dinesh Chandra Awasthy and P.W.-2 Babu Ram Awasthy were present at time and place of occurrence and took deceased to Police-Station Shivli and thereafter, to Hallet Hospital, Kanpur Nagar. It is also the prosecution case that Subhas Chand and Santosh Kumar brothers of P.W.-1, Dinesh Chandra Awasthy were also present at Police-Station Shivli at time of registration of F.I.R.

77. Above mentioned basic prosecution case is therefore to be tested on principle of probability and improbability. To begin with firstly, injured received firearm injury on account of gun shot and fell down on Chabutra. However, no blood was found by Investigating Officer either on the ground where injured fel or on hard-bed where injured was laid after he was picked up from ground. Secondly, no blood stained clothes of any of family members of deceased were recovered by Investigating Officer. Thirdly, no empties were found on spot by Investigating Officer. Fourthly, after occurrence had taken place, injured is alleged to have been taken to P.S. Shivli for lodging of F.I.R. After F.I.R. was lodged it is alleged that injured was taken to Hallet Hospital on a Marshal Jeep. However, neither there is any Majroobi Chitthi of deceased on record. Fifthly, the vehicle number of Marshal Jeep on which deceased is alleged to have been taken to Hallet Hospital was disclosed by P.W.-1 or P.W.-2 nor they have disclosed name of driver of aforesaid said vehicle. Sixthly, the driver of Marshal Jeep was best evidence to prove prosecution case regarding carrying of injured from Village-Aunaha to P.S. Shivli and then to Hallet Hospital, Kanpur Nagar. However, prosecution has deliberately withheld this important independent witness nor has assigned any reason for not adducing him in evidence. Seventhy, driver of Marshal Jeep being an independent witness would have clearly disclosed as to who all accompanied the injured to Police-Station Shivli and then to Hallet Hospital, Kanpur Nagar. But prosecution has refrain from adducing him. Eighthly, According to prosecution case it is alleged that injured was taken to Hallet Hospital by P.W.-1, Dinesh Chandra Awasthy. However, Paper No. 28 Ka-13 shows that injured was brought to Hospital by S.I. Rakesh Chandra and Constable Raj Bali. Ninthly, S. I. Rakesh Chandra and Constable Raj Bali were the best evidence to prove arrival of deceased at Hallet Hospital and further which family member of deceased had accompanied them. However, none of the aforesaid police personnel were examined to explain the correct position. As such prosecution withheld best evidence as to who brought injured at Hallet Hospital. Tenthly, prosecution story that P.W.-1 accompanied injured all the time is also falsified from the fact that F.I.R. was lodged on 31.12.2007 at 9.25 PM. in respect of an occurrence which took place at around 8.30 PM. After lodging of F.I.R. injured was taken to Hallet Hospital. Document Paper No.28 Ka-13 shows that injured was brought dead to Hospital on 31.12.2007 at 11.55 PM. Written information regarding death of injured was submitted by P.W.-1, Dinesh Chandra Awasthy at P.S. Shivli on 31.12.2007 at 11.55PM. Timing of Paper No. 28 Ka-13 as noted above clearly shows that P.W.-1 did not accompany injured to Hallet Hospital Kanpur.

78. When aforesaid circumstantial evidence is weighed in the light of oral testimony of P.W.-1 and P.W.-2 and there being no explanation in the same it cannot be said that prosecution case is probable. On circumstances as noted above, prosecution case to the contrary is improbable. Prosecution has not been able to prove the basic prosecution case it set out to prove. Thus, circumstantial evidence does not support prosecution case.

79. This brings us to the issue as to whether P.W.-1 and P.W.-2 are credible and therefore, worthy of trust.

80. As already noted above, testimony of a family member cannot be discarded merely on ground that he is a family member of deceased. However, in such a situation testimony of such witness has to be examined with care and caution. Object of the Court is to find out that when testimony of such witness is considered as a whole, it has a circle of truth or not.

81. Mr. Kamal Krishana has pointed out various deficiencies in statement of P.W.-1 and P.W.-2 and on that basis he has tried to dislodge the two prosecution witnesses of fact. Whether a witness can be discarded on the basis of evidence of another witness has already been considered by Apex Court in case of Mohan Lal Ganga Ram Gehani (Supra) and Chaudhary Ramji Bhai, Narsangh Bhai (Supra) wherein it has been held that a witness can be contradicted by his own previous statement under Section 145 Cr.P.C.

82. However, there is a corollary to aforesaid principle that testimony of witnesses of fact must prove basic prosecution case and little disparity or contradiction in their testimony are liable to be discarded as being natural. Therefore, what has to be assessed in present case is whether P.W.-1 and P.W.-2 have been consistent in their testimony and whether their testimony proves basic prosecution case.

83. Mr. Kamal Krishna has referred to the following contradictions/ inconsistencies in the testimony of P.W.-1 and P.W.-2. On aforesaid he submits that prosecution witnesses of fact are not credible and therefore, their testimony is not worthy of trust.

84. P.W.-1, Dinesh Chandra Awasthy is brother of deceased and P.W.-2 Babu Ram is father of deceased. As per prosecution story they are inimical and their evidence is partisan in nature. P.W.-1 in his examination-in-chief does not state that he has seen the incident. P.W.-2 Babu Ram also does not state in his examination-in-chief that P.W.-1 has seen the incident. P.W.-1 Dinesh Chandra Awasthy, who is the informant of the case, has admitted that except P.W.-2 Babu Ram and his sister Smt. Bitti, no one else has seen the incident. This part of cross-examination of P.W.-2, Babu Ram Awasthy, therefore leaves no room to believe that P.W.-1 has seen the incident.

85. P.W.-1 has admitted in clear terms (at page 20 of paper-book in fourth paragraph) that incident has taken place in front of iron gate of his house. A perusal of site plan (at page 91 of paper-book) will go to show that incident has taken place at the points X and Z, which have been shown in front of house of first informant. Distance between points X and Z is only 40 steps from place of occurrence. Thus

evidence of P.W.1 stands contradicted by site plan, which has been prepared at instance of P.W.-1, who is informant of present case.

86. P.W.-2 in his deposition (at page 29 of paper-book) has stated that when deceased was surrounded, P.W.-1 was not present. According to prosecution case, P.W.-2 was present in the village of occurrence namely Aunaha and at no point of time, he went to Kanpur. He thus remained present in village Aunaha throughout night. In this connection, it is relevant to point out that P.W.-8, S.I. Shubh Suchit, who is Investigating Officer of present case, has investigated the case for an offence under Section 302 I.P.C. He has admitted in clear terms (at page 41 of his deposition) that when he visited house of first informant soon after occurrence, he did not find any family member of deceased. This important deposition of P.W.-8 goes to show that P.W.-1 and P.W.-2 both were not present at the time and place of incident.

87. According to testimony of P.W.-2 (at page 29 of paper-book) after deceased fell down on open floor of the house i.e. Chabutara, he was made to lie on a hard bed. P.W.-1 does not state these facts in his deposition and therefore, evidence of P.W.-1 and P.W.-2 sharply contradict each other.

88. P.W.-1 has stated (at page 19 of paper-book) that statements of P.W.-2 Babu Ram and Smt. Bitti were recorded soon after registration of F.I.R. on the same day at 11.00P.M whereas Investigating Officer in his deposition (at page 39 of paper-book) has clearly stated that statement of Babu Ram was recorded on 06.01.2008 and statement of Smt. Bitti was recorded on 10.01.2008 in terms of Section 161 Cr.P.C. Aforesaid is suggestive of the fact that P.W.-1 was not present at time of incident. It is also important to mention that P.W.-1 in his testimony (at page 19 of paper-book) has stated that his statement was not recorded on date of incident whereas Investigating Officer, S.I. Shubh Suchit, P.W.-8 has admitted in first paragraph of his deposition that statement of first informant was recorded on date of incident itself and site plan was prepared at instance of P.W.-1.

89. P.W.-1 and P.W.-2 both were cross-examined and suggestion was made by defence that deceased was involved in number of criminal cases. Both witnesses have vehemently denied suggestion so made, which is evident from their testimony (at pages 21 and 25 of paper book). However, P.W.-8, S.I. Shubh Suchit, Investigating Officer in his testimony (at page 42 of paper-book) has admitted in clear terms that number of applications were given by villagers on several dates addressed to Senior Police Officers and High Ups that deceased had committed rape upon numerous ladies of the village. In this connection Investigating Officer has clearly mentioned (at page 42 of paper-book) that in Case Crime No. 804 of 2008, papers have been filed by villagers making accusation against deceased and Investigating Officer has taken out those papers of Case Crime No. 804 of 2008, which are at Serial No. 38 to 47.

90. P.W.-1, Dinesh Chandra Awasthy in his deposition has not stated at all as to how deceased reached Hallet Hospital at Kanpur Nagar. In view of specific documentary evidence that

deceased was taken to Hallet Hospital vide paper no. 28Ka/13, presence of P.W.-1 at the place of incident is completely ousted.

91. According to case of prosecution, P.W.-1 went to Police Station Shivli alongwith written report. P.W.-1 has nowhere stated in his deposition that after registration of F.I.R. a free copy of same was handed over to P.W.-1. It is also relevant to point out that P.W.-4 Head Moharrir, Munesh Shanker Dwivedi has not stated in his deposition (at page 42 of paper-book) that copy of F.I.R. was handed over to first informant.

92. The case was registered under Section 307 I.P. C. as Case Crime No. 331/2007 at Police Station Shivli vide Report (Rapat) No. 45 dated 31.12.2007 at 9.25PM. Aforesaid report contains a recital that alongwith first informant his two brothers namely Subhash Chandra and Santosh Kumar were also present at Police Station Shivli at time of registration of F.I.R. In this connection, it is also important to mention that P.W.-1 in his testimony (at page 17 of paper-book) has admitted in clear terms that information regarding incident was given to Santosh, Subhash and other relatives on phone. He met Santosh and Subhash at the mortuary of Hallet Hospital. In aforesaid circumstances, it can not be conceived by any stretch of imagination that Santosh and Subhash were present at the time of registration of F.I.R. In these circumstances, the only inference that can be drawn is that F.I.R. is an ante-timed document.

93. Learned A.G.A. could not point out any infirmity or illegality in aforesaid submissions urged by learned Senior Counsel for appellant. We have ourselves scrutinize the oral testimony of P.W.-1 and P.W.-2 and find that contradictions, inconsistencies and omissions in oral testimonies of prosecution witnesses of fact as alleged are present. In view of aforesaid, this Court has no other option but to discard prosecution witnesses of fact i.e. P.W.-1 and P.W.-2 as incredible. Consequently, their testimonies are not worthy of trust. In view of above the present criminal appeal is liable to succeed. It accordingly succeeds and is allowed. Appellant is acquitted of charges levelled against him. He shall be released forthwith if not wanted in another case.

(2020)1ILR A220

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.11.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Revision No. 109 of 2007

Rameshwar Singh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
S.P. Singh Somvanshi

Counsel for the Opposite Parties:
Govt. Advocate, K.R. Singh

A. Code of Criminal Procedure - Section 401 - High Court's powers of revision against acquittal - Revisional jurisdiction against the order of acquittal - should be exercised only in exceptional cases - to correct a manifest illegality resulting gross miscarriage of justice – but should not act as Court of appeal to re-appreciate the evidence (Para 17)

B. Criminal Trial - Code of Criminal Procedure - S. 154 - Delayed FIR - Effect -

Mere delay in lodging the FIR would not be enough for discarding the prosecution case - if it was otherwise proved - by the testimony of an eye-witness & other evidence brought on record (Para 21)

C. Criminal Trial - Conviction - on the basis of the Sole testimony of single eye witness - if the prosecution case could get proved by - the testimony of one eyewitness & testimony of that witness is firmed, believable, cogent and credible - it would be sufficient to convict the accused (Para 22)

D. Criminal Trial - Appreciation of evidence - minor/trivial contradictions - minor/trivial contradiction or inconsistency cannot demolish the entire prosecution story, if it is otherwise found to be credit worthy - If the contradictions in the testimony of the witnesses do not destroy the core of the prosecution case, the prosecution case should not be rejected - Every omission is not a contradiction (Para 23)

E. Criminal Trial – Motive - Relevance - motive becomes irrelevant when there is ocular testimony of the incident (Para 26)

PW-1 (daughter of deceased) was 13-14 years child - she stated that accused armed with Farsa and Axe came and dragged her father and chopped off his neck - she witnessed the incident from window of her home - Assailants/accused belonged to the same village and were known to PW – 1 and she recognized them- This witness was subjected to quite lengthy cross-examination but she remained firm in her deposition *Held* - minor discrepancy in her statement would not make her testimony unbelievable - Contradictions in the manner of assault by Axe on deceased as stated by PW-1, and evidence of PW-4 would not make the prosecution story improbable or false - PW-1 was the natural witness - Trial court order of acquittal set aside - matter remitted back to the trial court for decision afresh.

Criminal Revision partly allowed. (E-5)

List of cases cited: -

1. D. Stephens Vs Nosibolla (sic) AIR1951 SC 196

2. Ram Briksh Singh & ors Vs Ambika Yadav & anr (2004) 7 SCC 665

3. Sunil Kumar Vs St. Govt. of NCT of Delhi (2003)11 SCC 367

4. Bakhshish Singh Vs St. of Punj. & anr (2013) 12 SCC 187

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

1. This criminal revision under Section 397/401 CrPC has been filed against the judgment and order dated 16th December, 2006 passed by the Additional Sessions Judge/Special Judge (E.C. Act), Unnao in Sessions Trial No.156 of 2004 by means of which the learned Sessions Judge has acquitted the accused-respondent nos. 2 to 8 (Rajjan Singh, Guddu Singh, Raj Kumar Singh, Uttam Singh, Udham Singh, Madal Singh and Parashuram Singh) of the charges under Sections 147, 148, 302 read with Sections 149 and 201 IPC and the accused-respondent, Bhola Singh of the charge under Section 120-B IPC.

2. An FIR at Case Crime No. 501 of 2003 was registered under Sections 147, 148, 302, 201 and 120-B IPC At Police Station Hasanganj, District Unnao against eight accused on a written complaint of Rameshwar Singh, son of Late Guru Prasad Singh (PW-2). The allegations in the complaint were that the complainant was resident of Village Tala Sarai, District Unnao and when the incident took place, he was living at Village Jawan, Police Station Auras, District Unnao. On 26.10.2003, he along with his brother-in-law Ahibaran Singh came to village Jawan to meet his brothers on the occasion of "Diwali'. His brother Girish Singh and his brother-in-law Ahibaran Singh, niece

Ranjana Singh, daughter of Girish Singh were sitting on the Courtyard of his house and talking to each other. The lamps were burning on the occasion of "Diwali'. At around 7:00 hours, the accused Rajjan Singh and Guddu Singh, sons of Jairam Singh, Raj Kumar Singh, Uttam Singh and Udham Singh sons of Pooran Singh, Madal Singh, son of Mahraj Singh, Parashuram Singh, son of Narpat Singh armed with Axe, Farsa and knife came there. They dragged out Girish Singh, brother of the complainant, and they chopped off his neck on a piece of wood in front of house of Sunder Pasi. Thereafter, the accused captured Hardayal Singh, another brother of the complainant, who was sitting in front of house of Nanhke Pasi, and throttled him. It was said that the informant, his brother-in-law Ahibaran Singh and niece Ranjana Singh raised alarm and cried, but nobody came forward for help in the village. After killing two brothers, the accused took away their dead bodies. Despite making search, the dead bodies could not be recovered. It was further alleged that the accused killed two brothers of the complainant because Badake Singh, son of Jairam Singh was killed 17-18 years back in which the complainant and his brother Girish Singh, and two other persons belonging to Pasi Caste of the village were accused. It was also said that at present there was no enmity among them. It was also said that the accused persons have killed his two brothers by deceiving them. It was also said that accused Bhola Singh, son of Shanker was also involved in the incident. The complainant could reach the police hiding himself from the accused on next day and did not come in the night, fearing danger to his life from the accused.

3. The police, after investigating the offence, filed charge-sheet under Sections 147, 148, 302, 201 and 120-B IPC.

4. The inquest of dead bodies of Girish Singh and Hardayal Singh was conducted from 15.05 hours to 18.10 hours. Postmortem examination of dead body of Hardayal was conducted on 28.10.203 at 4:00 hours and of dead body of Girish Singh was conducted on the same day at 3.30 hours. The dead-bodies of Girish Singh and Hardayal Singh were buried under the ground by the accused after their murder.

5. On 29.10.2003, the accused Raj Kumar, Udham, Parashuram and Uttam were arrested, and on their pointing out Farsa and Axe were recovered. On 14.11.2003, accused Rajjan Singh, Madal Singh and Guddu Singh were arrested. On pointing out of accused Rajjan Singh one Axe, on pointing out of Guddu Singh one Axe and on pointing out to Madal Singh one Axe were recovered.

6. The case was committed to the Court of Session by the learned Chief Judicial Magistrate. Vide order dated 21st April, 2004, the charges under Sections 147, 148, 302 read with Sections 149 and 201 IPC were framed against accused Rajjan Singh, Guddu Singh, Raj Kumar Singh, Uttam Singh, Udham Singh, Madal Singh and Parshuram Singh. Against accused Bhola Singh, charge was framed under Section 120-B IPC.

7. To prove its case, the prosecution examined, Kumari Ranjana Singh, daughter of deceased Girish Singh, as PW-1, Rameshwar Singh, the complainant , brother of the deceased Girish Singh and Hardayal Singh as PW-2, Constable Surendra Pal Misra was a formal witness as PW-3, who proved the Chik FIR (Exhibit Ka-2) and G.D. Entry (Exhibit Ka-3) and sending of special report

(Exhibit Ka-4), Dr. Shiv Kumar Singh, who conducted postmortem examination of deceased Girish Singh and Hardayal Singh as PW-4, S.I. Krishna Kumar Yadav, who arrested accused Rajjan Singh, Guddu Singh and Madal Singh and recovered three Axes on their pointing out, and prepared seizure memo etc., as PW-5, S.I. Vijay Kumar Singh, who was the first investigating officer, who recovered the dead bodies, got conducted the inquest and sent the dead-bodies for postmortem examination, as PW-7. He also recovered Farsa and Axe on pointing out of Raj Kumar Singh, Uttam and Parashuram, which were allegedly used in commission of the offence.

8. The accused, in their statements recorded under Section 313 CrPC, denied the allegations against them, and said that there was enmity between them and the deceased, and they had been falsely implicated by the police in the case. The accused did not lead any evidence in their defence.

9. The trial Court determined the following issues for consideration:-

i)whether deceased Girish and Hardayal had died because of the injuries caused to them, as stated by the prosecution;

ii) whether the accused, with a common object, formed an unlawful assembly armed with Axe and Farsa, and pursuant to that common object killed deceased Girish and Hardayal; and

iii) whether on pointing out of accused arms, used in commission of the offence, were recovered under Section 27 of the Evidence Act.

10. The trial Court had concluded that the FIR was registered after delay of 17 hours from the time of alleged incident. The distance from the place of incident to the police station was 12 kilometers. For the delay, no explanation was offered in the complaint by complainant Rameshwar Singh. After considering the evidence of Rameshwar Singh, PW-2, the trial Court was of the opinion that the FIR was written at the police station, in consultation and, PW-2 was not present when the incident took place.

11. In view of the aforesaid, the trial Court was of the opinion that the FIR was suspicious. After the incident, the complainant was called from the village Jawankhera, where he was living, and thereafter, he went to the police station to lodge the FIR.

12. The trial Court, on first issue, after considering statements of PW-1 and PW-2 and testimony of PW-4, who conducted the postmortem examination of the dead-bodies of Girish Singh and Hardayal Singh, was of the opinion that there was discrepancy between medical evidence and the testimony of the eye-witnesses. The medical evidence did not support the oral testimony of the eye-witnesses, and from the medical evidence, it was clear that the incident did not take place in the manner described by the eye-witnesses. The trial Court had, therefore, opined that the eye-witnesses did not witness the incident.

13. On second issue, the trial Court was of the opinion that there was wide discrepancy between statements of PW-1 and PW-2. PW-1 stated that the accused dragged the dead-bodies on west-side and the blood was oozing from the bodies,

whereas the PW-2 in his statement said that the accused took the dead-bodies in two different sags. Considering this perceived discrepancy, the trial Court was of the opinion that the PW-1 and PW-2 were not the eye-witnesses of the incident. The trial Court also held that the incident did not take place at the time and place when and where it was alleged to have taken place. The eye-witnesses were the interested witness as the PW-1 was the daughter of Girish Singh, and complainant PW-2, was the brother of deceased Girish and Hardayal. In absence of an independent witness, their testimonies became suspicious and their presence was also doubtful. There was discrepancy between statements of the eye-whitenesses and the Doctor (PW-4), who conducted the postmortem on dead bodies of the deceased.

14. After considering the statement of investigating officer, it was held that the incident, as was projected, became suspicious. In respect of Bhola Singh, it was said that except for the statement of PW-2, where he said that in the incident Bhola Singh was also involved, there was no other evidence against him and, therefore, the case against Bhola Singh was not proved in any manner.

15. In view of the aforesaid, it was held that the presence of PW-2 was doubtful. There was wide discrepancy in the statement of the PW-1 and PW-2. The medical evidence did not support the prosecution case regarding the manner in which the incident was caused and, therefore, the case against the accused was not proved.

16. On third issue, the trial Court held that there was no immediate cause/motive for causing the incident by the accused. The alleged motive was that 18 years before the date of incident, Badake Singh was murdered. He was brother of Raj Kumar Singh and Guddu Singh. In the aforesaid incident, deceased Girish Singh, complainant, PW-2 and two other villagers belonging to Pasi Community were accused. It was said that the motive was not established for commission of the offence. The trial Court was of the opinion that the defence version that two deceased were killed somewhere else and, after the dead-bodies were recovered, the police had falsely implicated the accused appeared to be correct.

17. The grounds, on which a revisional Court can set-aside a judgment and order of acquittal, are well settled by catena of judgments. The powers under sections 397 to 401 of Cr.P.C. are to be exercised sparingly. The High Court, while exercising the revisional jurisdiction against an order of acquittal, should not act as Court of appeal to re-appreciate the evidence. However, it is the duty of Court to correct manifest illegality, resulting in gross miscarriage of justice.

18. The Supreme Court in ***D. Stephens vs Mosibolla , AIR1951 SC 196*** held that revisional jurisdiction invoked against the order of acquittal should be exercised only in exceptional cases to correct a manifest illegality or to prevent gross miscarriage of justice. Para-10 of the aforesaid judgment is extracted hereunder:-

" 10. The revisional jurisdiction conferred on the High Court under Section 439 of the Code of Criminal Procedure is not to be lightly exercised, when it is

invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record. As already pointed out, there has been no such error in the present case; on the other hand, it seems to us that on both the previous occasions, the Chief Presidency Magistrate was right in holding that the accused was not guilty of any offence under Sections 25 and 26 of the Indian Merchant Shipping Act."

Similar view has been reiterated in several judgments, including in ***Ram Briksh Singh and others Vs. Ambika Yadav and another, (2004) 7 SCC 665.***

19. The questions, which arise for consideration in the present revision, is whether the trial Court has been correct in discarding the testimony of PW-1, who was an eye-witness to the incident in which her father and uncle were killed mercilessly, even it if it is believed that the PW-2 was not an eye-witness. The second question, which needs to be considered, is whether discrepancy in the testimony of PW-1 and PW-4 were so wide that the prosecution case was to be rejected and the accused were to be acquitted. The third question is whether the trial Court had overlooked the material evidence and passed the impugned judgment and order of acquittal, resulting in manifest illegality and gross miscarriage of justice.

20. Keeping in mind the scope of revisional jurisdiction of the High Court against an order of acquittal the facts of the present case are analysed. PW-1 was 13-14 years child. In her cross-examination-in-chief, she stated that it was the "Diwali Day' and the lamps were burning. At around 7.00 p.m. accused Rajjan, Guddu, Raj Kumar, Uttam, Udham, Madal and Parashuram armed with Farsa and Axe came and dragged her father Girish to the house of Sundar Pasi. They put him on a piece of wood and chopped off his neck. It was further said that at that time his uncle Hardayal was sitting in front of house of Nanhke Pasi. The accused dragged him also by putting rope on his neck, and took him towards west. She said that she witnessed the incident from window of her home. She also said that she knew and recognized the accused. This witness was subjected to quite lengthy cross-examination, but nothing came out, on the basis of which, her testimony could be said to be shaken or unbelievable. She remained firm in her deposition. The minor discrepancy in her statement and the deposition of PW-4 would not make her testimony unbelievable. The trial Court did not keep in its mind that she was a child 12-13 years old when the incident took place and her father was mercilessly murdered by the accused by chopping off his neck from the body, and her uncle was also murdered. The inference regarding manner of assault, drawn on the basis of the medical evidence, should not have been enough to discard her testimony.

21. The prosecution case should not have been rejected by the trial Court merely on the ground that the FIR was lodged with delay of 17 hours. It is important to note here that because of fear and terror being spread on account of daredevil murder of two real brothers on

the day of the "Diwali', no witness from the village came forward to depose against the accused. The incident is said to have been taken place at 7:30 p.m. on the day of "Diwali'. The FIR was registered on 12:30 hours on the next day at the police station which was 12 kilometers away from the place of incident. Mere delay in lodging the FIR would not be enough for discarding the prosecution case, if it was otherwise proved by the testimony of an eye-witness and other evidence brought on record. Even if it is believed that there was a delay in lodging the FIR, and the same was lodged after summoning PW-2, but if the prosecution case could get proved by the testimony of one eye-witness, it would be suffice to convict the accused if the testimony of that witness is firmed, believable, cogent and credible.

22. The Supreme Court in the case of ***Sunil Kumar Vs. State Govt. of NCT of Delhi, (2003), 11 SCC 367*** has held that testimony of sole eye-witness can be enough for conviction provided his evidence is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. Paragraphs 8, 9 and 10 of Sunil Kumar Vs. State Govt. of NCT of Delhi (supra), which are relevant for the purpose of the present case, are extracted herein below:-

"8. In Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000] this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under: (AIR p. 619, paras 11-12)

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

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way -- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses."

9. Vadivelu Thevar case [AIR 1957 SC 614 : 1957 Cri LJ 1000] was referred to with approval in the case of Jagdish Prasad v. State of M.P. [1995 SCC (Cri) 160 : AIR 1994 SC 1251] This Court held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony

of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). But, if there are doubts about the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise.

10. Evidence of PW 5 has been analysed with great care and caution by the trial court as well as the High Court. The so-called improvements do not, in any way, introduce a new facet of the case. Every omission is not a contradiction. Minor details which are not indicated in the first information report are later on elaborated in court, do not justify a criticism that the case originally presented has been abandoned to be substituted by another one. PW 5's evidence appears to be clear, cogent and trustworthy. Nothing substantial has been brought on record to disregard the testimony of this witness. Though PW 3 changed his version, yet his evidence does not get totally wiped out. A part of it which is reliable can be taken note of by the court and has, in fact, been taken note of. The evidence of this witness notwithstanding his making a different version provides some corroboration, though as noted above, the evidence of PW 5 alone was sufficient to fix the guilt on the accused persons. Merely because of the fact that there were some minor omissions, which are but natural, considering the fact that the examination in court took place years after the occurrence, the evidence does not become suspect. Necessarily, there cannot be exact and precise reproduction in any mathematical manner. What needs to be seen is whether the version presented in the court was substantially similar to what was stated during investigation. It is only when exaggerations fundamentally change the nature of the case, the court has to consider whether the witness was telling the truth or not. As has been held by the trial court as well as the High Court, the evidence of PW 5 was truthful evidence. He has graphically described the assaults on the deceased. Accused Dharamvir gave several blows on the person of the deceased while accused Sunil caught hold of him to facilitate the assaults. Section 34 of the Act is clearly attracted. This is not a case where anything substantial has been brought on record to disregard the evidence of PW 5."

23. It is the settled law that minor contradiction or inconsistency cannot unnecessarily demolish the entire prosecution story, if it is otherwise found to be credit worthy. If the contradictions in the testimony of the witnesses do not destroy the core of the prosecution case, the prosecution case should not be rejected. In a murder trial, trivial discrepancy should not be the ground for rejecting the prosecution case, if it is otherwise found to be credit worthy. The Supreme Court in the case of ***Bakhshish Singh Vs. State of Punjab and another (2013) 12 SCC 187***, in paragraphs 31 to 33 has held as under:-

"31. This Court in several cases observed that minor inconsistent versions/discrepancies do not necessarily demolish the entire prosecution story, if it is otherwise found to be creditworthy. InSampath Kumar v. Inspector of Police

[Sampath Kumar v.Inspector of Police, (2012) 4 SCC 124 : (2012) 2 SCC (Cri) 42] this Court after scrutinising several earlier judgments relied upon the observations in Narayan Chetanram Chaudhary v. State of Maharashtra [(2000) 8 SCC 457 : 2000 SCC (Cri) 1546] to the following effect: (Sampath Kumar case [Sampath Kumar v.Inspector of Police, (2012) 4 SCC 124 : (2012) 2 SCC (Cri) 42] , SCC p. 130, para 21)

"21. ... "42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person.' (Narayan Chetanram Chaudhary case [(2000) 8 SCC 457 : 2000 SCC (Cri) 1546] , SCC p. 483, para 42)"

32. In Sunil Kumar Sambhudayal Gupta v. State of Maharashtra [(2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375] this Court observed as follows: (SCC p. 671, para 30)

"30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580] .)"

33. The embellishments in the statements of Narinder Banwait (PW 19) referred to above, in our view do not constitute such contradictions which destroy the core of the prosecution case as this Court in Raj Kumar Singh v. State of Rajasthan [(2013) 5 SCC 722] has observed as under: (SCC p. 740, para 43)

"43. ... It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labelled as omissions or contradictions. Therefore, the courts must be cautious and very particular in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the court to scrutinise the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of the evidence provided by the witnesses, and whether the validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief."

24. Similar view has been taken in ***(2009) 14 SCC 748, (2018) 5 SCC 435 and (2017) 11 SCC 85*** and several other cases.

25. In the present case, the contradictions in the manner of assault by Axe on deceased Girish Singh, as stated by PW-1, and evidence of PW-4 would not make the prosecution story improbable or false. The trial Court has been incorrect in discarding the testimony of PW-1. Even if it is believed that she did not witness the murder of his uncle, her testimony could not have been discarded, regarding the murder of her father. PW-1 was the natural witness. The assailants/accused belonged to the same village and were known to her. Her presence at the house and witnessing the incident had been discarded by the trial Court, considering the medical evidence. The approach of the trial Court does not appear to be correct.

26. The trial Court finding that there was no motive for commission of the offence does not appear to be correct. The accused, in their statements, have specifically stated that they have been falsely implicated because there was enmity between them and complainant due to murder of Badake Singh in which Guddu Singh, complainant and two others belonging to "Pasi Community' were the accused. The motive becomes irrelevant when there is ocular testimony of the incident.

27. In view of the aforesaid, the impugned judgment and order is set-aside, and the matter is remitted back to the trial Court for decision afresh. So far as acquittal of Bhola Singh (respondent no. 9) is concerned, the trial Court was correct in holding that except for bald statement of PW-2 that he was involved in commission of the offence, there is no evidence regarding his involvement in commission of the offence. Therefore, the impugned judgment and order, so far as it relates to Bhola Singh (respondent no. 9) is concerned, it is affirmed. The trial Court is directed to decide the case afresh in accordance with law within a period of four months from today.

28. Bail bonds of the respondents 2 to 8 (Rajjan Singh, Guddu Singh, Raj Kumar Singh, Uttam Singh, Udham Singh, Madal Singh and Parashuram Singh) are cancelled. They are required to surrender before the trial Court and apply for fresh bail.

29. The revision is **allowed partly.** Let a copy of this order, along with L.C.R., be transmitted to the concerned trial Court forthwith for compliance.

(2020)1ILR A229

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE
THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Revision No. 4113 of 2018

Ayodhya Prasad Umrao & Anr.
...Revisionists
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionists:
Sri I.M. Khan

Counsel for the Respondents:
A.G.A., Sri Birendra Singh, Sri Kamal Kishor

A. Criminal Procedure Code, 1973 - Section 319 - Degree of satisfaction for invoking Section 319 - should be more than prima facie as exercised at the time of framing of the charge, but short of satisfaction to an extent that the

evidence, if goes unrebutted, would lead to conviction.

B. Doctrine - *judex damnatur cum nocens absolvitur* - Judge is condemned when guilty is acquitted - prosecution U/s 319 Cr.P.C springs out of said doctrine - objective of Section 319 Cr.P.C is that the real culprit should not get away unpunished.

Held - eye witness, in her statement u/s 161 Cr.P.C. described physical appearance of miscreants but did not took the names of revisionists who are her own *Chachia Sasur* and her *Devar* - after five months delay, injured witnesses stated the involvement of the present revisionists, in commission of the offence- during trial, increased the number of assailants from 2 to 8, assigned weapons to them and attributed general role of assault by all of them - completely negated by the injury reports - under such circumstances summoning revisionists as accused persons, appears to be unjust and improper.

Criminal Revision Allowed. (E-5)

List of cases cited: -

1.Hardeep Singh Vs St. of Punjab (2014) 3 SCC 92

2. Periyasami & Ors Vs S. Nallasamy (2019) 4 SCC 342

3. Labhuji Amratji Thakor & Ors Vs St. of Guj & Anr Cri. Appeal No. 1349/2018 Dt. 13.11.2018

4. Brijednra Singh & ors. Vs. St. of Raj(2017) 7 SCC 706

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri I.M. Khan, learned counsel for the revisionists, Sri Birendra Singh, learned counsel for private opposite party, learned A.G.A. and perused the record.

2. The instant Criminal Revision is targeted against order dated 03.11.2018 passed by VII-Additional Session Judge, Fatehpur whereby while deciding application no. 12B under section 319 Cr.P.C. in four connected Session Trials i.e. S.T. Nos. 148/2014 under sections 396, 412 IPC, Police Station Bindki, District Fatehpur the accused applicants have been summoned by the court concerned.

3. Submissions made by learned counsel for the revisionists are that on the earlier occasion, a similar exercise was carried out by earlier Additional Session Judge, Court No. 8, Fatehpur vide order dated 08.02.2016 and said order was challenged before Coordinate Bench of this Court by means of Criminal Revision No. 1107/2016 (Jitendra Umrao Vs. State of U.P. and others). The aforesaid Bench of this Court by its judgment dated 09.08.2018 while allowing the aforesaid revision, set-aside the order dated 08.02.2016 and remitted the matter to the court concerned for fresh consideration in accordance with law, hence a subsequent order was passed on 03.11.2018 by the court below, which is under challenge by means of instant Criminal Revision.

4. Before coming to the merits of the case, it is imperative to mention bare skeleton facts of the case for better appreciation on the controversy involved.

5. On 02.08.2013 around 4.40 in the morning a F.I.R. was got registered by one Jitendra Umrao against unknown miscreants of the incident, alleged to have taken place during the intervening night of 01/02.08.2013, which was registered as Case Crime No. 232/2013 U/s 396 I.P.C., at Police Station Bindki District Fatehpur. As per the text of the F.I.R., on the fateful day, the informant along with his family members were sleeping at his residence

whereas the informant's mother -Smt. Somwati, Bhabhi-Jyoti, wife of Abhimannyu were sleeping on the roof top. The father Ganga Prasad was sleeping in guest room and two brothers namely Bhupendra and Abhimannyu were sleeping in their respective rooms. Around 2.00-300 hours, in dead hours of night, some miscreants barged into the house, through wall, where they assaulted upon mother Smt. Somwati and Bhabhi Smt. Jyoti, inflicting several injuries on them. Thereafter, they intruded into the rooms of Ganga Prasad (father), brothers Abhimannyu and Bhupendra, assaulted and caused serious injuries to them also. Then they broke Almirah, from where looted the cash, other valuables and fled away from the site. The informant's Bhabhi- Smt. Jyoti narrated the entire incident to the informant therafter, which made the informant rush to the spot of occurrence where he found his father dead and his mother, bhabhi and both the brothers seriously injured. He further narrated in the FIR that while taking her mother to the hospital, she took her last breath en-route. Bhabhi Smt. Jyoti and both the brothers were taken to C.H.C. Bindki, Fatehpur where both the brothers were referred to Kanpur for better treatment. Thus, from the text of F.I.R. following features are abundantly clear:-

(a). The incident was of in the night hours.

(b) No body could identify the assailants.

(c). There was loot of cash and valuable ornaments.

(d). Two persons namely Ganga Prasad and his wife Smt. Somwati lost their lives in this transaction, whereas 3 persons namely Bhupendra, Abhimannyu as well as Smt. Jyoti have sustained serious injuries over their person.

6. Annexure Nos. 2 ad 3 of the revision are injury reports of Shri Bhupendra Umarao and Abhimannyu Umrao issued by Madhuraj Hospital, Kanpur which categorically reveals that both the injured persons were admitted in the hospital on 02.08.2013 at 6.00 in the morning by Sujeet (revisionist no.2) and as per the opinion of the doctor, the injuries sustained by the injured were grievous in nature. It is interesting to point out herein that both the injured persons were admitted by Sujeet (revisionist no.2), who is a non-accused but by means of the impugned order, he was also made accused along with his father Ayodhya Prasad Umrao.

7. After registeration of the case, the investigation in the matter started rolling and police recorded statements of informant Jitendra Umrao U/s 161 Cr.P.C., Smt. Jyoti wife of Abhimannyu (eye witness), Bhupendra Umrao (injured), Abhimannyu (the injured witness). On critical analysis of the statements of injured witnesses, it is abundantly clear that the informant who is not an eye witness of the incident, has reiterated the version of FIR. However, Smt. Jyoti (eye witness) has mentioned that 6-7 miscreants barged into the house and assaulted them by lathi-danda to her mother-in-law Smt. Somwati and to herself, thereafter they barged into the rooms of Ganga Prasad, Bhupendra and Abhimannyu and assaulted them by lathi-danda, looted cash, valuables and jewelries. Thereafter she informed the informant Jitendra Umrao about the incident. In her statement

recorded under section 161 Cr.P.C. she has given vivid description of those miscreants that amongst them, one was aged about 40-45 years, another was slightly bulky and addressing one to another as Lachi @ Lachhi. She has identified all the miscreants in the electricity light and stated that none of the miscreants had covered their faces.

8. Similarly, Bhupendra Umrao (injured) has narrated the same story in his statement U/s 161 Cr.P.C. to the police with addition to it that there is certain misunderstanding between him and his wife Smt. Mamta and since then she is residing at her parent's place at Kanpur and the injured has raised his unfounded suspicion on Mamta that she might be involved in this incident. Except this, in his 161 Cr.P.C. statement, she too has not taken name of the present revisionists.

9. Yet another injured Abhimannyu has reiterated the version of his brother Bhupendra Umrao and has given vivid physical description of assailants. In his statement U/s 161 Cr.P.C. he further stated that the miscreants were talking in the language which is often used by "Kanjads" (caste and creed who are wanderers of abandoned places).

10. After thrashing all the material collected by the police during investigation, the police submitted charge sheet only against Prem Kumar and Sumerjeet U/s 396 I.P.C.

11. It is contended by the learned counsel for the opposite parties that the police has played a partisan approach in not recording the statements U/s 161 Cr.P.C. of the witnesses in appropriate manner by intentionally dropping the names of revisionists and co-accused, Mamta. Hence, opposite party no.2 filed a complaint case bearing Complaint Case No. 727/2014 before Chief Judicial Magistrate, Fatehpur for summoning the present revisionists. The statements under sections 200 and 202 Cr.P.C. were recorded and the said complaint is pending till date without any summoning order and application U/s 210 Cr.P.C. was moved for clubbing the same which is pending undecided.

12. After committal of the case, the trial in the matter begun and testimonies of PW-1, PW-2 and PW-3 were recorded. It is pointed out by the counsel for the revisionists that after recording the aforesaid testimonies, the texture of the case got changed. It is relevant to mentin here that the non-accused Ayodhya Prasad Umrao and his son Sujeet Kumar are close family members of the deceased, rather siblings.

13. This court got an opportunity to go through the testimonies of all the three witnesses (Annexure no. 8 to the affidavit) including the testimony of PW-1, Jitendra Umrao, who is not an eye witness, who in his examination-in-chief, has admitted that he lodged FIR against unknown persons but thereafter the injured brothers disclosed the name of assailants as Prem Kumar and Samarjeet (charge sheeted accused) and Raja, Surendra, Munesh Lachi @ Lachhi, Sujeet and Ayodhya Prasad as well as Mamta as accused. Ayodhya Prasad Umrao is the real uncle of informant and Sujeet Kumar is the cousin. In the cross examination, PW-1 has stated that he has taken name of the present revisionists as well as Mamta but they have not been made accused in the charge sheet. Thereafter PW-2, Bhupendra Umrao

in his examination-in-chief has stated that revisionist no.1 was armed with a revolver, revisionist no.2 was having gun in his hand, Mamta was armed with knife, Prem Kumar was armed Kanta, whereas Samarjeet, Raja, Surendra, Munesh, Lachi @ Lachhi were carrying lathi-danda and iron rods and all of them jointly assaulted upon the victims by their respective weapons.

14. Taking the arguments to be true on its face value of the applicants and comparing the injury report of Bhupendra Umrao, who was admitted in the hospital by none other than Sujeet Kumar (revisionist no.2), there are 3 traumatic swelling on his person, the prosecution story completely belies the allegations and the role attributed to the accused pesons.

15. Coming to examination-in-chief of PW-3 Abhimannyu Umrao, he too, in his testimony named the accused persons and it is interesting to point out here that his 161 Cr.P.C. statement was recorded on 21.08. 2013 in CD Parcha No. 19 wherein he has raised certain amount of suspicion on his wife Smt. Mamta but after almost five months, his second statement was recorded in CD Parcha No. 48, wherein he inserted the names of present revisionists.

16. It is contended by the learned counsel for the revisionists that not even a single item of the alleged looted articles was recovered either from the possession of revisionists or on their pointing out.

17. In nut-shell, the fact of the case summaries as follows:

(a) The revisionists are not named in the FIR.

(b) During 161 Cr.P.C. statements, none of the injured persons or eye witnesses have taken the names of revisionists or attributed their role in the commission of the offence. Ms. Jyoti has categorically given vivid physical descriptions of the assailants and has clearly mentioned that none of the assailants covered their faces at the time of the alleged incident.

(c) Under such circumstance, it is implausible that she would not identify the revisionists, who are her paternal uncle-in-law (Chachia Sasur) and younger brother-in-law (Devar).

18. If all the testimonies are taken to be true, they are named in the testimonies with their respective weapons, but the prosecution has failed to attribute any specific role to them in commission of the offence. There is no recovery of any incriminating article either from the possession or on their pointing out.

19. On these above mentioned factual parameters, this court has opportunity to examine the legal veracity and validity of the impugned order dated 03.11.2018.

LEGAL DISCUSSIONS:

It remains trite that the provisions contained in 319 Cr.P.C. are to achieve the objective that the real culprit should not get away unpunished. The prosecution U/s 319 Cr.P.C. is springs out of doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

20. By virtue of the aforesaid provision, the court is empowered to

proceed against any person who is not shown as an accused, if it appears from the evidence that such person/s have/s committed any offence for which he could be tried with other co-accused persons. The court concerned is duty-bound to identify the real culprit and punish him. Even under the circumstance when the investigating agency has not arrayed that person as accused, the court has no power to meet to such an exceptional eventuality. The million dollars question remains that under what circumstance and in what stage of trial the degree of satisfaction is to be exercised under section 319 Cr.P.C. The law courts are the sole repository of justice and duty is casted upon them to uphold the rule of law.

21. Thus, it would be inappropriate to deny such powers with the court in our criminal judicial system, which is not uncommon that real and unscrupulous accused at time, get away by manipulating the investigating and/or prosecuting agency.

22. The Hon'ble Apex Court in its recent celebrated pronouncement in the case of ***Haradeep Singh Vs. State of Punjab (2014) 3 SCC 92*** has laid down broad principles of law, which is as follows:

*"95. In **Suresh Vs. State of Maharashtra, AIR 2001 SC 1375,** this Court after taking note of the earlier judgments in **Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962** and **State of Maharashtra Vs. Priya Sharan Maharaj, AIR 1997 SC 2041,** held as under:*

"9... at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

*105. In **Sohan Lal and Ors. Vs. State of Rajasthan, (1990) 4 SCC 580,** a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.*

*106. In **Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi & Ors. AIR 1983 SC 67,** this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them U/s 319 Cr.P.C. and try them along with the other accused.*

23. Thus the provisions contained in Section 319 Cr.P.C. sanctions summoning of any person on the basis of any relevant evidence as available on record. However, being a discretionary power and an extraordinary one, it has to be exercised sparingly and only when cogent evidence

is available. The *prime facie* opinion which is to be formed for exercise of this power requires stronger evidence then mere probability of complicity of a person. The test to be applied is the one which is more than a prima facie case as examined at the time of framing charge but not of satisfaction to the extent that the evidence, if goes uncontroverted, would lead to the conviction of the accused.

23. In the recent judgment of Hon'ble Apex Court in the case of ***Periyasami and others Vs. S. Nallasamy (Criminal Appeal No. 456 of 2019)*** decided on 14th March, 2019), which is akin to facts of the present case and the Hon'ble Apex Court opined that in the first information report or in the statements recorded under Section 161 Cr.P.C., the names of the revisionists or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the First Information Report to identify such person. There is no assertion in respect of the villages to which the additional accused persons belong. Therefore, there is no strong or cogent evidence to make the revisionists stand the trial for the offences under Section 147, 448, 294(b) and 506 of IPC in view of the judgment in **Hardeep Singh Case (supra).** The additional accused cannot be summoned under Section 319 Cr.P.C., in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 Cr.P.C. additional accused can be summoned only if there is more than *prima facie* case, as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

24. The High Court had set-aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the Complainant. Mere disclosing the names of the revisionists cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 Cr.P.C., especially when the Complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity.

24. In the present case, on the above lines, when Ms. Jyoti, the eye witness, in her statement recorded under section 161 Cr.P.C. has clearly described the physical appearance of the miscreants by referring their age and height, clearly mentioning therein that none of the assailants have covered their faces but, there too, she was unable to identify Ayodhya Prasad Umrao, her own Chachia Sasur and Surjeet Kumar, her Devar. Not only this, as mentioned above, Sujeet Kumar/revisionist no.2 has taken the injured persons to Madhuraj Hospital, Kanpur and got them admitted, coupled with the facts that after five months delay a "wisdom" was drawn upon the injured witnesses regarding the involvement of the present revisionists in commission of the offence. There was no reported previous animosity between the family and thereafter at the belated stage during the trial, swelling the names, number of assailants from 2 to 8, assigning the weapons to them and attributing general role of assault by all of them, is completely negated by the injury reports of injured persons, therefore, under such circumstances summoning those revisionists as accused persons, appears to be unjust and improper.

25. The learned counsel for the revisionists has further relied upon yet

another judgment of Hon'ble Apex Court in the case of ***Labhuji Amratji Thakor & others Vs. State of Gujarat and another (Criminal Appeal No. 1349/2018) decided on 13.11.2018,*** wherein it has been underlined that the court has to consider the substance of the evidence which has come before it and as lay down by the Constitutional Bench in ***Hardeep Singh's*** case, has to apply the test i.e. *"more than prima facie as exercised at the time of framing of the charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction."*

26. In this case too, wherein the evidence recorded by the police, carrying number of pit holes and submitting charge sheet only against two persons, the prosecution at the stage of trial, wants to cover-up these short falls by their respective testimonies, assigning the weapons and general roles to all of them, which is in stark contrast with the injury reports of injured persons.

27. Learned counsel the revisionists further relied upon another judgment of Hon'ble Apex Court inre: ***Brijendra Singh and others Vs. State of Rajasthan (2017) Vol.7 SCC 706*** in which Hon'ble Apex Court opined that *"the "evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the I.O. during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether "much stronger evidence than mere possibility of their (i.e. revisionists) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order)as the revisionists were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the revision petition filed by the revisionists".*

28. The Trial Court has miserably failed to take into account that evidence collected during investigation by the investigating agency left untouched and brushed aside by learned Trial Judge while deciding the application 12B U/s 319 Cr.P.C.

29. Keeping in view all the factors, enumerated above, if cumulatively taken into account, goes to show that learned Trial Judge has failed to appreciate and apply the ratio laid down in the case of ***Hardeep Singh (Supra)*** in its correct perspective and has passed the order impugned, which is not sustainable in the eye of law. Therefore, revision deserves to be allowed.

30. Accordingly the impugned order dated 03.11.2018 is looses its graound and accordingly deserves to be quashed.

31. The order dated 03.11.2018 passed by VII-Additional Session Judge, Fatehpur passed while deciding application no. 12B under section 319 Cr.P.C. in four connected Session Trials i.e. S.T. Nos. 148/2014 under sections 396, 412 IPC, Police Station Bindki, District Fatehpur is set aside.

32. The revision is **allowed.**

33. The matter is remanded to the court concerned for fresh adjudication and court concerned is directed that after giving appropriate opportunity of hearing to rival parties, it shall decide the same, in accordance with law, keeping in view the aforesaid judgements decided by the Apex Court within one month from the date of production of a certified copy of this order.

(2020)1ILR A237

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

Criminal Revision No. 4357 of 2019

Manoj & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Rajesh Kumar Mishra, Sri Vimlendu Tripathi

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

A. Criminal Procedure Code, 1973 - Section 319 - ambit of expression 'evidence' used in Section 319 Cr.P.C - the word "evidence" is limited to the evidence recorded during tri al in shape of oral and documentary evidence - and not includes the evidence collected during investigation - any evidence collected during investigation stage either in favour of the prosecution or the accused cannot be taken into account while exercising power u/s 319 Cr.P.C - other evidence which come on record between the stage of taking cognizance by court till the commencement of the trial can merely be used for corroborative purposes (Para 16)

B. Criminal Procedure Code, 1973 - Section 319 Cr.P.C - Plea of alibi raised by accused - cannot be examined by court while exercising power u/s 319 Cr.P.C - Revisionist accused have ample opportunity to place his evidence at the appropriate stage (Para 19)

C. Maxim – *secundum subjectam materiam* - Ratio - judicial precedent - it is well settled that authority / judicial precedent has to be understood in context of facts based on which the observation made therein are made - a decision is precedent on its own facts - the ratio of a decision is generally *secundum subjectam materiam* (Para 12)

Revisionists summoned u/s 319 Cr.P.C on the basis of the statement of prosecutrix recorded during trial - in which she levelled allegation of gang rape against the revisionist - Order challenged on the ground that Trial judge did not consider the material collected during investigation in respect of revisionist plea of alibi which stood unrebutted & was of impeccable quality - *Held* - trial justified in not placing reliance on wholly inadmissible evidence of alibi collected during investigation

Criminal Revision dismissed. (E-5)

List of cases cited: -

1. Hardeep Singh Vs St. of Pun (2014) 3 SCC 92

2. Brijendra Singh & ors Vs St. of Raj (2017) 7 SCC 706

3. Shiv Prakash Mishra Vs St. of UP & anr Cr. Appeal No.1105 of 2019 dated 23.7.2019

4. Quinn Vs Leathem (1901) AC 495, Earls of Halsbury L.C.

5. St. of Hary Vs Sher Singh Manu SC/0236/1981

6. Gurcharan Singh Vs. St. of Pun Manu SC/0122/1955

7.Chandrika Prasad Singh Vs St. of Bih Manu SC/ 0084/1971

8.St. of Ori. Vs Debendra Nath Padhi 2004(8) Supremem Court Cases 568

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Sri Vimlendu Tripathi and Sri Rajesh Kumar Mishra, counsel for the revisionists and learned AGA.

2. The present criminal revision has been filed against the impugned judgment and order dated 4.10.2019 passed by learned Additional District and Session Judge, Hapur on the application filed by opposite party no. 2 u/s 319 Cr.P.C. in Special Session Trial no. 45 of 2016 (State vs. Joni) arising out of Case Crime no. 120 of 2016, u/s 363, 366, 376 IPC, and Section ¾ POCSO Act, P.S. Babugarh, District Hapur.

3. The breif background of the case is that the revisionists were summoned u/s 319 Cr.P.C. vide order dated 13.12.2018 on the basis of statement of prosecutrix recorded during trial in which she has levelled allegation of gang rape against the revisionists and the said order was challenged by the revisionists in Criminal Revision no. 459 of 2019. The coordinate Bench of this Court quashed the order dated 13.12.2018 and remanded the matter back for fresh consideration after affording opportunity of hearing to both the parties strictly in the light of ratio laid down in **Hardeep Singh's case** etc. within a period of eight weeks. The order passed by the Court is as under:-

"Heard learned counsel for the revisionists and learned AGA for the State.

The instant Criminal Revision is on behalf of the revisionist Manoj and Raju @ Raj Kumar is targetted against the orders passed by Additional Sessions Judge, Hapur while deciding the application no. 30 kha under Section 319 Cr.P.C. so preferred by the accused informant.

Submission made by the counsel is that the informant Ashok Kumar lodged an FIR on 06.04.2016 under Sections 363 and 366 IPC, P.S. Babugarh, District Hapur against one Johny. The name of the revisionist was neither named in the FIR nor his name came during investigation. Submission furhter made by the counsel is that during investigation, the statement under Section 164 Cr.P.C. of the victim was recorded in which she has taken name of Raju @ Rajkumar and Manoj for extending threats to girl but, interestingly, ignoring 164 Cr.P.C. and collecting or attending material, the I.O. of the case in the fitness of the case of the circumstances has submitted under Section 173 (2) Cr.P.C. only against Johny and there was no whisper in the charge sheet regarding the complicity of Jitendra, Raju and Manoj (revisionists). Thereafter since the case was triable by the sessions court and consequently the matter was committed to the court of Sessions. The testimony of the victim was recorded on 21.06.2018 in which she has taken the name and attributed the role against the Johny son of Babloo, Jitendra son of Karan, Jitendra's uncle Raju @ Rajkumar and uncle of Johny, Manoj and has mentioned that all the four has out raged her modesty. Not only this the mother of the victim has also recorded her testimony on the same lines and thereafter it was prayed from the court learned trial court to exercise the power under Section 319 Cr.P.C. and summoned known accused persons (revisionists) and by impugned order learned trial judge has summoned the revisionist.

Learned counsel for the revisionists has assailed the order on the ground that the order impugned is in

complete tangent of the ratio laid down by the Hon'ble Apex Court in the case of Brijendra Singh & others Vs. State of Rajasthan reported in (2017) 7 SCC 706, Hardeep Singh vs State Of Punjab & Ors reported in (2014)3 SCC 92, Labhuii Amratji Thakor & others Vs. State of Gujrat and another, (Criminal Appeal No. 1349 of 2018 arising out of SLP (Crl.) No. 6392 of 2018 decided on 13.11.2018.

In order to buttress his contention learned counsel for the applicant has relied upon Brijendra Singh's case in which Hon'ble Apex Court has categorically mentioned :-

"However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no sayisfaction of this nature."

On the similar lines in the recent judgment of Hon'ble Apex Court in Labhuji Amratji Thakor's case the court has opined that the power under Section 319 Cr.P.C. should be sparingly used and it should be very sparingly. More over under the circumstances it has been categorically mentioned that on the date and time of the incident, the revisionists Manoj Kumar was on Govt. duty and was residing in the Govt. accommodation and after 27.02.2016, he has not taken any leave and continuously remain present in the Chief Fire Extinguisher Office, District Bulandshahar and certified copy to this effect is annexed as Annexure-11 to the affidavit accompanying the revision. The revisionist no.1 is a Govt. Servant, all these factors has to be taken into account while recording the prima facie satisfaction.

After going through the impugned order, I am of the considered opinion that the order impugned is in the strak contrast with the ratio laid down by the above mentioned three judgements of Hon'ble Apex Court in which the Hon'ble Apex Court has provided the guidelines with regard to the summoning, the quantum of satisfaction, and the stage of using 319 Cr.P.C. application and thus under the circumstances in exercise of power under Section 397/401 Cr.P.C., I here quashed the order dated 13.12.2018 and remanded he matter back for fresh consideration after affording opportunity of hearing to both the parties strictly in the light of the ratio laid down in Hardeep Singh's case, Labhuji Amratji's case and Brijendra Singh's case within a period of eight weeks from the date of production of certified copy of thsi order.

With the aforesaid observation, this revision stands disposed of finally."

4. Since the entire facts of the case and evidence recorded during trial has already been discussed in the aforesaid order, I do not deem it fit to repeat the submission made by counsel for the revisionists onceagain as now even in the present petition argument advanced by learned counsel is the same and has assailed the impugned order dated 4.10.2019.

5. Learned counsel for the revisionists have assailed the impugned order on the ground that the trial judge has misinterpreted evidence on record and has recorded perverse finding about involvement of revisionists in the crime. Trial judge did not consider the material collected during investigation in respect of

their plea of alibi which stood unrebutted and solely on the basis of conjectures and surmises summoned the revisionists to face trial.

6. Learned counsel for the revisionists submitted that in view the judgement of Hon'ble Apex Court in the case of Hardeep Singh Versus State of Punjab (2014) 3 SCC 92, the trial judge has not considered the evidence on record and has relied on extraneous material without recording satisfaction more than prima facie satisfaction sufficient for framing charges is required under the law and no such satisfaction to this effect has been recorded in the impugned order. Learned counsels have further place reliance on subsequent decision of the Hon'ble Apex Court in the case of Brijendra Singh and others Versus State of Rajasthan (2017) 7 SCC 706 and followed in the a recent judgement rendered by Hon'ble Apex Court in the case of Shiv Prakash Mishra Versus State of Uttar Pradesh and another passed in Criminal Appeal No.1105 of 2019 (arising out of S.L.P. (Crl.) No.2168 of 2019) dated 23.7.2019 wherein the plea of alibi was raised by the accused and accepted by Investigating Agency which led to filing of charge-sheet. The powers under Section 319 Cr.P.C. was invoked by the prosecution which led to allowing of the application which was assailed in the High Court whereafter the matter was preferred upto Supreme Court wherein challenge made by the accused therein was upheld by holding that a detailed inquiry has been conducted by the investigating agency where the plea of alibi was found to be true, the trial court was not correct in allowing the application under Section 319 Cr.P.C. in a perfunctory and cursory manner without applying its judicial mind to the exonerative evidence collected by the Investigating Officer during investigation.

7. Sri Pankaj Saxena, learned A.G.A. Appearing for the State has strongly opposed the prayer for quashing the impugned order and has relied upon the Constitution Bench decision of Hon'ble Apex Court in Hardeep Singh Versus State of Haryana.. He has further argued that the plea of alibi cannot be considered at the stage of taking cognizance or claiming discharge by the accused under Section 227 of Cr.P.C. and the trial court while exercising powers under Section 319 Cr.P.C. The trial judge has rightly placed reliance on the statement of PW 3 who is the victim of gang rape by the revisionists and two other which continued for about a month. Therefore, the instant revision deserves to be dismissed.

8. In order to deal with the submissions made by learned counsels for the revisionists, especially in respect of subsequent judgements rendered by the Hon'ble Apex Court in Brijendra Singh's and Shiv Prasad Mishra's cases, I would like to deal with legal aspect as to what material/evidence is to be considered under Section 319 Cr.P.C. as laid down in the judgements of the Hon'ble Apex Court in the Constitution Bench decision rendered in the case of Hardeep Singh (supra).

9. The Hon'ble Apex court in it's decision of Constitution Bench in the case of Hardeep Singh(supra) has considered the scope, ambit and sweep of Section 319 Cr.P.C. in detail and has framed several questions including question No.(iii) which is reproduced below:-

"Question (iii) - Whether the word "evidence" used in Section 319 (1)

Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial ?"

10. The above said question has been answered in the following manner by the Apex Court:-

"85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence by the court to invoke the power under Section 319 Cr.P.C. The "evidence" is thus limited to the evidence during trial."

11. This Court, after carefully considering the Constitution Bench decision of Apex Court in the case of Hardeep Singh(supra) and subsequent decisions in Brijendra Singh's and Shiv Prakash Mishra's cases is of the opinion that a bare perusal of two Judges's Bench decision of Apex Court in the Brijendra Singh's case reveals that though earlier decision of Hardeep Singh was considered, however, the scope, ambit and sweep of expression "evidence" contained under Section 319 Cr.P.C. and explained in the para 85 in the judgement was not considered in the subsequent cases to the extent that any evidence collected during investigation either in favour of the prosecution or the accused cannot be taken into account while exercising the power under Section 319 Cr.P.C. In view of unambiguous interpretation to the word 'evidence'; it is limited to the evidence recorded by the trial court".

12. With profound respect and utmost humility at my command, I may record that it is well settled that authority/judicial precedent has to be understood in context of facts based on which the observation made therein are made. The ratio of a decision is generally secundum subjectam materiam.

13. In **Quinn v. Leathem (1901) AC 495, Earls of Halsbury L.C.** stated:

"...that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other case is only an authority for what it actually decides.

14. It is also well settled that a decision is precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgement that constitutes a precedent. The only thing in Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi.

15. This court indeed cannot comment on the decision of Hon'ble Apex Court in the Brijendra Singh and Shiv Prakash Mishra's cases(supra) but two conflicting views appeared to exist on the same point of meaning of expression "evidence' used in Section 319 Cr.P.C., the decision of Hon'ble Apex Court in the case of Hardeep Singh rendered by Bench of larger composition shall prevail upon Brijendra Singh's and another decision.

16. In view of the above, this Court has no hesitation to hold that the expression "evidence" found in Section 319 Cr.P.C. is to be understood to mean the evidence collected during the trial in shape of oral and documentary evidence. However, the other evidence which has come on record between the stage of taking cognizance by the Court till the commencement of the trial can merely be used for corroborative purposes as laid down by the Apex Court in five Judge Bench decision in the case of Hardeep Singh. In other words, an application under Section 319 Cr.P.C. is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial. While considering such application under Section 319 Cr.P.C. the trial court can take assistance, for corroboration only, of any evidence which is already on record introduced between the stage of taking cognizance and the stage of commencement of trial. However, the trial court is not empowered to invoke Section 319 Cr.P.C. merely based on evidence which is part of investigation stage unless the same is already brought on record between the period of taking cognizance and before the trial begins.

17. Essentially, the main thrust of the learned counsels for the revisionists is to the plea of alibi which according to them was of an impeccable quality and thus the trial judge instead of rejecting the same on flimsy ground should have considered the same in this behalf statement of witnesses was also recorded by the Investigating Officer under Section 161 Cr.P.C. to record a positive finding that the revisionists could not have been present at the scene of commission of crime. It is well settled that statement under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of proviso to subsection (1) of Section 162 Cr.P.C., the statement can be used only with limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, the trial judge was perfectly justified in not placing reliance on wholly inadmissible evidence of alibi collected during investigation and if he had relied upon the same it would squarely be against interpretation given by Constitution Bench of Hon'ble Apex Court in Hardeep Singh's case being extraneous material collected during investigation and could not be treated as an evidence for the purposes of exercise of powers under Section 319 Cr.P.C. Consideration of plea of alibi while exercising powers under Section 319 Cr.P.C. may also be looked into from another angle i.e. Section 103 of Evidence Act which stipulates that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that proof of that fact lies on a particular person. Second illustration to Section 103 of Evidence Act reads as under:

"B wishes the court to believe that at that time in question he was elsewhere, he must prove it."

18. This provision makes it obvious that burden of establishing plea of alibi of the revisionists before this Court lay squarely upon them. There is hardly any doubt regarding this legal proposition. Reference may be made to the cases of **State of Haryana Versus Sher Singh,** Manu SC/0236/1981, **Gurcharan Singh Versus State of Punjab,** Manu SC/0122/1955 and **Chandrika Prasad Singh Versus State of Bihar** Manu SC/0084/1971.

19. This could be done by leading evidence in trial court and not by relying on the material collected during investigation. In such a case the prosecution would have to be given an opportunity to cross-examine this witness can demonstrate that their testimony was not correct. The Court also in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused at the stage of taking cognizance, framing of charges or summoning the accused on the basis of evidence recorded during trial under Section 319 Cr.P.C. The revisionists accused will have ample opportunity to place their evidence at the appropriate stage. In this behalf the judgement of the Hon'ble Apex Court, rendered in the case of State of Orissa Versus Debendra Nath Padhi, 2004(8) Supreme Court Cases 568 be referred to. It was held:

" .....Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

20. The above judgement relates to the stage of claiming of discharge by the accused under Section 227 Cr.P.C. However, in view of well settled law that even at the stage of framing of charge, material in respect of plea of alibi cannot be relied upon to discharge the accused.

21. The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence. One of the aims and purposes of the Criminal Justice System is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power in the court

to proceed against others not arrayed as accused in the circumstances set out by this Section. It is a salutary power enabling the discharge of a court's obligation to the society to bring to book all those guilty of a crime.

22. The facts of the present case are very alarming and grevious in nature inasmuch as a minor girl aged about 15 years has not only given detailed version of ordeal faced by her in the statement recorded u/s 164 Cr.P.C. but PW-3 victim has narrated that for a month she was confined in a room by the revisionists and two other co-accused and was continuously gang raped by them. The trial court while considering the entire evidence onceagain after being remanded by this Court has recorded finding that the plea of alibi of the revisionists cannot be examined inasmuch as the revisionist no. 1 was merely working in the office of Chief Fire Brigade Officer, Bulandshahar and the revisionist no. 2 was present in the Ashram of his Guru and location of his mobile was found continously at that place and both plea cannot be examined by him while exercising power u/s 319 Cr.P.C. The plea of both the revisionists as noted cannot be examined at this stage and besides it, as the prosecutrix was kept under illegal detention for a month and was continously raped by the accused including the revisionists the location of their mobile and certificate of Chief Fire Brigade Officer has no relevance at this stage, which at best can be scanned and examined when the revisionists lead defence evidence and prove the aforesaid documents in accordance with law.

23. In the light of aforesaid, the present revision is bereft of merit. The impugned order passed by trial judge is perfectly justified and well within the guidelines/ parameters laid down by Constitution Bench decision of Hon'ble Apex Court in the case of **Hardeep Singh.**

24. The revision is accordingly, dismissed.

(2020)1ILR 244

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 4893 of 2019

Gyan Chand & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Amresh Kumar Tiwari, Sri Dharmendra Dhar Dubey

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

Criminal Procedure Code, 1973 - Section 245 (2) - Discharge - Appearance of the accused at the time of considering his prayer for discharge - if stages u/s 200 to 202 Cr.P.C have ended & reached stage of section 244 Cr.P.C - appearance necessary.

Magistrate rejected discharge application u/s 245(2) Cr.P.C - on the ground that revisionists-accused not surrendered and not taken bail - *Held* - Admittedly, stage from 200 to 204 Cr.P.C. has been passed - It was the stage of recording of statement under Section 244 Cr.P.C. - proceedings u/s 244 begins with the appearance of the accused, therefore, in a case where the stages provided in sections 200 to 202 of the Code have already come to an end and the case reaches the stage of section 244 - the discharge prayer, in such situation under

section 245 (2) of the Code cannot be entertained without the appearance of the accused – magistrate rightly rejected discharge application. (Para 6 & 7)

Criminal Revision dismissed. (E-5)
List of cases cited: -

1. Nanhe Lal & Ors Vs St. of UP & anr 2014 1 ACR 726

2. Sheoshankar & 2 ors Vs St. of UP & anr 2018 Law Suit (All) 759

3. Ajai (sic) Kumar Ghose Vs St. of Jhr & anr 2010 1 SCC (Cri) 1301

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This criminal revision under Section 397/401 Cr.P.C. has been with a prayer for quashing the order dated 03.10.2019, passed by learned Chief Judicial Magistrate, Court No. 17, Deoria, on application filed under Section 245(2) Cr.P.C. as well as the proceeding of Complaint Case No. 872 of 2019 (Old No. 225 of 2014), under Sections 323, 354, 380, 427, 504, 506 I.P.C., Awinash Versus Gyan Chand and others, pending before learned Chief Judicial Magistrate, Deoria.

2. Heard Sri Dharmendra Dhar Dubey, Advocate, holding brief of Sri Amresh Kumar Tiwari, learned counsel for revisionists and learned A.G.A. for State.

3. Learned counsel for revisionists argued that initially date and time of occurrence was said to be different. Subsequently, by tempering, the same was changed from 23.04.2014 at 5 P.M. to 23.11.2014 at 3.10 P.M. and this was with intention to keep pace with medico legal report. This apparent tempering was challenged in a proceeding under Section 340 Cr.P.C., but no cognizance was taken. Hence, a proceeding under Section 482 Cr.P.C. was filed before this Court, wherein a direction was made for time bound disposal of above application moved under Section 340 Cr.P.C. Thereafter, Magistrate registered above application as a complaint case and decided to proceed further as complaint case. It has not yet been decided and the same is lingering for its disposal, whereas revisionists have been summoned for above offences under Sections 323, 354, 380, 427, 504, 506 I.P.C.. Though, accusation was for offences punishable under S.C./S.T. Act also, but no summoning for this offence was there. Thereafter, complainant moved a revision before Court of Sessions for this non-summoning, which was rejected. Ultimately, with a malice, civil suit was filed, wherein ad-interim injunction application 6C was rejected on merit. Again another complaint by brother of present complainant was filed with the same sequence of occurrence and offences, wherein proceeding was there. Hence, all these facts were raised in an application moved under Section 245(2) Cr.P.C., but learned Magistrate has passed impugned order, rejecting application on the ground that revisionists have yet not surrendered before above court and have not taken bail, hence discharge application was not maintainable. It was in utter defiance of provision of Section 245(2) Cr.P.C. because there was no mandate for appearance of revisionists for disposal of application, moved under Section 245(2) Cr.P.C. The law propounded by this Court in **Nanhe Lal and others Vs. State of U.P. and another; 2014 1 ACR 726** (Criminal Revision No. 3640 of 2013, decided on 16th January, 2014) as well as **Sheoshankar and 2 others Vs. State of**

U.P. and another; 2018 Law Suit (All) 759 has been pressed. Hence, this revision with above prayer.

4. Learned A.G.A. has vehemently opposed the revision.

5. A proceeding under Section 340 Cr.P.C. is pending, wherein application was considered as a complaint case, but trial could not be concluded. Present accusation and inquiry made by Magistrate, resulted passing of impugned order, for offence punishable, as above. This summoning order was challenged before court of revision, wherein revision was dismissed. Now, discharge application under Section 245(2) Cr.P.C. was moved, which was rejected by impugned order. Admittedly, stage from 200 to 204 Cr.P.C. has been passed. It was the stage of recording of statement under Section 244 Cr.P.C., but the same has yet not been recorded. Nothing more than complaint is there on record and on the basis of prima facie substance, summoning order was passed. Now, as per Section 245(2) Cr.P.C., Magistrate is empowered to make discharge at any time before discharge under Section 245(2) Cr.P.C., provided he will have to give the reason of such discharge i.e. law does not prohibit for any discharge under Section 245(2) Cr.P.C., but it is till proceeding up to Section 204 Cr.P.C. Regarding proceeding at the stage of 244 Cr.P.C., mandate of personal appearance is there and on the basis it, circular letter of this Court in administrative side has also been issued to all the subordinate Courts as C.L. No. 2386/Admin, 'G-II' Dated: Allahabad 19.02.2013, wherein principle laid down in Dr. Gulzar Vs. State of U.P. was reiterated as *"The essential feature of the Court discussion is that the accused is bound to furnish bond that he will appear before the Court during the trial, unless otherwise directed by the Court. He cannot file any application in the proceedings unless he binds himself to appear before the trial. The application entrained by the trial Court without seeking bond is unwarranted.....Till the accused are bound by the Court and have not surrendered before the Court they have no Locus to file any application before the Court where the trial is going on."* The same principle has been propounded in **Sheoshankar and 2 others Vs. State of U.P. and another** (Supra).

6. Hon'ble apex court in **Ajai Kumar Ghose Vs. State of Jharkhand and another; 2010 1 SCC (Cri) 1301** in para 9 has held as under:-

"9. Mr. Nandit Srivastva tried to submit that the Apex Court, in the aforesaid case of Ajai Kumar Ghose (supra) has very clearly held that the power under section 245 (2) of the Code can be exercised even before the appearance of the accused, therefore, learned Magistrate as well as the revisional Court could not be said to be justified in requiring the petitioner to appear in person in Court at the time of considering his prayer for discharge under section 245 (2) of the Code. It is no doubt true that the Apex Court has held in the aforesaid case that the discharge prayer under section 245 (2) can be entertained even before appearance of the accused in the Court but that proposition seems to have been laid down in different context. It appears that the Apex Court bifurcated the expression "previous stage of the case" in two categories. The first category is the stage of the case under section 202 to 204 of the Code, and the other category is the

stage of evidence on appearance of the accused under section 244 of the Code. In the first category of the case, the Apex Court opined that the discharge prayer can be considered before appearance of the accused but in the second category of the case presence of the accused has been held necessary because the proceedings under section 244 begins with the appearance of the accused, therefore, in a case where the stages provided in sections 200 to 202 of the Code have already come to an end and the case reaches the stage of section 244 of the Code on appearance of the accused, the discharge prayer, in such situation under section 245 (2) of the Code cannot be entertained without the appearance of the accused. This conclusion finds support from the observations of the Apex Court made in para 29 of the judgment in Ajai Kumar Ghose case. In that paragraph the Apex Court held "If the Magistrate comes to the conclusion that there is sufficient ground for proceeding, he can issue process under section 204 of the Code?. It is in fact here that previous stage referred to in Section 245 normally comes to an end because the next stage is only the appearance of the accused before the Magistrate in a warrant case under section 244 of the Code." To put it otherwise, as and when any process issued to the accused, the previous stage referred to in section 245 (2) of the Code ordinarily comes to an end but there may be Cases were discharge prayer is made on appearance of the accused but before the start of prosecution evidence or during the course of prosecution evidence but before its conclusion. In the subsequent situation, the personnel presence of the accused, if not already exempted under section 205 of the Code, is necessary. In this view of the matter, the submission of the learned counsel for the petitioner that after issuing the process under section 204 of the Code the Magistrate could consider the discharge prayer of the petitioner under section 245 (2) of the Code without personal appearance of the petitioner in the Court, does not appear to be correct."

7. Hence, it was necessary to begin proceeding under Section 244 Cr.P.C. with appearance of accused. In present case revisionists have not surrendered and have not executed bonds for their appearance. Hence, Magistrate was well within jurisdiction and with reasons supported by above precedents for passing impugned order. There was neither exceeding of jurisdiction nor misuse of jurisdiction or error apparent on the face of record.

8. Hence, this revision merits its dismissal. The revision is **dismissed** as such.

(2020)1ILR 247

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Criminal Misc. Writ Petition No. 18131 of 2018

Suresh Singh Bhadoria & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajneesh Tripathi, Sri Anil Kumar Yadav

Counsel for the Respondents:
A.G.A., Sri Narendra Singh

A. Constitution of India - Art. 226 - Criminal Writ petition - Interim

protection from arrest, after dismissal of writ petition - not permissible - when a petitioner is not granted final relief & writ petition is to be dismissed - no interim order/relief to be granted to petitioner.

FIR discloses cognizable offence - no interference called for under Article 226 - After dismissal of writ petition prayer by petitioner for interim protection from arrest - *Held* - If final relief has been declined - court would not be justified in granting any interim relief / interim order - by staying arrest, as a matter of interim protection - since it will amount to grant a relief to the petitioners without deciding their right in any manner (Para 19)

B. Constitution of India - Art. 141 - Law declared by Supreme Court - Binding - no specific direction of High Court is required - to the authorities - to follow the law laid down by Supreme Court.

There is no presumption that the respondents shall not follow the law laid down by Supreme Court - to follow the law laid down by Supreme Court - no direction of High Court required - in absence of any factual foundation - that authorities are illegally disregarding the directions of Apex Court - no futile or uncalled for directions are to be issued by this Court - unless they are necessary for giving due justice to the parties before Court - founded on pleadings and facts of the case. (Para 6)

C. Ratio - Binding Precedent - Meaning - What is binding precedent is the ratio, i.e., the law laid down by this Court - The law is laid down when an issue is raised, argued and decided (Para 16)

Crl. Misc. Writ Petition dismissed. (E-5)
List of cases cited: -

1. Joginder Kumar Vs St. of UP 1994 Cri.L.J. 1981, 1994(4) SCC 260

2. Lal Kamlendra Pratap Singh Vs St. of UP 2009 (4) SCC 437

3. Smt. Amarawati & anr Vs St. of UP 2005(1) AWC 416

4. D.K. Basu Vs St. of WB 1997 (1) SCC 416

5. K.K. Jerath Vs Union Territory, Chandigarh & Ors JT 1998(2) SC 658

6. St. of Ori Vs Madan Gopal Rungta AIR 1952 SC 12

7. Amarsarjit Singh Vs St. of Pun AIR 1962 SC 1305

8. Cotton Corporation of India Limited Vs United Industrial Bank Limited & ors AIR 1983 SC 1272

9. Km. Hema Mishra Vs St. of UP & Ors (2014) 4 SCC 453

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

1. Sri Anil Kumar Yadav, Advocate, holding brief of Sri Rajneesh Tripathi, learned counsel for petitioners and learned A.G.A. appearing for State are present.

2. This writ petition under Article 226 of Constitution has been filed seeking a writ of certiorari for quashing of First Information Report dated 22.04.2018, registered as Case Crime No. 212 of 2018, under Sections 147, 498A, 323, 504, 506, 313 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Kishni, District Mainpuri.

3. From perusal of first information report it cannot be said that commission of a cognizable offence is not made out. There is no material on record to demonstrate that proceedings initiated by means of aforesaid report are vexatious, frivolous or otherwise illegal. In the circumstance, no interference is called for.

4. The learned counsel for the petitioners then submitted that respondents-authorities be directed not to arrest petitioners by observing the law laid down by Apex Court in **Joginder Kumar**

Vs. State of U.P. 1994 Cri.L.J. 1981=1994(4) SCC 260, Lal Kamlendra Pratap Singh Vs. State of U.P. 2009 (4) SCC 437 and this Court in **Smt. Amarawati and another Vs. State of U.P., 2005(1) AWC 416**. He also said that similar orders have been passed by this Court in many matters and, therefore, following the principle of parity similar direction must be issued in this case also.

5. We propose to examine on this aspect of the matter with deeper scrutiny. It is not the case of petitioners that they have already surrendered or that though they have attempted to surrender but there is any illegal, unauthorised obstruction created by respondents in such endeavour of petitioners. It is also not the case that any authority of this Court or Apex Court though cited before court concerned but it has refused to consider the same or ignored. No such allegations have been made.

6. The law laid down by Apex Court by virtue of Article 141 of the Constitution of India, is binding on all courts and authorities across the nation and everybody is supposed to act in the aid and enforcement of such law laid down by Supreme Court. There is no presumption that the respondents shall not follow the law laid down by Supreme Court. There is also no presumption that a decision of Supreme Court laying down certain law, if cited, in support of arguments by a party, that would not be looked into and appreciated by anyone. To follow the law laid down by Supreme Court, no sanction or approval or direction of this Court is required. To ask for such direction, when there is no factual foundation in the writ petition, is nothing but doubting the capability, approach and efficiency of the respondents, which is not in the larger public interest. Moreover, in absence of any factual foundation, it is well established that no futile or uncalled for directions are to be issued by this Court. Its hand are already full of work and rather extremely loaded therewith, hence entertaining cases just for futile direction, which ex facie deserved to be dismissed, would be nothing but encouraging avoidable unnecessary burden upon this Court.

7. Even otherwise a direction to follow a decision of Apex Court without appreciating, whether it applies on the facts and circumstances of the case and would be cited by parties concerned, is like anticipating something, which is not existing in presenti and on the facts of the case, may not be applicable.

8. Moreover, in the entire writ petition there is no factual foundation laid down by petitioners that police authorities are trying to arrest them illegally disregarding the directions of Apex Court in **Joginder Kumar (supra)** and **Lal Kamlendra Pratap Singh (supra)** as well as this Court in **Smt. Amarawati (supra).** In absence of any factual foundation the direction sought from this Court are neither justified nor appropriate nor should be issued by presuming certain facts which are not part of record and petitioners themselves have not made any complaint in respect thereof.

9. It may also be pointed out that in none of the cases referred to above there is any complete embargo against arrest by police if it is otherwise justified.

10. In **Joginder Kumar (supra)**, a habeas corpus writ petition under Article

32 of the Constitution was filed before Supreme Court alleging about unlawful detention of petitioner (a practising lawyer) by police authorities and seeking his release. The Senior Superintendent of Police, Ghaziabad appeared before Court and admitted to have detained petitioner for five days, not in detention but for taking his help in inquiry/investigation of an offence of abduction. Since the petitioner was already released by police, the Court found that relief in habeas corpus now cannot be granted. Yet it enquired as to how and in what circumstances, without informing the court concerned, an individual could be detained by police for five days. The Court found it a case of massive violation of human rights, besides the statutory legal provisions relating to arrest etc. The Court held that law of arrest is one of balancing individual rights, liberties and privileges, on the one hand; and, individual duties, obligations and responsibilities on the other hand. The Court said that an arrest cannot be made merely for the reason that a police officer is empowered under law to do so. The existence of power is one thing and justification for exercise thereof is another. Genuine, justified and satisfactory reasons must exist before a police officer should go to arrest a person so as to curtail his fundamental right of life and liberty. A person is not liable to arrest merely on suspicion of complicity of offence. Except in heinous offences, an arrest must be avoided unless there exists reason therefor. That was not a case where after inquiry or investigation by police, a charge sheet was filed and thereupon an incumbent was to surrender himself to the Court, and the power of Court either to release him on bail if so requested, or to sent him in judicial custody was under consideration.

11. This decision then was considered in **D.K. Basu Versus State of West Bengal 1997 (1) SCC 416** which was a public interest litigation entertained by Supreme Court taking cognizance of a letter received from Executive Chairman, Legal Aid Services, West Bengal complaining about certain custodial deaths.

12. The decision in **Joginder Kumar (supra)** in similar circumstances has been referred and followed subsequently also in **K.K. Jerath Vs. Union Territory, Chandigarh and others, JT 1998(2) SC 658** which was a case of anticipatory bail under Section 438 Cr.P.C. apprehending arrest during a C.B.I. inquiry. It was attempted to argue that there is presumption of innocence in favour of each individual until charge against him is established and, therefore, it would not be consistent with philosophy of Constitution that such a person should be subjected to interrogation by application of psychological or ambient pressures much less physical torture. It was stressed that Apex Court has a duty to protect a citizen against such inroads of these fundamental rights. The Apex Court while dismissing petition observed that in considering a petition for grant of bail, necessarily, if public interest requires detention of citizen in custody for purposes of investigation, it would be allowed otherwise there could be hurdles in investigation even resulting in tampering of evidence. In other words the Apex Court did not find any attraction in the arguments for the reason that a bail application has to be considered in the light of already established principle through various judicial precedents and not on mere asking.

13. There are several subsequent cases also wherein the Apex Court has distinguished the cases where there was no allegation of misuse of power of arrest by

police authorities and an incumbent was arrested having been found prima facie guilty of commission of a cognizable offence.

14. In **Lal Kamlendra Pratap Singh (supra)** the matter came to be considered before the Court for quashing of a first information report. Here also apprehended arrest due to mere registration of a first information report. The matter was brought before this Court seeking quashing of first information report. The High Court dismissed the application and thereagainst the matter was taken to Apex Court. A complaint was made that during investigation or inquiry, petitioners apprehend their arrest by police authorities in an arbitrary manner. It is in this context the Court reminded police authorities to follow the dictum and direction laid down in **Joginder Kumar (supra)**. When the matter was pending before Supreme Court, the police completed investigation and submitted a charge sheet. The Court then declined to interfere since the charge sheet was submitted and permitted petitioner to approach the court concerned by filing a bail application. The Court approved and reminded a seven Judges decision of this Court in **Smt. Amarawati (supra)** wherein an observation was made that the absence of power of anticipatory bail in State of U.P. would not debar the concerned Court/Magistrate to grant an interim bail if there is any likelihood of delay in disposal of bail application finally.

15. Here also in **Lal Kamlendra Pratap Singh (supra)**, there is no direction by Apex Court that even if there is no factual foundation or that there is some justification for the police still a blanket direction can be issued to police which may, in a given case, influence or interfere with the smooth investigation. It is also well settled that no uncalled for observations or directions should be issued by this Court unless they are necessary for giving due justice to the parties before Court, founded on pleadings and facts of the case.

16. So far as various orders cited at Bar, we find that in none of those case all these aspects have, as discussed above, have been raised, argued and decided and those judgements do not lay down any binding precedent. The ultimate direction or action of the Court do not constitute a binding precedent. What is binding precedent is the ratio, i.e., the law laid down by this Court. The law is laid down when an issue is raised, argued and decided. That is not so in respect to orders cited at Bar.

17. It is lastly contended that till charge-sheet is submitted, as a matter of interim protection, arrest of petitioners may be stayed and at least to this extent, an interim order may be passed.

18. The submission, in our view, lacks substance being contrary to law that when a petitioner is not granted final relief and writ petition is to be dismissed, no interim order in such matter can be passed.

19. Once the writ petition has to be dismissed, this Court has no power to pass any order in the nature of interim or interlocutory order. The Apex Court has deprecated such practice and has held, if final relief has been declined, no interim relief/interim order should be granted to petitioners. The first such case is **State of Orissa Vs. Madan Gopal Rungta AIR 1952 SC 12.** Therein High Court declined

to grant final relief on the ground that there was an alternative remedy available to petitioner and, therefore, dismissed the writ petition relegating petitioner to avail alternative remedy, but then observing that before filing suit, 60 days' notice under Section 80 C.P.C. will have to be given, which will take some time, an interim relief was granted. Deprecating this, Apex Court said that grant of relief under Article 226 is founded only on its decision that a right of the aggrieved party has been infringed. Therefore, existence of right is foundation of exercise of jurisdiction under Article 226. When the Court has decided nothing at all in respect to rights of parties, it would not be justified to grant any relief, final or interim, as the case may be, since Article 226 does not confer such jurisdiction. In para 6 of the judgment, the Court said:

"In our opinion, article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of section 80 of the Civil Procedure Code, and in our opinion that is not within the scope of article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under article 226 of the Constitution. In our opinion, the language of article 226 does not permit such an action. On that short ground the judgment of the Orissa High Court under appeal cannot be upheld."

20. The aforesaid dictum has been followed in **Amarsarjit Singh Vs. State of Punjab AIR 1962 SC 1305** (para 22), **Cotton Corporation of India Limited Vs. United Industrial Bank Limited and others AIR 1983 SC 1272** (para 10) **and recently in Km. Hema Mishra Vs. State of U.P. and others (2014) 4 SCC 453** (para 22).

21. In view thereof, we have no hesitation in observing that the prayer for quashing the F.I.R. if is declined on the ground that allegations contained therein discloses cognizable offence, therefore, no interference is called for at this stage, this Court would not be justified in granting any relief as an interim order by staying arrest since it will amount to grant a relief to the petitioners without deciding their right in any manner and this would be against the exposition of law settled by Apex Court in the aforesaid decisions.

22. Even otherwise, at this stage, this Court is not examining legality or otherwise of arrest made by Police, since neither any one has been arrested nor this writ petition as such has been filed with a

complaint that Police or Investigating Officer has committed violation of any provision pertaining to arrest of any person or the petitioners themselves. The main relief in the writ petition is for quashing of first information report which, admittedly having disclosed commission of cognizable offence is not liable to be interfered with at this stage.

23. In view of above, no interference is called for.

24. The writ petition is dismissed.

(2020)1ILR253

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.11.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Misc. Writ Petition No. 21811 of 2019

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

Counsel for the Petitioner:
Sri Uma Nath Pandey

Counsel for the Respondents:
A.G.A.

A. Indian Penal Code, 1860 - Sections 441 & 447 - Criminal Trespass - Section 441 IPC is in two parts - term "such property" occurring in second part refers to "property in the possession of another" - Applicability of second part - second part become applicable - when a person enters into - 'property in the possession of another person' - S. 441 not applicable where a person is in possession of his own property as an owner or where he does not retain possession or maintain use of the 'property of another.' (Para 12)

Allegation petitioner unauthorizedly raising constructions and developing colony over plot without prior sanction - Admittedly in the revenue records plot recorded in the name of petitioner in the capacity of Director of Company - *Held* - petitioner is the owner & in possession of plot, he has not entered into or upon property in possession of another person - even if the petitioner raises constructions, which may be unauthorized, he would not be liable for an offence of criminal trespass punishable under section 447 I.P.C. (Para 13)

Crl. Misc. Writ Petition allowed. (E-5)

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Virendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner; learned A.G.A. for the respondents 1 and 2; and perused the record.

2. The instant petition seeks quashing of the first information report (for short F.I.R.) dated 20.07.2019 registered as Case Crime No.847 of 2019 at P.S. Surajpur, District Gautam Budh Nagar, under section 447 IPC.

3. The impugned FIR has been lodged by an officer of the Greater Noida Industrial Development Authority, Gautambudh Nagar (for short the Authority) by alleging that the petitioner is unauthorizedly raising constructions and developing colony over plot No.918 at village Tilpata, which falls within the notified area of the Authority, without obtaining prior sanction for such development.

4. The petitioner has challenged the impugned FIR on two grounds: (a) that the petitioner was developing his own land

therefore no offence of criminal trespass is made out; and (b) that no notice as contemplated by section 441 IPC as applicable in the State of UP was served before lodging the FIR. It has been pleaded that, admittedly, in the revenue records plot no.918 is recorded in the name of Radhika Green Homes Pvt. Ltd. whose Director is the petitioner - Pawan Kumar (the accused) therefore no offence punishable under section 447 IPC is made out. In support thereof Khatauni extract of 1421-1426 F has been annexed as Annexure 2 to the petition.

5. On 24.09.2019, following order was passed:-

"Heard learned counsel for the petitioner and Sri S.R. Pandey, learned AGA.

It is submitted by learned counsel for the petitioner on the strength of the averments made in paragraphs 13 and 14 of the writ petition that lodging of the impugned FIR was not preceeded by any statutory notice as contemplated under Section 441 IPC (Amended by the State).

Sri S.R. Pandey, the learned AGA seeks time to obtain instructions in the matter.

Put up as fresh on 17.10.2019.

Till then no coercive measure shall be taken against the petitioner in case crime No. 847 of 2019 under Section 447 IPC at P.S. Surajpur, District Gautam Buddh Nagar.

Copy of the order be provided to Sri S.R. Pandey, the learned AGA, forthwith.

Sri S.R. Pandey learned AGA for the State also undertakes to intimate about this order to the learned counsel for the NOIDA Development Authority, in writing, within three days who in turn shall also obtain instructions in the matter."

6. Pursuant to the above order, a short counter affidavit has been filed. In the counter affidavit it has been pleaded that the Authority in exercise of power under Section 10 of the U.P. Industrial Areas Development Act, 1976 has already issued a notice on 03.07.2019 (Annexure CA-1) seeking removal of unauthorized constructions, which can be treated as a notice contemplated by section 441 IPC, and since the petitioner has not acted upon the notice within the time specified in the notice, the FIR is maintainable.

7. Learned A.G.A. pointed out that the notice dated 03.07.2019 clearly spell out that the accused must remove the constructions and restore the land to its original state. He also urged that the amended provisions of section 441 I.P.C., as applicable in the State of Uttar Pradesh, make unauthorized use of property also an offence, if such unauthorized usage is not stopped despite notice. He submitted that since notice was sent to remove the unauthorized constructions and to restore the land to its original state, regardless of the fact that the petitioner is the owner of Plot No. 918, since constructions have been raised unauthorizedly, offence punishable under Section 447 I.P.C is made out from a bare perusal of the impugned FIR.

8. Learned counsel for the petitioner submitted that since it has not been disputed that plot No.918 is owned and possessed by the petitioner in the capacity of Director of the Company whose name is recorded in the revenue records, the offence punishable under section 447 IPC is not made out even if the constructions

are illegal. Hence, the impugned FIR is liable to be quashed.

9. We have considered the rival submissions and have perused the record carefully.

10. Section 447 IPC provides that whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both. Section 441 IPC, as applicable in the State of Uttar Pradesh, vide U.P. Act No.31 of 1961, defines criminal trespass as follows:-

"Criminal Trespass - Whoever enters into or upon ***property in possession of another*** *with intent to commit an offence or to intimidate, insult or annoy* ***any person in possession of such property,*** *or,* ***having lawfully entered*** *into or upon* ***such property, unlawfully remains there*** *with intent thereby to intimidate, insult or annoy any* ***such person,*** *or with intent to commit an offence,*

or ***having entered into or upon such property,*** *whether before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961,* ***with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property, or its possession or use when called upon to do so by that another person*** *by notice in writing, duly served upon him, by the date specified in the notice,*

is said to commit "criminal trespass."

(Emphasis Supplied)

11. A bare perusal of the provisions of section 441 IPC would reveal that it is in two parts. The first part relates to a person who enters into or upon property in possession of another with an intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with an intent to commit an offence. The second part relates to a person who has entered into or upon such property, whether before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961, with the intention of taking unauthorized possession or making unauthorized use of such property, fails to withdraw from such property, or its possession or use, when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice.

12. In both parts of section 441 IPC, the use of the words *"such property"* is of extreme significance and when the provision is read as a whole, one would find that the term *"such property"* refers to that what is described in the opening part, that is *"property in the possession of another"*. The above interpretation gets strength from the use of the phrase *"that another person"* while describing the person competent to give notice to withdraw from such property or its possession or use. Thus, in our considered view, the second part would become applicable where a person having entered into a property in the possession of another person with the intention of taking unauthorized possession or making unauthorized use of such property fails to withdraw from such property, or its

possession or use when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice.

13. In the instant case, the offence of criminal trespass as defined in the first part of section 441 I.P.C. is not made out because admittedly the petitioner has not entered into or upon property of another person but is in possession of his own property as an owner thereof. Likewise, no offence would be made out under the second part because the petitioner does not retain possession or maintain use of the property of another. Indisputably, the petitioner is the owner and in possession of Plot No. 918. He has not entered into or upon property in possession of another person. Under the circumstances, even if the petitioner raises constructions, which may be unauthorized, he would not be liable for an offence of criminal trespass punishable under section 447 I.P.C.

14. It may be noticed that the land pertaining to plot no.918 in the revenue records is recorded in the name of Radhika Green Homes Pvt. Ltd. whose Director is the petitioner. Otherwise also, it is not the case of the informant that plot No.918 is the land of the Authority unlawfully occupied or possessed by the accused. Under the circumstances, the essential ingredients of an offence punishable under section 447 IPC are not made out.

15. Consequently, the writ petition is **allowed.** The impugned first information report is quashed. The quashing of the first information report shall be without prejudice to the rights of Greater Noida Industrial Development Authority to take recourse to such measures or such proceedings against the petitioner in respect of alleged unauthorized constructions raised by him, as the law may permit. There is no order as to costs.

(2020)1ILR 256

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.01.2020

BEFORE
THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 74 of 2007

U.P.S.R.T.C. Lucknow ...Appellant
Versus
Mohd. Kasim Faruki & Ors. ...Respondents

Counsel for the Appellant:
Prabhakar Tewari, Akhter Abbas, J.B. Singh

Counsel for the Respondents:
Mohd. Airaj Siddiqui, Pradeep Kumar Singh

A. Motor Accident Act, 1988 – Civil Procedure Code - Order 41 Rule 33 – Enhancement of compensation - Plea of enhancement by claimant in appeal of owner – No appeal or cross objection for enhancement of compensation - Appeal filed by owner challenging only the findings of the Tribunal recorded in regard to the accident - The appellant cannot be put to a loss by dismissing the appeal and enhancing the compensation which would amount to put a premium on non-action of the claimant-respondents when they were satisfied with the award passed by the Tribunal. (Para 14)

B. Constitution of India – Article 142 – Exercise of power – Distinction between power of Supreme Court and High Court – In case of Jitendra Khimshankar Trivedi, Apex court enhanced the compensation exercising the jurisdiction under Article 142 of the Constitution of India which cannot be done by this court - Power to do complete justice is conferred on Apex

Court and the High Court does not have such powers. (Para 16)

First Appeal From Order dismissed. (E-1)

List of cases cited :-

1. Jitendra Khimshanker Trivedi and others Versus Kasam Daud Kumbhar and others;2015(1) T.A.C. 673 (S.C.)

2. Ranjana Prakash and others Versus The Divisional Manager and another (Civil Appeal No.6110 of 2011);2011 (7) SCC 6

3. Dulcina Fernandes & Others Vs. Joaquim Xavier Cruz & Another; (2013) 10 SCC 646

4. Ranjana Prakash and others Versus The Divisional Manager and another (Supra)

5. C.M.Singh Versus H.P.Krishi Vishva Vidyalaya & others; (1999) 9 SCC 40

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

1. Heard, Shri Akhter Abbas, learned counsel for the appellant and Shri M.A.Siddiqui, learned counsel for the respondents.

2. This First Appeal From Order has emanated from the judgment and award dated 25.09.2006 passed by the Motor Accident Claims Tribunal/Special Judge (E.C.Act), Lucknow in Claim Petition No.295/2005:Mohd.Kasim Faruki and others Versus U.P.State Road Transport Corporation awarding a sum of Rs.1,64,500/- together with 6% interest from the date of filing of claim petition.

3. The brief facts of the case giving rise to the present appeal are that on 17.02.2003 at about 9.45 in the morning Roadways Bus No.UP-40C-0902 was coming out of the bus stand at Kaiserbagh Bus Stand, Lucknow and its conductor was calling the passengers for Bahraich. The brother of deceased Km. Bushra @ Muwashisra raised voice to stop the bus on which the bus stopped. While the deceased was climbing on the bus, the driver moved the bus forward with jerks, therefore the deceased came under the rear wheels of the bus. The deceased suffered serious injuries. She was immediately admitted in Blarampur Hospital, Lucknow where she died after 8 hours. Therefore the claim petition was filed claiming compensation claiming therein that the deceased was doing the work of stitching of dress of school children.

4. The claim petition was contested by the appellant alleging therein that no accident had taken place from the bus in question. However, the Roadways Bus No.UP-40C-0902 i.e. the bus in question had gone to Bahraich from Lucknow at about 10 in the morning and reached Bahraich at about 1 p.m.

5. On the basis of pleadings of the parties four issues were framed. After evidence the claim petition has been partly allowed and an amount of Rs.1,64,500/- has been awarded as compensation alongwith interest at the rate of 6% per annum from the date of filing of the claim petition to be paid to the claimants-respondents as per apportionment given in the judgment.

6. Submission of the learned counsel for the appellant was that neither any accident had occurred with the bus of the appellant nor any negligence was found on the part of the driver of the bus in question. The bus was neither challaned by the police nor stopped by the public on the place of accident, therefore the occurrence of accident was not proved. But the learned Tribunal discarding the evidence

adduced on behalf of the appellant has wrongly and illegally allowed the claim petition without any cogent reason. He accordingly prayed for setting aside the impugned judgment and award and allowing the appeal.

7. Per contra, learned counsel for the respondents submitted that the accident was proved by the claimant-respondents by adducing cogent evidence and the evidence filed by the appellant in regard to the accident has rightly been discarded by the learned Tribunal as it is not believable.

8. He has further submitted that the learned Tribunal has not awarded just compensation therefore the same is liable to be enhanced. The deceased was aged about 20 years at the time of accident on 17.02.2003, therefore, the multiplier of 18 in place of 16 should have been applied. The respondents are also entitled for the future prospects and enhancement of the amounts towards the conventional heads. He had also submitted that the notional income of the deceased should have been assessed as Rs.3,000/- per month in place of Rs.1500/- per month as the deceased was doing the work of stitching of School dress. He submitted that though the respondents could not file any appeal or cross objection for enhancement but this court while hearing the appeal of the appellant can enhance the amount of compensation in view of the judgment of the Hon'ble Apex Court in the case of **Jitendra Khimshanker Trivedi and others Versus Kasam Daud Kumbhar and others;2015(1) T.A.C. 673 (S.C.).**

9. In reply to the plea of enhancement of the respondents learned counsel for the appellant submitted that since the respondents have not filed any appeal or cross objection for enhancement and the present appeal has been filed only challenging alleged occurrence of accident, therefore this court may not enhance the compensation. If the amount of compensation is enhanced without any appeal or cross objection by the claimant-respondents, the filing of appeal challenging the occurrence of alleged accident would put the appellant in loss because on the one hand his claim that the accident has not occurred from the bus in question is not accepted and on the other hand the amount of compensation, which has been accepted by the respondents, is enhanced. Learned counsel for the appellant in this regard has relied on a judgment of the Hon'ble Apex Court in the case of **Ranjana Prakash and others Versus The Divisional Manager and another (Civil Appeal No.6110 of 2011);2011 (7) SCC 6**. Lastly the learned counsel for the appellant had submitted that if the submissions of learned counsel for the respondents in regard to the enhancement is accepted then the deduction of 1/2 is liable to be made in place of 1/3rd as the deceased was bachelor at the time of death and only the mother could have been treated as dependent.

10. I have considered the submissions of learned counsel for the parties and perused the record.

11. The deceased Km.Bushra @ Muwashisra had died in an accident on 17.02.2003 at about 9.45 a.m. in the morning by Roadways Bus No.UP-40C-0902 as the driver of the bus had started the bus with jerks while the deceased was climbing on the bus. The deceased had suffered serious injuries, therefore, she was admitted in Balrampur Hospital where

she had died after 8 hours of the accident. The accident was proved by the P.W.1 and P.W.2 examined on behalf of the claimant/respondents. The appellant could not ellicit anything in the cross examination which could create any doubt about the testimony of the witnesses and the accident.

12. Perusal of the record also indicates that the First Information Report vide case Crime No.73 of 2003 under Section 279/304-A IPC was lodged on 17.02.2003 i.e. on the same day at 6.10 in the evening at Police Station Wazirganj Sadar, District Lucknow. After investigation the charge sheet was filed against the driver of the bus in question on 27.02.2003 on which the cognizance was taken by the court concerned. The Hon'ble Apex Court in the case of **Dulcina Fernandes & Others Vs. Joaquim Xavier Cruz & Another; (2013) 10 SCC 646** has examined the situation where the evidence of eyewitness was discarded by the tribunal and that the respondent in that case was acquitted in the criminal case concerning the accident. However, the Hon'ble Apex Court opined that it can not be overlooked that upon investigation of the case, registered against respondent, prima facie, materials showing negligence were found to put him on trial.

13. The learned Tribunal has also considering the evidence on record has recorded a categorical finding that the accident had occurred on account of the negligence of the driver of bus no.UP-40C-0902. The deceased had died on account of the serious injuries suffered in the accident. On due consideration of the submissions and evidence on record this court is in agreement with the findings recorded by the learned Tribunal in regard to the accident by the bus of the appellant and does not find any illegality or error in it. The appeal is misconceived and lacks merit and is liable to be dismissed.

14. Adverting to the plea of enhancement of compensation raised by learned counsel for the respondents, admittedly the claimant-respondents have not filed any appeal or cross objection for enhancement of compensation because it appears that the claimant-respondents were satisfied with the compensation awarded by the learned Tribunal as per law prevalent at the relevant time, while they had filed a caveat. This appeal has been filed challenging only the findings of the Tribunal recorded in regard to the accident on the ground that the accident had not occurred by the bus in question and the amount of compensation has not been challenged. Therefore, this court is of the view that the appellant cannot be put to a loss by dismissing the appeal and enhancing the compensation which would amount to put a premium on non action of the claimant-respondents when they were satisfied with the award passed by the Tribunal.

15. The Hon'ble Apex Court in the case of **Ranjana Prakash and others Versus The Divisional Manager and another (Supra)** has held that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections. The Apex Court has also held that the Provisions of Order 41 Rule 33 of the Code of Civil Procedure cannot be invoked to get a larger or higher relief and the High Court cannot increase the compensation in an appeal by the owner/insurer. However the Hon'ble Apex

Court has held that the respondents-claimants can defend the compensation awarded by the Claims Tribunal on other grounds. The relevant paragraphs 6, 7 and 8 are extracted below:-

"6. We are of the view that High Court committed an error in ignoring the contention of the claimants. It is true that the claimants had not challenged the award of the Tribunal on the ground that the Tribunal had failed to take note of future prospects and add 30% to the annual income of the deceased.

But the claimants were not aggrieved by Rs.23,134/- being taken as the monthly income. There was therefore no need for them to challenge the award of the Tribunal. But where in an appeal filed by the owner/insurer, if the High Court proposes to reduce the compensation awarded by the Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Tribunal, by pointing out other errors or omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation. Therefore, in an appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason, 30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that claimants did not independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections.

7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seeks compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner/insurer for

reduction. The High Court cannot obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation."

16. So far as the judgment relied by the learned counsel for the claimant-respondents in the case of **Jitendra Khimshankar Trivedi and others Versus Kasam Daud Kumbhar and others** (Supra) is concerned, in the said case the Hon'ble Apex court has enhanced the compensation exercising the jurisdiction under Article 142 of the Constitution of India which cannot be done by this court. The Hon'ble Apex Court in the case of **C.M.Singh Versus H.P.Krishi Vishva Vidyalaya & others; (1999) 9 SCC 40,** has held that power to do complete justice is conferred on it and the High Court does not have such powers.

17. The appeal is, accordingly, **dismissed.** No order as to costs.

18. The lower Court record and the amount deposited before this court, if any, shall be remitted to the concerned tribunal.

(2020)1ILR 261

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2019

BEFORE
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 108 of 1991

M/S R.N. Tandon & Sons ...Appellants
Versus
Betwa River Board ...Respondent

Counsel for the Appellants:
Sri Ayush Khanna, Sri Atul Dayal, Sri N. Sinha, Sri S.C. Budhwar, Sri S.P. Gupta, Sri Avanish Srivastava

Counsel for the Respondent:
Sri U.N. Sharma, Sri A.K. Rai

A. Arbitration Conciliation Act, 1940 – Section 30 and 33 – Terms of contract - Importance - Award of the arbitrator is in consonance with clause 8 and 9 of the contract, which does not speak about payment of interest - Arbitrator gave cogent reasons holding that no interest was payable - Judgment of the District Court reversing the arbitral award is bad in the eye of law – Held, Appellants are entitled to the refund of the interest deducted. (Para 20 & 21)

First Appeal From Order allowed. (E-1)

List of cases cited :-

1. K.Marappan (Dead) Versus Superintending Engineer T.B.P.H.L.C. Circle Anantapur, 2019 JX(SC) 391

2. Raveechee and Company Versus Union of India, AIR 2018 SC 3109

3. Puri Construction Pvt. Limited Versus Union of India, AIR 1989 SC 777

4. State of Orissa Versus B.N. Agarwalla , (1997) 2 SCC 469

5. FCI Versus Joginderpal Mohinderpal, (1989) 2 SCC 347

6. First Appeal From Order No.714 of 2005, State of U.P. and other Vs. J.M. Construction Company, decided on 11.4.2019

7. K.P. Poulose v. State of Kerala & Anr., reported in [1975] 2 SCC 236

8. Hind Builders Vs. Union of India, (1990) 3 SCC 338

9. Dandasi Sahu Versus State of Orissa, (1990) 1 SCC 214

10. Thawer Das Vs. Union of India, AIR 1955 SC 468

11.Raipur Development Authority and other Vs. Chokhamal and others, 1989 (2) SCC 721

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Ayush Khanna, learned counsel for the appellant. No Advocate appeared for the respondent though name of Sri A.K. Rai and Sri U.N. Sharma are shown for the respondent and fresh notice was also issued which has been received by the respondents. The appeal is pending since 1991. The respondents have been negligent in appointing a counsel also. Today also, no-one represents the respondents though time and again notices have been sent to them. The fact that on the first occasion, jthe officer concerned was of the view that no interest would be charged from the appellant later on Suo Motu on audit objection, interest was ordered to be charged. The appellant has already deposited the said interest because of the order of the District Court which upheld the objection of the respondent herein, which is subject matter of challenge before this Court.

2. By means of this appeal, the appellant - contractor challenges the order and judgment dated 15.11.1990 passed by District Judge, Jhansi in Suit No. 13 of 1988 (M/s R.N. Tandon & Sons Vs. Betwa River Board) allowing objections of the respondents and refusing to accept the award of sole arbitration.

3. The brief facts of the case are that Betwa Board had entered into a contract with M/s R.N. Tandon & Sons for the construction of earth Dam on the left flank of River Betwa at Rajghat from Km. 4.04 to 6.05 (Lot II) and the agreement was executed with respect thereto on 14.1.1981 at Rajghat, district Lalitpur, U.P. There was some dispute between the parties with respect to the recovery of interest on the cost of machines taken by the contractor - appellant herein. AND WHEREAS DISPUTES pertaining to the 'Interest charges on the cost of machines made available to the claimant by the Board' having arisen between the two parties, of the said contract, the Chief Engineer (R), Tetwa River Board, Nandanpura, Jhansi, in pursuance of the aforesaid conditions of contract, nominated me, as the sole Arbitrator under his No.4921/CE/BRB/Appeal-2 (Tandon)/dated 12/86. Ruling of the Executive Engineer considered unacceptable by the contractor arose for the first time when the Executive Engineer, Rajghat Dam No.II, Chanderi Proposed recovery of the interest. The claimants asked for clarification from the Superintending Engineer as per clause 52 of Agreement. S.E. Gave his decision that recovery of interest on advance in form of Machinery is well covered under clause 9 of special conditions of the contract read along with clause 8 and 9 of the General conditions. C.E. Examined the arguments of both the parties gave his decision that no interest charge is leviable on the cost of machines and only cost is to be recovered from claimant as shown in column 4 of Annexure VII of the Agreement.

4. Learned counsel for the appellant has relied on the following authoritative pronoucements:-

(i) Hind Builders Vs. Union of India, (1990) 3 SCC 338;

(ii) K Marappan (Dead) through sole LR Balasubramanian Vs. Superintending Engineer TBPHLC Circle Anantapur, 1019 LawSuit (SC) 977;

(iii) State of U.P. and others Vs. J.M. Construction Company, FAFO No.714 of 2005, decided on 11.4.2019 by this High Court.

5. The main bone of contention in this appeal is whether when the terms of contract are silent about interest, can the first appellate court reverse the finding of the the Arbitrator held in favour of the contractor holding that on the terms of contract, no interest was payable by the contractor.

6. Learned counsel Sri Khanna has vehemently submitted that the decision requires to be upturned as it is against settled legal position and the District Court has decided the matter as if it is deciding an appeal and has tried to rewrite the arbitral award and no interest was chargeable from the appellant as held by the arbitrator and by the authorities in their Ist decision Suo Motu reviewed on audit objection raised later on.

7. This is an appeal under Arbitration Conciliation Act, 1940.

8. It is submitted by learned Advocate that judgment of the Apex Court in **K.Marappan (Dead) Versus Superintending Engineer T.B.P.H.L.C. Circle Anantapur, 2019 JX(SC) 391** and in **Raveechee and Company Versus Union of India, AIR 2018 SC 3109,** has interpreted the role of the Courts while hearing matters under the arbitration Act. The judgment goes to show that *pendente lite* interest will depend upon several factors such as; phraseology used in the agreement clauses conferring power relating to arbitration, nature of claim and dispute referred to arbitrator, and on what items power to award interest has been taken away and for which period. The Court observed:

"34. Thus our answer to the reference is that if contract expressly bars award of interest *pendente lite*, the same cannot be awarded by the Arbitrator. And that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest *pendente lite* by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court , it would be for the Division Bench to consider the case on merits."

9. The decision of Supreme Court in **Puri Construction Pvt. Limited Versus Union of India, AIR 1989 SC 777** and **State of Orissa Versus B.N. Agarwalla , (1997) 2 SCC 469** and submits that in view of the said judgment, the appeal requires to be allowed as none of the aspects which are needed for upturning the well reasoned arbitral award and the finding of facts and upholding the same do not show that there was any perversity, though it was not proved that any misconduct or that there was breach of any of the provisions under the Arbitration Act which would call for interference by this Court in its appellate jurisdiction.

10. The Apex Court in **FCI Versus Joginderpal Mohinderpal, (1989) 2 SCC 347** has held that the objection against an arbitral award can be raised only if it falls within the parameters fixed by the provisions of Section 14, and 33 of the Act, 1940. If the award satisfies that it is based on equity, fair play, principles of natural justice and established practice and procedure then the award should not be interfered. In proceedings of arbitration

there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to **FCI Versus Joginderpal Mohinderpal (supra).**

11. Section 30 of the Act, 1940 read as follows :

"Section 30. Grounds for setting aside award. An award shall not be set aside except on one or more of the following grounds, namely:-

(a) that an arbitrator or umpire has misconducted himself or the proceedings

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is other- wise invalid."

12. Section 33 of the Act, 1940 read as follows :

"33. Arbitration agreement or award to be contested by application. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits: Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

13. Thus, the judicial review of an award has been circumscribed by Apex Court in **FCI Versus Joginderpal Mohinderpal (supra)** wherein it has been held that arbitration as a mode for settlement of disputes between the parties, has a tradition in India. It has a social purpose to be fulfilled today,. It has a great urgency today when there has been an explosion of litigation in the courts of law established by the sovereign power . It is, therefore, the function of Courts of Law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the Courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of correction by the court of an award made by the arbitrator.

14. In backdrop of this it will have to be decided as to whether can it be said that the decision of arbitrator upturned by the Court below is bad and was wrongly not made the Rule of Court as per Arbitration Act, 1940.

15. While perusing the award 26.7.1998, it is found that the arbitrator considered each item threadbare and has given his findings. Can it be said that arbitral award does not fulfill the contours of principles which are required to be followed by an arbitrator under the Act, 1940. Item No.5 is taken as illustration so as not to burden the judgment but to come to the conclusion as to show that the Arbitrator and the Judge both had applied the legal acumen.

16. This Court in **First Appeal From Order No.714 of 2005, State of U.P. and other Vs. J.M. Construction Company, decided on 11.4.2019,** has summarised the principles for deciding matters under the Arbitration Act, 1940 & 1996 wherein in paragraph no.24 it is observed as follows:-

"In **Rajasthan State Road Transport Corporation,** the learned counsel for the respondent-Company submitted that in fact there was no material on which the finding was recorded by the Arbitrator. In support thereof, learned counsel invited our attention to a decision of this Court in the case of **K.P. Poulose v. State of Kerala & Anr., reported in [1975] 2 SCC 236** wherein it was held that the award can be set aside on the ground of misconduct if relevant documents are not considered by the Arbitrator. Therefore, we asked learned counsel for the appellant-Corporation to substantiate the finding recorded by the arbitrator that it is based on the material on record. In pursuance to the direction given by this Court, learned counsel for the Corporation filed an affidavit on 12.7.2006 and submitted that the document wherein the details on divisionwise average kilometer of new tyres and retreaded tyres along with average short-fall in guaranteed kilometers for the various periods was on record of arbitrator and same was produced before us. The details were given of all the Divisions i.e. Bharatpur, Jaipur, Sikar, Kota, Ajmer, Bikaner, Jodhpur and Udaipur. In all these eight divisions for the various period i.e. from June 1991 to February, 1994 the details have been given to substantiate the allegations that what was the average mileage of the new tyre and what was the average mileage given by the retreaded tyres and on that basis, the short-fall was given and accordingly, the amount of loss was worked out. These details which were placed before us formed part of the record before the arbitrator. The arbitrator in his detailed award has recorded his finding on the basis of the average performance of new vehicle tyres with that of the retreaded tyres of the Company and on that basis he has worked out the assessment in paragraph 17 of the award. Paragraph 17 of the award reads as follows :

"The RSRTC has compared the performance of retreaded tyres with the performance of new tyres in each division. In each division, as mentioned earlier, the road conditions, the vehicles used, the weather conditions, the general driving skills of the drivers and the level of maintenance and upkeep of vehicles were similar for the new tyres as well as retreaded tyres. The retreaded tyres should have given a kilometerage of 46,000 or 95 % of the life of new tyres. Therefore, the assessment of the performance done by the RSRTC is strictly in conformity with the provisions of clause 5 of the agreement. Notwithstanding the acceptance by the respondent of an error of judgment in guaranteeing 46,000 kms for a retreaded tyre, from the Statements enclosed by the claimant with its letters mentioned in para 5 of this order, it is clear that the retreaded tyres performance fell short of the guaranteed level. I, therefore, find claim of the RSRTC to be fully justified."

"9. This is the finding of fact given by the arbitrator. As against this, learned Single Judge as mentioned above, has held that there was no assessment in each division in similar conditions. Therefore, the learned Single Judge set aside the award but it is not factually correct. As mentioned above, there was a

comparative assessment given by the Corporation and that was part of the record before the arbitrator and on that basis the finding of fact was recorded by the arbitrator. Learned counsel for the respondents strenuously urged before us that the performance of new tyres and of retreaded tyres on roads like Jaipur-Delhi would be better as against the road of Jaipur-Lalsot. Therefore, there was no assessment of performance of the new tyres vis-a-vis the retreaded tyres supplied by the Company in similar conditions. In fact, an average has to be taken of each division. It is not necessary that in each of the divisions of the Corporation, the road conditions will be similar. Once the company has entered into an agreement knowing fully well the conditions obtaining in the State of Rajasthan that all the routes in the State are not the roads of Class `A' category but there are roads of Class `A', Class `B' and Class `C' categories also. Therefore, the average performance has been recorded taking into consideration this aspect. It is unlikely that all over the State of Rajasthan the road condition like Jaipur-Delhi will be available for all other divisions. Therefore, in all the divisions the average performance has been taken into consideration. The assessment has been based on average of similar conditions of the roads i.e. the good quality as well as the poor quality. Therefore, average performance of the new tyres with the retreaded tyres has to be taken on the basis of roads available in Rajasthan. The average running of the new tyres on these road conditions with that of the retreaded tyres was to be compared to find out whether the performance of retreaded tyres was up to 95% average or not. After assessing the comparative assessment and going through the materials on record the arbitrator has recorded his finding. It was for the company if they wanted more information or wanted to allege that the road conditions are not similar or that the performance of the tyres which were fitted in the rear axle or on the front axle would not be the same, all these details if it wanted, it could have obtained from the Corporation but they did not do so and only at this stage the company wants to bring this factual controversy that retreaded tyres were not used in similar conditions. This argument at this belated stage cannot be accepted as all the materials have been considered by the arbitrator and after taking into consideration the average of each tyre in each region of the corporation has worked out that the performance of the retreaded tyres was not to the extent of 95%. This was a finding of fact recorded by the arbitrator and the same was made rule of the court by the District Judge. But the learned Single Judge erroneously took upon himself to sit as a court of appeal and disturbed this finding of fact. In our opinion, the view taken by the learned Single Judge of the High Court cannot be sustained."

17. During the pendency of this appeal, stay has not been granted. The appellant has seen that the amount awarded by the District Judge is secured by way of bank guarantee or any other security. Clause-9 of contract reads as under:-

"(iii) <u>Clause-9 Special Conditions (modified):</u>

<u>Plant and Machinery:</u>

The plant and equipment procured by the Board shall be made available to the contractor on terms and conditions laid down as under:-

(A) Plant/equipment available for the work for exclusive use by the contractor:

(i) The plant and equipment as per Annexure-VII, procured by the Board for execution of part of work under the contract to shall have to be taken over by the contractor at the cost occassioned to the Board which has been indicated in Col.4 of the said Annexure. This coast shall be set-off against the total amount of advance for equipment admissible to the contractor under Clause-8 (modified) of the General Conditions of contract and shall be recovered in accordance with Clause-9 of the same condition of the contract."

18. Clause-9 of the General conditions does not speak about payment of interest is the submission of Sri Khanna as a special condition which is at page 180 of the paper-book. He has further relied on the judgment of the Apex Court in Hind Builders Vs. Union of India, (1990) 3 SCC 338, K Marappan (Dead) through sole LR Balasubramanian Vs. Superintending Engineer TBPHLC Circle Anantapur, 1019 LawSuit (SC) 977 and State of U.P. and others Vs. J.M. Construction Company, FAFO No.714 of 2005, decided on 11.4.2019 by this High Court., which has interpreted the contract to mean that where there are two interpretations possible, the Arbitrator's view would prevail. In this case, in fact there was no two views possible. The view taken by the Arbitrator is laud and clear and the Arbitrator's view was such that the first court should not have interfered. Similar view has been reiterated recently by the Apex Court and this Court is the submission of Sri Khanna.

19. It is further submitted by the counsel for the contractor that while reading the aribtral award, it cannot be said that it falls within the parameters as envisaged under Section 30 of Act, 1940. It cannot be said that the arbitrator has misconducted himself and that there is any error apparent on the face of record. The factual errors are not open for correction by a Court. It is submitted that no mistake of fact is justiciable hence in view of the decision of the Apex Court in **Dandasi Sahu Versus State of Orissa, (1990) 1 SCC 214** wherein it has been held that the arbitrator, in the case of a reference made to him in pursuance of an arbitration agreement between the parties, being a person chosen by parties and was apprised as the sole arbitrator of all the questions and the parties bind themselves as a rule, to accept, the award as final and conclusive. The arbitrator need not give any reasons and even if he commits a mistake either in law or in fact in determining the matter referred to him, where such mistake does not appear on the face of the award, the same could not be assailed or quashed or upturned. The award could be interfered with only in limited circumstances as provided under Section 16 and 30 of the Arbitration Act, 1940. In this situation the Court has to test the award with circumspection.

20. While considering the factual background and interpreting the arbitral award and the order of the District Judge, the award of the arbitrator is in consonance with clause 8 and 9 of the contract. The District Court seems to have return the judgment as if it was sitting in appeal and deciding the Suit which could not have been done. The authorities were also of the view that no interest could have been charged from the appellant but they reviewed their own decision which became subject matter of arbitration and the arbitrator gave cogent reasons

for allowing the appellant's application and held that no interest was payable. This well reasoned arbitral award was interfered by the court on the ground that the finding is bad though he referred to several judgments he himself embarked on fact finding mission and appreciated on the basis that the arbitrator had committed an error and relying on ***AIR 1955 SC 468 in the case of Thawer Das Vs. Union of India*** and misread the award as if there was an error apparent on the face of record. The modified clause 9 did not permit any interest and the advance was to be given without any interest. The arbitral award also was based on the decision of the Apex Court in ***1989 (2) SCC 721, Raipur Development Authority and other Vs. Chokhamal and others.*** The reasons were well assigned by the arbitrator, thus, the judgment of the District Court reversing the arbitral award is bad in the eye of law and contrary to the contours of arbitral award being set aside by courts.

21. This appeal is allowed. The appellants are entitled to the refund of the interest deducted. The security could be encashed. The judgment of district Court is quashed and is set aside.

22. Record and proceedings be sent back to the Trial Court. The award of the Tribunal shall be made rule of the court under the Arbitration Act, 1940.

23. This Court is thankful to Sri Khanna for ably assisting the Court in getting this matter of 1991 disposed of.

(2020)1ILR 268

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

First Appeal From Order No. 344 of 2012

National Insurace Co. Ltd. ...Appellant
Versus
Om Prakash Pandey & Ors. ...Respondents

Counsel for the Appellant:
Sri Amit Manohar

Counsel for the Respondents:
Sri Akhilesh Ch. Srivastava, Sri Ramesh Ch. Pathak

A. Motor Accident Act, 1988 - Section 165 – Claim petition – Locus of brother of deceased - If there is no other legal heir of the deceased, the brother is a legal representative and is competent to maintain claim petition - Person who is to get the property of deceased will be a legal representative - Tribunal found the name of the claimant has been mutated in revenue records after the death of deceased and both brothers were living in a joint family - Tribunal rightly concluded the claimants to be legal representative of the deceased – Argument that the claimants are brother and bhabhi is only relevant for the purpose of determining dependency which is significant for the purpose of ascertaining the quantum of compensation. (Para 11)

B. Motor Accident Act, 1988 – Compensation - Calculation – Age of deceased was found between 30 to 35 years, therefore, applied the multiplier of 15 – The amount of compensation determined by the tribunal is in lower side and need not to be disturbed. (Para 12)

First Appeal From Order dismissed. (E-1)

List of cases cited :-

1. Sarla Verma Vs. Delhi Transport Corporation Ltd., AIR 2009 SC 3104

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

1. Heard Shri Amit Manohar, learned counsel for the appellant and Shri R.C. Pathak, learned counsel for the claimants.

2. This appeal has been filed against the judgement and award dated 16.08.2011 of Motor Accident Claims Tribunal /Additional District Judge, Court no. 5, Basti in MACP No. 99 of 2008 in which the learned tribunal has granted Rs. 1,50,00/- as compensation along with 6% simple interest per annum from the date of institution of the claim petition.

3. The factual matrix of the case is that an accident took place on 22.05.2006. Deceased driver Prem Prakash along with owner of the Jeep and other persons returning from Tilak ceremony of nephew of Narsingh Pandey resident of Ladewa to Basti. At night about 10:30 PM near village Bankata when Jeep reached from Manauri Chauraha to railway crossing, a tractor trolly coming in front of the jeep, whose driver driving the tractor trolly very rashly and negligently and dashed the Jeep No. U.P.-51H/1300 and Jeep overturned in a pit and Krishna Kumar Srivastava, Dharmendra, Hanshlal and Bhaagwat Dubey who were sitting in the Jeep died on the spot and others sustained injures including driver and owner of the Jeep. Driver of the tractor trolly along with tractor trolly escaped from the spot. Due to injury, driver of Jeep Prem Prakash got unconscious and during treatment he died. Owner of the Jeep Umashanker Mishra and other injured had seen the accident. The Information of accident was given by the owner of the Jeep to shift his responsibility on the tractor trolly stating the tractor trolly is responsible for the accident and on the basis of the written report, Case Crime No. 806 / 06 under sections 279, 337, 338, 304A IPC was registered for the accident and case was investigated. Since owner of the Jeep and other injured are unable to inform about the registration no. of tractor trolly, driver and owner of the tractor trolly, the Investigating Officer submitted Final Report. Driver Prem Prakash was seriously injured in the accident and was admitted in District hospital, Basti from where after first aid he was referred to Medical College. Thereafter, injured Prem Prakash was admitted in Avatar Hospital, Lucknow for treatment where he died due to injuries sustained in the accident on 23.05.2006 at 10:00 PM. Post-mortem of the dead body was not conducted as the owner of the Jeep said that he along with Insurance Company will provide compensation. At the time of accident deceased Prem Prakash was 32 years of age and by profession he was driver and was healthy and unmarried person. He was getting Rs. 3000/- per month as salary and Rs. 300/- as monthly food allowance from the owner of the vehicle. Deceased Prem Prakash was residing with the claimant and giving his whole salary to them. Since, owner of the Jeep was the employer of deceased, therefore, he is responsible for the compensation. The Jeep was insured with National Insurance Company and the driver Hari Prakash @ Prem Prakash was having a valid license. Therefore this claim petition was filed by the brother and sister-in-law of the deceased.

4. The National Insurance Company filed a written statement and has denied the facts alleged in the claim petition and has specifically alleged that in absence of cause of contest, the claim petition is not maintainable and may be set aside. At the

time of accident age of Prem Prakash was more than 32 years, he was not working as driver and he was also not getting the monthly income of Rs. 3000/- and claimants are not the heirs of the deceased. Claimant no. 1 is the brother of the deceased and claimant no. 2 is the sister-in-law (bhabhi) and claimant no. 2 is dependent of claimant no. 1 and claimant no. 1 is self independent. Therefore, claimants are not entitled to get compensation. It has been alleged that in view of FIR the accident took place because of rashness and negligence by tractor trolly and therefore, claim is not maintainable against the insurance company. The owner of the tractor trolly and driver are not made party. On the date of accident the Jeep was not insured and the driver was not having valid license and the Jeep was being driven in violation of the Insurance policy. The offending vehicle was used as a taxi and on the date of accident it was over loaded and therefore, insurance company is not responsible to pay compensation to the claimant.

5. The owner of the offending vehicle filed written statement and denied that Prem Prakash @ Hari Prakash was not working as a driver of offending Jeep and he was only driving the Jeep in absence of the owner's driver. On the date of incident deceased Hari Prakash @ Prem Prakash was driving the offending Jeep. Ahead him Government vehicle of Nalkoop Vibhag was going on, in which, the Executive Engineer Shri Sohan Ram and certain employees of the department were also sitting. The Government vehicle got trapped in the tractor trolly and overturned on the road side and since the offending vehicle was behind the Government vehicle also overturned because of dazzle of headlight of tractor and in which owner and driver sustained injury. Owner of the offending vehicle has bear all the expenses of funeral and Braham Bhoj. He has not lodged the Case Crime No. 806 /06, he also sustained injuries and got fainted and was admitted to District Hospital. The Executive Engineer put pressure on Kotwali police for lodging the F.I.R. He bear all the medical expenses of deceased. Claimants are not the heirs of deceased. Claim petition was not filed in a systematic way.

6. Following issues were framed-

1. Whether Premprakash Pandey died on 22.5.2006 at 10.30 PM when the driver of Jeep UP- 51H/1300 and the driver of the tractor trolly driving rashly and negligently dashed and the Jeep overturned?

2. Whether there was any contributory negligence on the part of deceased in the accident?

3. Whether the petition is not maintainable under section 163-A of the MV Act?

4. Whether the petition is defective due to non joinder of the driver and owner of the tractor trolly?

5. Whether the deceased was having valid and effective driving license at the time of accident?

6. Whether the offending Jeep was not insured at the time of accident?

7. Whether the claimants are entitled for compensation, if yes, how much and from whom?

7. Evidence was given from both sides and after hearing both sides, the learned Tribunal passed the impugned award aggrieved by the same this appeal has been filed.

8. The appellant has challenged the impugned award on the ground that there was no evidence regarding involvement of the said Jeep in accident, no FIR has been lodged against the Jeep but has been lodged against the driver of tractor trolly and they were not made parties, the deceased was not in permanent employment of the owner, the liability under section 163-A has been wrongly fixed, the income was wrongly assessed and deduction of 50% was not maid as the deceased was unmarried and claimants being elder brother and sister in law were not legally entitled for any compensation.

9. The learned Tribunal on evidence and settled legal principles rightly concluded that the petition under section 163-A was maintainable as the deceased was driving the Jeep when the accident took place. It was also rightly decided that there was no possibility of impleading the tractor owner and driver as they were not traceable and moreover when the petition has been filed under section 163-A. It was established on record that the deceased was having valid and effective driving license at the time of incident and the Jeep he was driving was insured. The learned Tribunal also rightly concluded that in a petition under section 163-A, the issue of negligence or contributory negligence is not significant. Thus, the decision on Issue no 1 to 6 is legally valid and justified and there appears to be no perversity in the finding of the Tribunal.

10. The learned counsel for the appellant has submitted that the claimants being elder brother and bhabhi (sister in law), are not entitled for any compensation. Section 165 of the M V Act provides for Claims Tribunal and the Explanation provides that claims for compensation includes a claim under section 140 and 163-A. Section 166 of the M V Act provides that in case of injury claim petition can be filed by the injured person himself and in case of death, by all or any of the legal representative of the deceased. Thus, sub-section (1) of section 166 provides:

"An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made;

a, by the person who has sustained the injury; or

b. by the owner of the property; or

c. where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

d. by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be;

Provided that where all the legal representatives of the deceased have not jointed in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application."

11. It is pertinent to mention that the above provision of the M V Act speaks in terms of legal representative. If there is no other legal heir of the deceased, the brother is a legal representative and is competent to maintain claim petition. It has been nowhere shown that except brother there was anyone who can represent the estate of deceased. Any person who is to get the property of deceased will be a legal representative. In

the instant case the learned Tribunal has found that the name of the claimant has been mutated in revenue records after the death of deceased and both brothers were living in a joint family and their parents have already died. Therefore the learned Tribunal rightly concluded the claimants to be legal representative of the deceased. As such the argument of the learned counsel to appellant that the claimants are brother and bhabhi is only relevant for the purpose of determining dependency which is significant for the purpose of ascertaining the quantum of compensation.

12. The learned Tribunal on the basis of evidence determined the age of the deceased in between 30 to 35 and, therefore, applied the multiplier of 15. In **Sarla Verma v Delhi Transport Corporation Ltd., AIR 2009 SC 3104,** a multiplier of 16 could have been taken. Therefore the appellant should not be aggrieved by the use of the multiplier of 15. The learned Tribunal finding the deceased to be driver and concluding that he might not have regular assignment, hypothetically, determined the income to be Rs. 2500/- monthly and thus Rs. 30000/- in an year. It cannot be said to be in higher side. The learned Tribunal did not stop here and took the view that after being married, the deceased could spare money out of his income to the extent of only 1/3rd for the claimants and thus made a deduction of 2/3rd and determined the amount of compensation to be only 150000/- which is again in a very lower side. The appellant has submitted for only 50% deduction and therefore, there is no reason for he becoming aggrieved. I find the amount of compensation is in lower side and need not to be disturbed.

13. On the basis of the above discussion, I find no force in appeal and the appeal is liable to be dismissed.

14. Appeal is **dismissed** accordingly.

15. The amount of Rs. 25000/- deposited by appellant at the time of filing the appeal shall be remitted back to the learned Tribunal to be paid to the claimant.

(2020)1ILR 272

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2020

BEFORE
THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 581 of 2001

Smt. Manokamini Devi ...Appellant
Versus
Ashok Kumar ...Respondent

Counsel for the Appellant:
N.N. Jaiswal

Counsel for the Respondent:
D.P.S. Chauhan, Ran Vijai Singh

A. Code of Civil Procedure 1908 - Order XLI Rule 25 – Power of appellate Court - Powers of the appellate court and those of trial court are co-extensive - Learned appellate court had power to get the survey map prepared - Once the appellate court has power to get the survey map prepared the remand only for the purpose of getting the survey map prepared may not be a good ground – Moreover, Order XLI Rule 25 provides that to determine any question of fact, the appellate court may, if necessary, frame issues and refer the same to the trial court - In such case the appellate court shall direct such trial court to take an additional evidence required and shall return the evidence to the appellate court together with its findings thereon – Appellate Court erred in disposing of the appeal – Held, order of appellate court liable to be modified with necessary direction. (Para 13, 16, 17 & 18)

First Appeal From Order allowed. (E-1)

List of cases cited :-

1. Ram Bali Singh and others Versus Ram Sakal, 1990 (8) LCD 282

2. H.V.Vedayvasachar Versus Shivshankara and another, 2010(1)AWC 110 (SC)

3. Bachahan Devi & another Versus Nagar Nigam, Gorakhpur and others; (2008) 12 SCC 372

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

1. Heard, Shri Prashant Jaiswal, Advocate holding brief of Shri N.N.Jaiswal, learned counsel for the appellant and Shri Ran Vijai Singh, learned counsel for the respondents.

2. This First Appeal From Order has been filed challenging the judgment and order dated 17.10.2001, passed in Regular Civil Appeal No.57 of 1993;Manokamini Devi Versus Ashok Kumar.

3. The appellant had filed a Regular Suit No.450 of 1987 for mandatory injunction before the Munsif, Barabanki alleging therein that the plot no.158 situated in village Chakkazipur, Pargana and Tehsil-Fatehpur, District-Barabanki was belonging to Smt. Rani Kaneez Ali which was her bhumidhari holding. She had partitioned this plot into five smaller plots and sold those plots to different persons. The plaintiff-appellant had purchased one of these plots of Khasara No.158, which is depicted in the site plan as 1-B. It was purchased through a registered sale deed dated 17.09.1977 and the possession was also obtained. According to the plotting scheme of Smt.Rani Kaneez Ali there were three plots i.e. 3, 4 and 5 on the northern side and plot nos.1 and 2 on the southern side and there was a 20 feet road in between them. The defendant-respondent had purchased plot nos.3,4 and 5 depicted in the site plan. The defendant had started encroaching the road in between the plot nos.1 and 2 on one side and 3, 4 and 5 on the other side on points A, B, C and D depicted in the site plan. The appellant tried to stop the defendant but he did not stop and raised a wall of 50 feet long and 5 feet high, therefore the suit was filed.

4. The respondent-defendant had filed written statement and cross objection with a prayer for permanent injunction alleging therein that the appellant and respondent have purchased half-half portion of the road in between the plots and paid Rs.500/- each to Smt. Rani Kazeez Ali and he tried to raise some construction on his portion. Accordingly 10 feet out of the 20 feet road is of the defendant-respondent out of which 5 feet land has been encroached by the plaintiff-appellant.

5. On the basis of the pleadings of the parties five issues were framed. After evidence the suit for mandatory injunction of the plaintiff-appellant was decreed in her favour and the defendant-respondent was directed to remove the encroachment. The counter claim of the defendant-respondent was also allowed and the plaintiff-appellant was directed to remove the construction. The suit was decreed by means of the judgment and order dated 02.09.1993. The judgment and order passed by the trial court was assailed by the plaintiff-appellant by filing a regular Civil Appeal in the court of District Judge, Barabanki. In the appeal also cross objection was filed by the respondent.

6. After considering the pleadings of the parties learned appellate court found

that it is not in dispute that both the parties have purchased their plots in question from Smt. Rani Kaneez Ali and it is also not in dispute that the lay out plan in regard to the concerned plots in question were annexed with the sale deed. However the appellate court found that on measuring the Map prepared by the Commissioner on the basis of measurement of 1 cm.=10 feet the position of the spot in question is not correct and the distance shown between the different points is not correct and there is difference. On account of these discrepancies the learned appellate court found that the position of the spot is not clear therefore it cannot be ascertained as to how much of area has been encroached and the constructions have been raised by the parties. Therefore, without ascertaining the correct position of the spot the correct conclusion cannot be drawn. The learned appellate court disposed of the appeal and remanded the matter to the trial court with direction to get the issues disposed of after getting the correct Map of the site prepared. However, the judgment passed by the learned trial court has not been set aside. Hence the present appeal has been filed by the plaintiff-appellant.

7. Submission of learned counsel for the appellant was that the learned appellate court has wrongly and illegally remanded the case without setting aside the judgment and order passed by the trial court on the ground that the report of the Commissioner as per the scale given is not correct while commissioner's report was never challenged by any of the parties either before the trial court or before the appellant court. Even then if the appellate court was of the view that the commissioner's report was wrong the appellate court could have called for a fresh commissioner's report and decided the appeal accordingly on its merit. The learned appellate court has wrongly and illegally on the basis of some minor mistake in the commission report has ignored the relevant documentary and oral evidence adduced by the parties and avoided the admitted facts with regard to the 20 feet road. Therefore the impugned judgment is not sustainable and is liable to be set aside. Learned counsel for the appellant has relied on **1990 (8) LCD 282;Ram Bali Singh and others Versus Ram Sakal and 2010(1)AWC 110 (SC);H.V.Vedayvasachar Versus Shivshankara and another.**

8. On the other hand learned counsel for the respondents had submitted that the appellate court has rightly remanded the case because once it was found that the commissioner's report was not correct the alleged encroachment made by the respondent which come to 9 feet in place of 14.6 feet and the distance between the plots of the appellant and the respondent will reduce from 20 feet.

9. I have considered the submissions of learned counsel for the parties and perused the record.

10. The facts regarding purchase of plots by the parties from Smt.Rani Kaneez Ali and road of 20 feet in between the plots are not in dispute. The filing of Regular Suit for mandatory injunction by the plaintiff-appellant and cross objection claiming permanent injunction by the respondent with a prayer for removal of the encroachment by the parties are also not in dispute. The regular suit as well as the cross objection were allowed. Therefore, the Regular Civil Appeal was filed by the plaintiff-appellant and cross

objection was filed by the defendant-respondent.

11. The short question for consideration by this court is as to whether the commissioner's report which was never objected by either of the parties could have been discarded by the learned appellate court and on account of some discrepancies in the commissioner's report the matter could have been remanded to the trial court without setting aside the judgment and order passed by the trial court.

12. It is not in dispute that no objections were filed by either of the parties against the commissioner's report. However, if the learned appellate court has found that on the basis of scale of 1 cm.=10 feet, on which the map was prepared by the commissioner, the correct position of the land in question and encroachment thereon could not be ascertained and the correct conclusion can not be drawn, the learned appellate court has not committed any illegality or error in not accepting the report. The learned counsel for the appellant has also failed to disclose any discrepancy in the findings recorded by the learned appellate court in regard to the commissioner's report except that no objection was filed. Therefore, now the question arises as to whether the learned appellate court should have decided the appeal after calling a fresh commissioner's report or could have remanded the matter.

13. It is settled proposition of law that the powers of the appellate court and those of trial court are co-extensive and the learned appellate court had therefore power to get the survey map prepared. Once the appellate court has power to get the survey map prepared the remand only for the purpose of getting the survey map prepared may not be a good ground. This court in the case of **Ram Bali Singh and others Versus Ram Sakal (Supra)** has held so and with the consent of the parties remanded the matter to the appellate court with direction to decide the controversy himself after getting the requisite map prepared. But in the present case the learned appellate court has not only directed to get the map prepared but has also directed to dispose of the issues on the basis of the map after determination of distance from Mahmoodabad-Ram Nagar road to the shops and the distance of the house of the appellant, width of the road in dispute on spot and the nature of area of encroachment because on the basis of the commissioner's report it could not be ascertained.

14. The Hon'ble Apex court in the case of **H.V. Vedavyasachar Versus Shivshankara and another (Supra)** has held that the order of remand can only be passed in terms of Order XLI Rule 23, Order XLI Rule 23A, Order XLI Rule 25 of the Code of Civil Procedure and on finding that none of the said provisions have any application in that case modified the order passed by the High Court and directed the learned trial court to remit the matter to the appellate court after recording the evidence as directed by the High Court within the time provided and thereafter directed the first appellate court to dispose of the appeal on receipt of the order and the evidence within the time provided keeping in view the fact that the appellant was dispossessed as far back as in 1993.

15. In the present case the appellate court came to the conclusion that for

recording the correct conclusion the position of the spot is essential and in absence thereof no conclusion can be drawn and remanded the matter to the trial court to get the correct map prepared and thereafter dispose of the issues but neither set aside the judgment nor directed to the trial court to return the findings and reasons therefor.

16. Order XLI Rule 25 of the Code of Civil Procedure 1908 provides that to determine any question of fact which appears to the appellate court essential to the right decision of the suit upon the merits, the appellate court may, if necessary, frame issues and refer the same for trial to the court from whose decree the appeal is preferred and in such case the appellate court shall direct such court to take an additional evidence required and such court shall proceed to try such issues and shall return the evidence to the appellate court together with its findings thereon and the reasons therefor within such time as may be fixed by the appellate court or extended by it from time to time. Rule 25 of Order XLI of the Code of Civil Procedure 1908 is extracted below:-

"25. Where appellate Court may frame issues and refer them for trial to Court whose decree appealed from- *Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]."*

17. In view of above it appears that the learned Appellate court has remitted the matter to the trial court to call a correct report and return the same together with its findings thereon and the reasons therefor to the appellate court so the correct conclusions may be drawn and the appeal may be decided on merit therefore the order passed by the trial court has not been set aside. But instead of fixing any time has disposed of the appeal which could not have been done by the appellate court. The Hon'ble Apex in the case of **Bachahan Devi & another Versus Nagar Nigam, Gorakhpur and others;(2008) 12 SCC 372** has held in paragraphs 9 and 10 as under:-

"9. Under Order XLI Rule 25, if it appears to the Appellate Court that any fact essential for the decision in the suit was to be determined, it could frame an issue on the point and refer the same for trial, to the Court from whose decree the appeal is preferred and in such case, shall direct such court to take additional evidence required. The order of remand should not be passed as a matter of routine. The First Appellate Court which has the power to analyse the factual position can decide the issue and the additional issues. In the instant case the First Appellate Court, inter alia, observed as follows:

"As such, it would not be proper for the first Appellate Court in such matter to itself record the evidence and to give its findings in regard to newly created issues.

The Hon'ble High Court has also held that in the present matter under the provision of Order 41 Rule 25 of Civil Procedure Code, becomes mandatory (shall) though in this provision, the word 'may' has been used. No doubt in the present matter also the Appellate Court has framed 6 additional issues which are legal in nature and also factual, with the result if the Appellate Court gives its findings relating to said legal and factual issues after itself recording (receiving) evidence then the aggrieved party would be prevented from his right of filing first appeal. Accordingly, the aforesaid ratio laid down by the Hon'ble High Court is fully applicable in the present matter."

10. A bare reading of the provision makes it clear that the same comes into operation when the Court, from whose decree the appeal is preferred, has omitted to frame or try and issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order XLI Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate Court to do so. This is clear from the use of the expression 'may'. But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor. Requirement for recording the finding of facts and the reasons disclosed from the facts is because the appellate court at the first instance has come to the conclusion that the lower court has omitted to frame or try any issue or to determine any question of fact material for the right decision of the suit on merits. It has to be noted that where a finding is called for on the basis of certain issues framed by the appellate court, the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of the first instance. This position was highlighted in Gogula Gurumurthy and Others v. Kurimeti Ayyappa (1975(4) SCC 458), where it was inter-alia observed in para 5 as follows:

"We consider that when a finding is called for on the basis of certain issues framed by the appellate Court the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal

after the findings are received from the court of first instance. We find the same view taken in Gopi Nath Shukul v. Sat Narain Shukul (AIR 1923 All 384)."

18. In view of above, this court is of the view that the judgment and order passed by the appellate court is liable to be modified to the extent that the trial court after getting the correct map prepared record its findings on the issues and the reasons therefor and send the same to the appellate court so that the appellate court may decide the appeal on merit. It would also be appropriate because the Regular Suit is of the year 1987 and Regular Civil Appeal of the year 1993. The appeal is accordingly partly allowed and the judgment and order dated 17.10.2001 passed in Regular Civil Appeal No.57 of 1993 stands modified to the extent indicated above with the following directions:-

1. The learned Trial Court, after receiving record shall call report of the commissioner with the correct map of the spot and thereafter after recording its findings and reasons therefor in accordance with law as directed by the appellate court, shall send the record alongwith its findings and the reasons therefor to the appellate court expeditiously and preferably within a period of three months from the date of receipt of the record.

2. After receipt of the findings and reasons therefor from the trial court alongwith the record, the appellate court shall decide the Regular Civil Appeal No.57 of 1993 in accordance with law on merit expeditiously and preferably within a period of three months from the date of receipt from the trial court.

19. The appeal is, accordingly, **partly allowed** with the aforesaid directions. No order as to costs.

20. The lower Court record shall be remitted to the concerned trial court forthwith.

(2020)1ILR 278

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.11.2019

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

First Appeal From Order No. 719 of 2000

Ravindra Pal Yadav ...Appellant
Versus
Smt. Badami Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri I.N. Singh, Sri Ajay Yadav, Sri Arvind Kumar Srivastava, Sri Ram Bilas Yadav

Counsel for the Respondents:
Sri A.A. Khan, Sri A.K. Srivastava, Sri Ashok Kumar Singh, Sri Gaurav Singh

A. Motor Accident Act, 1988 – Driving Licence - Validity and effectiveness – Driving licence does not lose its effectiveness merely on ground that the vehicle in question though registered for commercial purpose was being used at the time of the accident for private purpose - validity of the driving licence cannot be doubted even in the absence of any particular or special endorsement made on it as that requirement is not legal one - Finding recorded by the Tribunal is on the face perverse, erroneous – Held, the driver of the offending vehicle was duly licensed.

First Appeal From Order allowed. (E-1)

List of cases cited: -

1. Mukund Dewangan Vs. Oriental Insurance Company Ltd. 2017 (14) SCC 663

2. United India Insurance Co. Ltd. Vs. Smt. Shashi Prabha Sharma and others AIR 2015 Allahabad 167 Full Bench Allahabad High Court

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Arvind Kumar Srivastava, learned counsel for the owner-appellant, Sri Ashok Kumar Singh and Sri Gaurav Singh, learned counsel for the respondent no.6 and perused the material brought on record.

2. By way of the instant appeal, challenge has been made to the award and order dated 16.02.2000 passed by IIIrd Additional District & Sessions Judge, Gorakhpur / Motor Accidents Claim Tribunal, in Motor Accident Claim Case No.71 of 1996 Smt. Badami Devi and others Vs. Ravindra Pal Yadav and others, whereby liability to pay compensation to the tune of Rs.1,49,000/- has been saddled with the owner-appellant.

3. Brief reference of the relevant facts of the case as discernible from the certified copy of the impugned award appears to be that the accident in question was caused on 12.01.1996 at 9:00 p.m. on the tri-crossing of Village Futhawa Inar, Police Station Chauri Chaura, District Gorakhpur by rash and negligent driving of Maruti Van U.P.53 E 1575 by its drive whereby he dashed the same with Ram Dulare Chauhan, aged 40 years, the deceased due to which he sustained injury and on account of which he died. The matter was reported at Police Station Chauri Chaura, District Gorakhpur.

4. The claimants-respondents moved claim petition claiming overall compensation amount under various heads to the tune of Rs.11,80,000/-. The Insurance Company also contested the claim petition by filing written statement and on the basis of the same, the Tribunal framed as many as 9 issues regarding factum of the accident and various other counts as per respective pleadings of the parties. It also took note of the documents filed on record which have been elaborated and discussed in the impugned award dated 16.02.2000 (passed by the Tribunal) and after recording finding on various issues, the Tribunal allowed the claim petition and in its operative portion, it directed payment / realization of Rs.1,49,000/- along with 12% interest as the overall compensation which amount was directed to be distributed among the claimant-respondents, in various proportion.

5. Consequently, this appeal.

6. Learned counsel for the owner-appellant has submitted that the liability to pay compensation has been wrongly saddled with the owner appellant on the ground that the offending vehicle, Maruti Van U.P.53 E 1575 was registered for commercial purpose, however, it was being plied, at the time of accident in question, for private purpose on account of which the Insurance Company claimed immunity branding the aforesaid act of the owner plying the vehicle in question to be in violation of the terms and conditions of the Insurance Policy, which finding on the face is perverse, erroneous and not sustainable in view of the fact that in case any light motor vehicle is plied for whatsoever purpose - say - private or commercial by a duly licensed driver then it need not bear any particular / special endorsement on the driving licence of the driver as such that licence is meant for commercial purpose and the Insurance Company cannot claim immunity on that count, because the vehicle in question is admittedly motor vehicle for which a

licence issued for driving a light motor vehicle will be a valid and effective driving licence.

7. In support of his contention, learned counsel for the appellant has placed reliance on the decision of Hon'ble Apex Court in the case of **Mukund Dewangan Vs. Oriental Insurance Company Ltd. 2017 (14) SCC 663,** particularly on paragraph nos. 45 and 46 which are extracted herein below:

45. Transport vehicle has been defined in section 2 (47) of the Act, to mean a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. Public service vehicle has been defined in section 2 (35) to mean any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward and includes a maxicab, a motor cab, contract carriage, and stage carriage. Goods carriage which is also a transport vehicle is defined in section 2 (14) to mean a motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods. It was rightly submitted that a person holding licence to drive light motor vehicle registered for private use, who is driving a similar vehicle which is registered or insured, for the purpose of carrying passengers for hire or reward, would not require an endorsement as to drive a transport vehicle, as the same is not contemplated by the provisions of the Act. It was also rightly contended that there are several vehicles which can be used for private use as well as for carrying passengers for hire or reward. When a driver is authorised to drive a vehicle, he can drive it irrespective of the fact whether it is used for a private purpose or for purpose of hire or reward or for carrying the goods in the said vehicle. It is what is intended by the provision of the Act, and the Amendment Act 54/1994.

46. Section 10 of the Act requires a driver to hold a licence with respect to the class of vehicles and not with respect to the type of vehicles. In one class of vehicles, there may be different kinds of vehicles. If they fall in the same class of vehicles, no separate endorsement is required to drive such vehicles. As light motor vehicle includes transport vehicle also, a holder of light motor vehicle licence can drive all the vehicles of the class including transport vehicles. It was pre-amended position as well the post-amended position of Form 4 as amended on 28.3.2001. Any other interpretation would be repugnant to the definition of "light motor vehicle" in section 2 (21) and the provisions of section 10(2)(d), Rule 8 of the Rules of 1989, other provisions and also the forms which are in tune with the provisions. Even otherwise the forms never intended to exclude transport vehicles from the category of "light motor vehicles' and for light motor vehicle, the validity period of such licence hold good and apply for the transport vehicle of such class also and the expression in section 10(2)(e) of the Act "Transport Vehicle' would include medium goods vehicle, medium passenger motor vehicle, heavy goods vehicle, heavy passenger motor vehicle which earlier found place in section 10(2)(e) to

(h) and our conclusion is fortified by the syllabus and rules which we have discussed. Thus we answer the questions which are referred to us thus:

(i) "Light motor vehicle' as defined in section 2(21) of the Act would include a transport vehicle as per the weight prescribed in section 2(21) read

with section 2(15) and 2 (48). Such transport vehicles are not excluded from the definition of the light motor vehicle by virtue of Amendment Act No.54/1994.

(ii) A transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 kg. would be a light motor vehicle and also motor car or tractor or a road roller, "unladen weight' of which does not exceed 7500 kg. and holder of a driving licence to drive class of "light motor vehicle" as provided in section 10(2)(d) is competent to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg. or a motor car or tractor or road-roller, the "unladen weight" of which does not exceed 7500 kg. That is to say, no separate endorsement on the licence is required to drive a transport vehicle of light motor vehicle class as enumerated above. A licence issued under section 10(2)(d) continues to be valid after Amendment Act 54/1994 and 28.3.2001 in the form.

(iii) The effect of the amendment made by virtue of Act No.54/1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of section 10(2) which contained "medium goods vehicle" in section 10(2)(e), medium passenger motor vehicle in section 10(2)(f), heavy goods vehicle in section 10(2)(g) and "heavy passenger motor vehicle" in section 10(2)(h) with expression "transport vehicle' as substituted in section 10(2)(e) related only to the aforesaid substituted classes only. It does not exclude transport vehicle, from the purview of section 10(2)(d) and section 2(41) of the Act i.e. light motor vehicle.

(iv) The effect of amendment of Form 4 by insertion of "transport vehicle" is related only to the categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of "light motor vehicle" continues to be the same as it was and has not been changed and there is no requirement to obtain separate endorsement to drive transport vehicle, and if a driver is holding licence to drive light motor vehicle, he can drive transport vehicle of such class without any endorsement to that effect.

8. Per contra, learned counsel for the claimant-respondents has has placed reliance on the decision of the Full Bench of this Court in the case of ***United India Insurance Co. Ltd. Vs. Smt. Shashi Prabha Sharma and others AIR 2015 Allahabad 167 Full Bench Allahabad High Court*** and claimed that on the basis of the aforesaid citation, ratio is fixed in such cases like the present one, liability though may be fastened upon the Insurance Company to pay the amount of compensation initially on it but the same may be directed to be recovered from the owner of the offending vehicle.

9. Considered the rival submissions and gone through the impugned award passed by the Tribunal.

10. In this case, no cross objection has been filed by the claimant-respondents. Finding on issue no.8 though it has been wrongly mentioned as finding on issue no.7, however both the parties agreed that it be treated as finding on the point of validity and effectiveness of the driving licence as issue no.8. The Tribunal after analyzing various aspects both legal as well as factual was of the opinion that the vehicle in question Maruti Van U.P.53 E 1575 primarily registered as commercial vehicle. However, it was being driven by a person though holding licence for driving the light motor vehicle but without any

endorsement (on the licence) driving commercial vehicle would be violative of the terms and conditions of the insurance policy and would amount to not driving such vehicle with valid and effective driving licence.

11. The point raised on behalf of the owner-appellant relates to fact that in view of the clear cut mandate of the Hon'ble Apex Court herein quoted above also fortifies claim of the owner-appellant that driving licence to drive the light motor vehicle will not lose its effectiveness merely on ground that the vehicle in question though registered for commercial purpose was being used at the time of the accident for private purpose and the point to be seen in such case is rooted to core consideration whether the nature of the vehicle permits the holder of the driving licence for driving light motor vehicle or not and that point works categorical in favour of the owner in the context.

12. In this case, validity of the driving licence cannot be doubted even in the absence of any particular or special endorsement made on it as that requirement is not legal one. The claim raised on behalf of the owner-appellant is sustained in view of the categorical finding recorded by Hon'ble Apex Court in the case of Mukund Dewangan (supra). Similarly, finding recorded in relation to the validity of the driving licence on issue no.8 by the Tribunal is on the face perverse, erroneous and the same is hereby set aside and it is held that the driver of the offending vehicle Maruti Van U.P.53 E 1575 was duly licensed on 12.01.1996 at 9:00 p.m. when the accident occurred on the tri-crossing of Village Futhawa Inar, Police Station Chauri Chaura, District Gorakhpur.

13. Insofar as overall amount awarded under facts and circumstances of the case as compensation amount to the tune of Rs.1,49,000/- is concerned, the same cannot be said to be either excessive or unreasonable, the same is justified, therefore, operative portion of the impugned award passed by the Tribunal dated 16.02.2000 along with 12% interest is hereby sustained. The entire amount of the compensation shall be paid by the insurer of the offending vehicle i.e. respondent no.6, Oriental Insurance Co. Ltd. instead of the owner-appellant Ravindra Pal Yadav.

14. Accordingly, this appeal is allowed in terms aforesaid.

(2020)1ILR 282

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

First Appeal From Order No. 758 of 2016

The Oriental Insurance Company Ltd. ...Appellant

Versus

Smt. Renu & Ors. ...Respondents

Counsel for the Appellant:
Sri Ramesh Singh

Counsel for the Respondents:
Deepali Srivastava, Sri Ram Singh, Sri Sanjay Kumar Tripathi, Sri Amit Kumar Sinha

A. Motor Accident Act, 1988 – Driving licence – Validity – Tribunal found the offending vehicle was light goods motor vehicle - Tribunal further found that in

the motor vehicle, three wheeler passenger vehicle and four wheeler vehicle is also included - No otherwise evidence - Offending vehicle was not heavy transport vehicle – Driver was very much authorized to drive the offending vehicle – Held, finding of Tribunal is justified and according to law which deserves no interference. (Para 6)

Held -

6. Conclusion was further supported by the judgment in Kulwant Singh & others Vs. Oriental Insurance Company Ltd. 2014 (4) T.A.C. 676 (SC) in which the Supreme court has laid down that if the driver is authorized to drive light motor vehicle, even if there is no endorsement for driving commercial vehicle, it shall be inferred that the driver was authorized to drive light passenger carriage vehicle and light goods carriage vehicle and as such the Insurance Company cannot deny to pay the compensation.

First Appeal From Order dismissed. (E-1)

List of cases cited :-

1. Kulwant Singh & others Vs. Oriental Insurance Company Ltd. 2014 (4) T.A.C. 676 (SC)

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

1. Heard Shri Ramesh Singh, learned counsel for the appellant and Shri Ram Singh, learned counsel for the opposite parties.

2. This appeal has been filed against the judgment and award dated 30.11.2015 passed by Motor Accident Claims Tribunal /Additional District Judge, Court no. 5, Gorakhpur in MACP No. 764 of 2012 (Smt. Renu Gupta & others Vs. Prabhari Adhikari (Store) Nagar Nigam Gorakhpur & others) by which the learned Tribunal has awarded Rs. 1,54,000/- as compensation along with 7% simple interest per annum from the date of filing of this claim petition.

3. Aggrieved by the impugned award, this appeal has been filed on the ground that at the time of accident driver of the vehicle was not having a valid driving license to drive a transport vehicle and he was having a license of driving motorcycle or light motor vehicle. For plying transport vehicle, an endorsement was made on 29.12.2012 just after one day after the accident, which clearly proves that the vehicle was being driven in breach of insurance policy. Therefore the Insurance Company is not responsible to pay compensation and the impugned award is not sustainable under law and is liable to be set aside.

4. The respondent nos. 1 and 2 have filed a cross appeal against the impugned award stating that the awarded compensation is on lower side and is liable to be enhanced. The learned tribunal has passed the award on the basis of notional income of Rs. 15,000/- and it should be at least Rs. 36,000/- per month. The learned tribunal has omitted to consider the price rise while determining the notional income. At the time of death, the deceased was only 3 years old and the learned tribunal wrongly deducted 1/3 income against the personal expenses of the deceased. In the light of the decision of the Hon'ble High Court and Hon'ble Supreme Court the awarded amount is liable to be enhanced and the appeal of the Insurance Company is liable to be dismissed.

5. From the memo of appeal itself, it appears that the factual issues with regard to negligence and rash driving, insurance

of offending vehicle and other aspect based on factual matrix have not been challenged by the appellant. The appeal is restricted to the only fact with regard to validity of the driving license to drive transport vehicle. In this regard, the only submission that has been advanced is that the accident took place on 28.12.2012 in the day time and the driver was not authorized to drive transport vehicle and after the accident, on the very next day, an endorsement was made in the license of the driver, authorizing him to drive transport vehicle and the validity of this authorization is from 29.12.2012 to 28.12.2015. Admittedly at the time of accident, the driver of the vehicle was authorized to drive a motor cycle and light motor vehicle.

6. From the perusal of the impugned judgment, it appears that the learned tribunal specifically framed a issue with regard to validity of the driving license and while disposing that issue, the learned tribunal has discussed the nature of the vehicle by which the accident took place. On record the learned tribunal found that the offending vehicle was light goods motor vehicle and when unloaded the weight of vehicle was 850 Kg and when loaded the vehicle was 1550 Kg. Learned tribunal has mentioned that under the Motor Vehicle Act unloaded light motor vehicle has been categorized up to the weight of 7500 Kg. The learned tribunal further found that in the motor vehicle, three wheeler passenger vehicle and four wheeler vehicle is also included and it also includes goods delivery vehicle. No otherwise evidence was given from the side of the appellant. That the offending vehicle was not heavy transport vehicle and therefore, it was decided by the learned tribunal on the basis of evidence, that the driver was very much authorized to drive the offending vehicle. This conclusion was further supported by the judgment in **Kulwant Singh & others Vs. Oriental Insurance Company Ltd. 2014 (4) T.A.C. 676 (SC)** in which the Supreme court has laid down that if the driver is authorized to drive light motor vehicle, even if there is no endorsement for driving commercial vehicle, it shall be inferred that the driver was authorized to drive light passenger carriage vehicle and light goods carriage vehicle and as such the Insurance Company cannot deny to pay the compensation. In view of the law laid down and as discussed above, the finding of the learned Tribunal on this point is justified and according to law which deserves no interference.

7. This claim petition involves death of a 3 years old child and the learned Tribunal has awarded only Rs. 154000/- as compensation which is in lower side by which the appellant should not be aggrieved. Nothing more has been argued by the appellant.

8. In view of the above discussions, I find no force in this appeal and the appeal is liable to be dismissed.

9. The appeal is **dismissed.**

10. The office is directed to send a copy of this judgment to the Court concerned for information and necessary compliance.

11. Stay if any shall stand vacated. Remit back the amount of Rs. 25000/- deposited by the appellant to the learned Tribunal to be adjusted against the awarded compensation.

(2020)1ILR 285

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1101 of 2019

Smt. Sharda Yadav ...Appellant
Versus
M. Shriniwas Rao & Ors. ...Respondents

Counsel for the Appellant:
Sri A.K. Malviya, Sri Satya Prakash Shukla

Counsel for the Respondents:
Sri Rakesh Bahadur, Sri Rakesh Bahadur

A. Motor Accident Act, 1988 – Negligence committed by Driver - Principles of contributory negligence – Burden of proof - Negligence means failure to exercise required degree of care and expected of a prudent driver - Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person - The degree of care required depends upon facts in each case - Burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents - It is the duty of driver of the offending vehicle to explain the accident. (Para 6, 7 & 8)

Held -
10. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

B. Interpretation of Statute - Motor Accident Act, 1988 - Section 110-A and 110-B - Rule of Res Ipsa Loquitar - Scope - Provisions are not merely procedural provisions - It substantively affect the rights of the parties - New situations and new dangers require new strategies and new remedies - It is possible to develop the law - When a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and therefore, rule of res-ipsa loquitar as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits. (Para 11 & 12)

First Appeal From Order partly allowed. (E-1)

List of cases cited :-

1. Rylands V/s. Fletcher, (1868) 3 HL (LR) 330

2. Jacob Mathew V/s. State of Punjab, 2005 ACJ(SC) 1840).

3. (2013) 7 SCC 476 Vimal Kanwar & Ors. Vs. Kishore Dan & Ors.

4. National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050

5. Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121

6. National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Satya Prakash Shukla, learned counsel for the appellant, Sri

Rakesh Bahadur for the Insurance company. None appears for the owner.

2. This appeal has been filed by the appellant Smt. Sharda Yadav, who is widow of the deceased against the award dated 21.11.2008 passed by learned Motor Accident Claim Tribunal/ Additional District Judge, Ghazipur wherein the Tribunal has awarded Rs. 5,15,512/-as compensation. The Insurance company has filed the cross objection challenging the compensation as well as the finding of negligence by the Tribunal.

3. The brief facts leading to the litigation on 9.12.2003 at about 11.40 when deceased was drawing his cycle, a truck bearing No. AP 16 T 7899 came from behind very rashly and negligently dashed the deceased from behind. The deceased succumbed to the injuries while he was being taken to the hospital. The deceased was serving in the education department and was earning about 12,000/- per month. His age of retirement was 62 years. The deceased was survived by his widow who has filed the claim petition. The respondent owner driver did not appear before the Tribunal did they appeared before this Court. The Tribunal framed five issues and answered in favour of the claimant appellant but the claimant is not satisfied with the quantum of compensation. The claimant appellant examined four witnesses and filed several documents namely FIR, Post mortem, family register, Charge sheet by way of certificate 37 G, salary certificated of the deceased was filed. The insurance cover note, permit of the truck, driving license of the driver of the truck, the insurance company vehemently contested the claim and here the insurance has filed cross objection recently contending that the driver of the truck was not negligent and that the claimant has not proved the negligence. The compensation awarded is on higher side. It is further contended that the claim petition deserves to be dismissed.

4. Sri Satya Prakash Shukla, learned counsel for the appellant has relied on the followings decisions: **2009 (1) ACCD 187 (All)** Smt. Kamla Devi and others Vs. Chandra Engineering Corporation, Faizabad and others; **2009 (1) ACCD 191 (All),** Oriental Insurance Co. Ltd. Vs. Smt. Manju and another; **2009 (3) ACCD 1441 (SC)** National Insurance Co. Ltd. Vs. Smt. Saroj and others; **2009 (3) ACCD 1445 (SC)** North West Karnataka Road Transport Corp. Vs. Gourabai and others; **2008 (1) ACCD 258 (SC)** Oriental Insurance Co. Ltd. Vs. Jashuben and others; **2007 (2) ACCD 1138 (All)** National Insurance Company Ltd. Vs. Smt. Indira Srivastava and others and **2007 (2) ACCD 1141 (All)** National Insurance Company Ltd. Vs. Rajendra Prasad and others and contended that the amount granted is not in consonance with these judgments.

5. In reply Sri Rakesh Bahadur, learned counsel for Insurance has relied on the judgment of Apex Court reported in **(2013)9 Supreme Court Cases 65** Reshma Kumari and others Vs. Madan Mohan and another and has contended that the Tribunal has committed an error on relying on the charge sheet filed in absence of other reliable documents as the so called witnesses had not seen the accident and it was not proved that the driver of the truck was negligent and has submitted that cross objection under order 41 Rule 22 of the CPC 1908 requires to be allowed.

6. While dealing with the issue of negligence, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

7. Negligence means failure to exercise required degree of care and expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

8. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

9. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

10. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in **Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.** From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

11. These provisions (sec.110-A and sec.110-B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

12. In the light of the above discussion, even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitar as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits **(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 ACJ(SC) 1840).**

13. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side.

14. While going through the record, it is clear that the cyclist was on his correct side and the truck driver came from behind did not blow any horn and the injuries which the deceased suffered go to show that the driver against whom the charge sheet is filed and the version in FIR is proved by the testimony of the witnesses. The principles of the res ipsa loquitar will apply in the facts of this case and the judgment of Reshma Kumari **(Supra)** and the judgment of this High Court relied by Sri Rakesh Bahadur namely 2013 (1) T.A.C. 606 (All.) Smt. Gaura Devi and others **(Supra)**. Hence the factum of accident has been proved and the driver or the owner have not appeared before the Tribunal, the Tribunal has drawn the adverse inference and not only on the basis of charge sheet but as the FIR had mentioned the number of the truck, the Tribunal held the driver of the truck to be negligent. The injuries on the deceased also proved the rashness with which the driver of the truck drove the vehicle, hence the submission of counsel for respondent can not succeed. The cross objection also fails. The judgement of the Gaura Devi (Supra) is eclipsed by the judgment of the Apex Court in Vimla Devi and others Vs. National InsuranceCompany and others and by the judgment reported in 2019 (2) SCC 186 and the judgment of Apex Court in Sunita and another Vs. Rajsthan State Road Transport Corporation AIR 2019 SC 994. The injuries which have been cused go to show that it was the act of negligent driving by the driver of the truck reference of the judgment of Apex Court in S. Kumar Vs. United India Insurance company Limited AIR 2019 SC 3235, hence the deceased died due to the negligence of the driver of the truck. This finding of fact by the tribunal is not demonstrated to be bad or perverse. And in that view of the matter the cross objection as far as proving negligence is concerned fails.

15. After hearing the learned counsels for the parties and perusing the judgment and order impugned, this Court finds that the income of the deceased Rs. 7,945/-per month has been wrongly assessed by the Tribunal as the Tribunal has deducted amounts which were not supposed to be deducted from the salary of the deceased namely the advantages which were can not be deducted and as held by the Hon. Supreme Court in the case of (2013) 7 SCC 476 **Vimal Kanwar & Ors. Vs. Kishore Dan & Ors.** I am even fortified in my view by the judgment of Apex Court reported in National Insurance Company Limited VS. Mannat Johal and another (Infra). The amount, therefore, which would be entitled to the family would to Rs. 12,000/- to which, as the deceased was 54 years of age, 10% of the income requires to be added in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** which would bring the figure to Rs.1, 44, 000 + Rs.14,400 =Rs.1,58,400/-. Out of which 1/3th requires to be deducted as personal expenses of the deceased, hence after deduction of 1/3th means Rs/ 52,800/- the amount available to the family would be Rs.1, 05, 600/-. As the deceased was in the age bracket of 51-55 years, the applicable multiplier would be 11 in view of the decision in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.** In addition to that, Rs.70,000/- is granted towards conventional heads as it is matter of 2004. Hence, the claimants are entitled to a total sum of Rs. 1, 05, 600/- x 11) + 70,000 =Rs. 12, 31, 600/-.

16. As far as issue of rate of interest is concerned, the interest should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

17. In view of the above, the appeal is **partly allowed.** Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount be deposited within a period of 12 weeks from today. The amount already deposited be deducted from the amount to be deposited.

18. This Court is thankful to both the counsels to get this very old matter disposed of.

19. The cross objection is dismissed. Record be send back to the tribunal forthwith.

(2020)1ILR 289

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

First Appeal From Order No. 1718 of 2011

National Insurance Co. Ltd. ...Appellant
Versus
Subhawati Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Amit Manohar

Counsel for the Respondents:
Sri Shesh Narain Mishra

A. Motor Accident Act, 1988 – Compensation – Calculation – On the basis of salary of the deceased - Age of deceased was found between 38 to 40 years – In view of norms of application of multiplier laid down in Sarla Verma's case, Tribunal rightly applied multiplier of 15 – Held, no perversity or illegality in the impugned judgment and award. (Para 12, 13 & 16)

Held –
15. In Sarla Verma (supra), it has been held by the Supreme Court that a proceeding before the Tribunal is in the nature of inquiry in which a very few thing is required to be established. The Court observed: "Basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased.

First Appeal From Order dismissed. (E-1)

List of cases cited :-

1. Sarla Verma Vs. Delhi Transport Corporation Ltd., AIR 2009 SC 3104

2. National Insurance Company Vs. Pranay Sethi & others, AIR 2017 SC 5157

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

1. Heard Shri Amit Manohar, learned counsel for the appellant and Shri Shesh Narain Mishra, learned counsel for the opposite parties.

2. This appeal has been filed against the judgement and award dated 18.02.2011 of Motor Accident Claims Tribunal /Additional District Judge, Court no. 1, Basti in MACP No. 105 of 2006 in which the learned Tribunal has awarded Rs. 4,66,940/- as compensation along with 6% simple interest per annum from the date of institution of the claim petition.

3. The factual matrix of the case is that an accident took place on 22.05.2006 at 10:30 PM, deceased Bhaagwat Prasad Dubey with other employees of his department was in the Jeep and was coming after attending a marriage function to Basti. In village Bankata near railway crossing when the driver of the Jeep U.P.-51H/1300 driving the Jeep rashly and negligently tried to overtake the tractor trolly, the right portion of the Jeep dashed with trolly and because of that the Jeep got uncontrolled and overturned in a pit. The person in the Jeep sustained injures and 4 of them died on the spot including Shri Bhaagwat Prasad Dubey. The Information was given by the owner of the Jeep to shift his responsibility on the tractor trolly stating the tractor trolly is responsible for the accident and on the basis of the written report, Crime No. 806 / 06 under sections 279, 337, 338, 304A IPC was registered for the accident. The driver of the Jeep was completely responsible who was driving the Jeep very rashly and in a very dangerous way resulting in accident. At the time of accident deceased Bhaagwat Prasad Dubey was 38 years in age and he was Class-IV employee in Rajkiya Nalkoop Vibhag and his monthly income was Rs. 6342/-. Therefore this claim petition was filed by his wife and minor daughter and sons.

4. The owner of the offending vehicle filed written statement and denied

that Bhaagwat Prasad Dubey was traveling in the alleged offending Jeep. He has admitted that deceased was Class-IV employee in the Irrigation Department. He has further stated that he had purchased the Jeep and on the day of incident he had gone to Shri Narsingh Pandey of his department in a marriage function and he was returning in the night by Jeep. Ahead him, the Executive Engineer Shri Sohan Ram was also going in a Jeep with certain employees. The Jeep got trapped in the tractor trolly and overturned on the road side, therefore, certain persons sustained injuries and some persons died. The leg of the Executive Engineer was also broken. The offending Jeep was departmental and therefore, the Executive Engineer put pressure on him for lodging the F.I.R. as he was coming from his Jeep behind the Jeep. He also sustained injuries and got fainted and was admitted to District Hospital. The Jeep was insured with National Insurance Company and the driver Hari Prakash Pandey was having a valid license. If the Tribunal comes to a conclusion that the accident took place by his Jeep, the responsibility to pay compensation is on the National Insurance Company.

5. The National Insurance Company also filed a written statement and it has been alleged that in view of FIR, the accident took place because of rashness and negligence of by tractor trolly and therefore, claim is not maintainable against the Insurance company. The owner of the tractor trolly has not been made party. There is nothing against the driver of the Jeep and on the basis of false allegation the claim has been filed. The driver was not having valid license and the Jeep was being driven in violation of the Insurance policy, the tractor trolly was not insured and was driving illegally. The responsibility to pay compensation is on tractor owner and the claim petition is not maintainable.

6. The learned tribunal framed four issues, the English translation is as follows:

1. Whether on 22.05.2006, at night 10:30 p.m. near Bankata Railway Crossing under P.S. Kotwali, District Basti, Bhaagwat Prasad Dubey was coming in Jeep No. U.P.-51H/1300 to Basti, while crossing the railway crossing, the driver of the Jeep, in order to overtake, crossed the Jeep very rashly and negligently and right side of jeep dashed with tractor trolly, Jeep got overturned in a pit and Bhaagwat Prasad Dubey sustained injuries and he died on the spot and Whether accident occurred due to only negligence of tractor driver or accident occurred due to composite negligence of Jeep driver and tractor driver?

2. Whether at the time of accident Jeep was validly and effectively insured with opposite party no. 2 Insurance Company?

3. Whether on the date of accident driver of the Jeep was having valid and effective driving license?

4. Whether the claimants are entitled for any relief, if yes, then how much and from whom?

7. In support of the claim petition PW-1 Smt. Subhawati Devi (claimant), PW-2 Ram Pher, PW-3 Gulab Chandra have been examined and the police papers such as FR, F.I.R., site map, postmortem report, insurance papers and driving license have been filed. In addition to it, the claimant has also filed the salary

certificate of the deceased. The defendant side has not given any evidence. The learned Tribunal, after hearing both the sides and perusing the record, has delivered the impugned judgment and award.

8. Feeling aggrieved by the impugned award, this appeal has been filed on the ground that no FIR was lodged against the said Jeep and its driver and the report was lodged against tractor trolly and the police submitted final report as the tractor trolly was not traceable in absence of its number. Other argument is in respect of income and use of multiplier.

9. PW-1 Subhawati Devi is claimant who has supported the allegations of petition but she has admitted that she had not seen the accident taking place. PW-3 Gulab Chandra is the eye witness of the accident and he has narrated how the accident took place and the driver of the Jeep was driving the Jeep rashly and negligently and by overtaking dashed the tractor trolly going to the wrong side due to which the accident took place. No evidence for rebuttal was given from the side of the defendants. The claim petition further finds support by the police papers as mentioned above.

10. The learned tribunal found on the basis of the evidence on record that the driver of the offending Jeep at the time of accident was driving the Jeep very rashly and negligently and the right portion of the Jeep was dashed to the tractor trolly and the Jeep got overturned and several persons in the Jeep sustained injuries and four persons died including the husband of the claimant. So for as the fact that FIR was lodged against tractor trolly against which the police submitted final report, the learned trial court found on evidence that the eyewitness proved that the rashness and negligence of the driver of the said Jeep was established on the basis of eyewitness account and moreover, the owner of the said Jeep has admitted in his written statement that under pressure he lodged FIR against tractor trolly and at that time he was not in healthy state of mind. No evidence in rebuttal and to prove negligence of other vehicle or composite negligence was given by the side of appellant. Therefore, it was rightly concluded by the learned tribunal that the accident took place because of the rash and negligent driving of the offending Jeep and in the accident the husband of the claimant sustained injuries and died.

11. So far as the insurance is concerned the same has not been denied. The driving license of the driver of the offending Jeep was also found to be valid on the date of accident. Therefore issue no. 2 and 3 were also decided in favour of the claimant and against the defendant.

12. The amount of compensation has been calculated on the basis of salary which the deceased was earning at the time of accident. P.W.-2 Ram Pher, senior clerk of the department has been examined who has proved the salary statement of the deceased and has stated that after deduction, the deceased was getting Rs. 3812/- monthly. On the basis of this amount the compensation has been calculated. The learned tribunal has found the age of deceased to be between 38 to 40 years and he has applied a multiplier of 15. The submission of the learned counsel to the appellant is, in view of **Sarla Verma Vs. Delhi Transport Corporation Ltd., AIR 2009 SC 3104,** in the age of 40 to 45 years instead of multiplier of 15, a multiplier of 14 will be applicable.

13. In **Sarla Verma** (Supra) case multiplier is from the age of 36 to 40 years is 15. The Supreme Court has laid down as below:

"We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

14. It is clear from the above observation that in the age of 36 to 40 years, the available multiplier is 15 and not 14, as the learned Tribunal has determined the age of the deceased to be between 38 to 40. The has been further affirmed on the point of multiplier system by the judgment in **National Insurance Company Vs. Pranay Sethi & others, AIR 2017 SC 5157.** Therefore, the learned Tribunal has rightly applied the multiplier in this instant case.

15. In **Sarla Verma (supra),** it has been held by the Supreme Court that a proceeding before the Tribunal is in the nature of inquiry in which a very few thing is required to be established. The Court observed:

"Basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased."

16. In my view, the the learned Tribunal has discussed all above aspects as laid down in **Sarla Verma (supra)** and has determined compensation on the basis of the net salaried income of the deceased by applying right multiplier. I do not find any perversity or any illegality in the impugned judgment and award.

17. In view of the above discussions, I find no force in this appeal and the appeal is liable to be dismissed.

18. The appeal is **dismissed.**

19. The office is directed to send a copy of this judgment to the Court concerned for information and necessary compliance.

20. Stay if any shall stand vacated. Remit back the amount of Rs. 25000/- deposited by the appellant to the learned Tribunal to be adjusted against the awarded compensation.

(2020)1ILR 293

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

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

First Appeal From Order No. 2871 of 2005

United India Insurance Co. Ltd.
...Appellant
Versus
Smt. Ramwati Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashok Kumar Srivastava, Sri Nagendra Kumar Srivastava

Counsel for the Respondents:
Sri Nigamendra Shukla

A. Workmen's Compensation Act, 1923 - Appeal – Pleading – Effect of no rebuttal - The Insurance Company-appellant having full opportunity to contest the claim did not do proper rebuttal - Claimant-respondents stands proved by cogent and consistent testimony – It would not be arguable that there was no such relationship (the employer and the employee) in absence of supporting material. (Para 15)

B. Workmen's Compensation Act, 1923 - Section 4 – Verbal Cross Objection - Admissibility - Interest to be awarded is to be fixed at the rate of 12% per annum - However, it was fixed at the rate of 4% per annum – Verbal objection on behalf of the claimant is liable to be sustained - Award impugned modified to the extent that the interest rate shall be charged at the rate of 12% per annum instead of 4% - Verbal cross objection raised by the claimant-respondent allowed. (Para 16)

First Appeal From Order dismissed. (E-1)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Nagendra Kumar Srivastava, learned counsel for the Insurance Company-appellant, Sri Nigamendra Shukla, learned counsel for the claimant-respondent nos.1 to 6 and perused the material brought on record.

2. By way of the instant appeal, challenge has been made to the judgment and award dated 27.09.2005 passed by the Workmen's Compensation Commissioner / Assistant Labour Commissioner, Bulandshahar, in W.C.A. No.04 of 2002, Smt. Ramwati Devi and others Vs. Aftab Ahmad and another, whereby overall compensation amount Rs.3,51,080/- has been awarded under various heads to the claimant-respondents.

3. Learned counsels for both the parties agree that this case relates to the point of income and assessment of the compensation, thereon each point can be adjudicated upon and scrutinized merely by perusal of the certified copy of the award itself, therefore, there is no need for lower court's record and the case may be decided after hearing both the sides.

4. Consequently, this case is being decided on the strength of the material available on record.

5. Brief facts giving rise to this appeal as reflected from material available on record appear to be that one Chandra Pal Sharma, resident of Village Faridpur, District Gautam Budh Nagar was in the employment of Aftab Ahmad, owner of the Truck No.DL-1 GA / 2155 as driver and was earning Rs.4000/- per month. He was on duty on 30.01.2002 when the accident caused on account of slippage of jack, due to which the driver was crushed under the vehicle and died on account of sustaining injury. At that point of time, the deceased Chandra Pal Sharma was aged 40 years and he was possessing valid and effective driving licence and he was a skilled driver.

6. Relevant notice for compensation was given to the employer. Thereafter, the Insurance Company-appellant was also informed about the accident and was asked to give compensation to the family of the deceased. It was also claimed that the aforesaid offending truck was insured with

the cover note no.0348319 for period 07.11.2001 to 06.11.2002. The overall compensation amount Rs.20,00,000/- along with accrued interest and expenses under various head was demanded by the claimant-respondents.

7. The case was contested whereby the Workmen's Compensation Commissioner after considering the merits of the case found it a case fit one for awarding compensation to the tune Rs.3,51,080/- along with 4% interest. This amount was required to be paid by the insurer of the offending truck i.e. Insurance Company-appellant. Further penalty was also imposed upon opposite party no.1, (herein respondent no.7), truck owner for paying Rs.65,000/-.

8. Feeling aggrieved by the same, the Insurance Company-appellant has moved before this Court by filing this appeal. Core contention raised before this Court is that monthly income of the deceased was not proved as was required under the Workmen's Compensation Act, 1923 and the relationship of the employer and employee was not satisfactorily explained by the claimant-respondents. It cannot be said that the deceased was working in the employment of respondent no.7 and he sustained injury in the alleged accident on the date and time as claimed by the claimant-respondent nos.1 to 6 in their claim petition.

9. Fact is that merely on the verbal claim of the wife of the deceased, monthly income was fixed by the Workmen's Compensation Commissioner which is not supported by any documentary evidence. The salary certificate has also not been brought on record. Had the deceased been in the employment of the truck owner, there must have been some documentary proof for payment of the salary but there is nothing on record which may justify that any relationship as employer and employee existed between the deceased and respondent no.7.

10. In view of above, it is doubtful whether the death of the deceased occurred during course of employment whereby Chandra Pal Sharma died. In view of this particular aspect of this case, no responsibility can be saddled with the Insurance Company - the appellant, insurer of the offending truck in question. The burden of proof was not properly discharged by claimant-respondent nos.1 to 6.

11. While replying to the aforesaid contentions, it has been claimed by the learned counsel for the claimant-respondents that testimony given by Ramwati Devi PW-1, wife of the deceased Chandra Pal Sharma was found to be consistent and nothing adverse emerged from her cross examination though cross examination was done by the Insurance Company-appellant and no proof in rebuttal regarding existence of relationship of the employer and the employee between the deceased and respondent no.7 was ever furnished or brought on record before the Workmen's Compensation Commissioner. Therefore, better testimony prevailed and it was rightly acted upon by the Workmen's Compensation Commissioner though accepted the claim and awarded the compensation but failed to give proper quantum of interest on the overall compensation amount, for the reason that criterion fixed for awarding interest on the compensation amount under the provisions of Section 4 A of the Workmen's Compensation Act, 1923, stipulates 12%

interest to be applied on the overall compensation amount.

12. Learned counsel for the claimant-respondents further added that it is admitted fact that no appeal for enhancement on that count has been presented even then in such case where statutory provisions have not been complied with and verbal objection raised then it should be treated to be a prayer for enhancement. Thus the interest awarded can be interfered with by this Court and it may be corrected so as to do substantial justice to the claimant-respondents.

13. Considered the rival submissions too.

14. In this case, insofar as testimony of Ramwati Devi PW-1 as reflected from the award impugned dated 27.09.2005 is concerned, obviously, every parameter was taken into consideration by the Workmen's Compensation Commissioner and aspect and magnitude of testimony of Ramwati Devi PW-1 that was forthcoming was rightly acted upon by the Workmen's Compensation Commissioner. There is nothing on record which may give credence to the claim of the Insurance Company-appellant that there was no relationship existing between the deceased and owner of the offending vehicle - respondent no.7 as the employer and the employee.

15. Further no proper rebuttal has been done by the Insurance Company-appellant while it had full opportunity to contest the claim on that particular count as raised before this Court. Consequently, in such case where the case of the claimant-respondents stands proved by cogent and consistent testimony, it would not be arguable that there was no such relationship (the employer and the employee) in absence of supporting material thereof.

16. Admittedly, the interest to be awarded in the case was as per Section 4 A of the Workmen's Compensation Act to be fixed at the rate of 12% per annum, however, it was fixed at the rate of 4% per annum. Therefore, on that count verbal objection of the learned counsel for the claimant-respondent nos.1 to 6 is sustained. The award impugned is modified to the extent that on the overall compensation to the tune of Rs.3,51,080/-, interest rate shall be charged at the rate of 12% per annum instead of 4%. The verbal objection raised by learned counsel for the claimant-respondents is accepted, accordingly.

17. Accordingly, the impugned award dated 27.09.2005 passed by the Workmen's Compensation Commissioner / Assistant Labour Commissioner, Bulandshahar, in W.C.A. No.04 of 2002, Smt. Ramwati Devi and others Vs. Aftab Ahmad and another, stands modified to that extent and the appeal preferred by the Insurance Company is liable to be rejected, whereas, the verbal cross objection raised by the claimant-respondent stands allowed as above.

18. For the reasons aforesaid, the instant appeal lacks merit and the same is dismissed.

(2020)1ILR 296

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.

THE HON'BLE SAURABH LAVANIA, J.

First Appeal No. 148 of 2018

Israr Ahmad ...Appellant
Versus
Azazul Hussain Ahmad & Anr.
...Respondents

Counsel for the Appellant:
Rajneesh Kumar Verma, Surendra Pratap SIngh

Counsel for the Respondents:
Ziauddin Khan

A. Family Courts Act, 1984 - Section 19 - challenge to - custody of minor child-divorce between appellant and respondent no. 2- appellant no. 1 i.e. minor is getting proper care by his mother though he is 11 years old-father pleaded to have custody of minor according to Mohammadan Law, in which custody of male child is given after the male child attains the age of 7 years-Court held that welfare of the child is safer with the mother-what is of paramount consideration is the welfare of the child under Guardians and Wards Act. (Para 10 to 21)

First Appeal dismissed. (E-6)

List of cases cited: -

1. Athar Husain Vs. Syed Siraj Ahmed & Ors. (2010) 2 SCC 654

2. Anjali Kapoor (SMT) Vs. Rajiv Bailaj (2009) 7 SCC 322

3. Smt. Nazma Vs. Abdual Wahab (2012) 91 ALR 815

4. Smt. Nazma Vs. Abdual Wahab (AIR 2005 Ker 68)

5. Mohammed Jameel Ahmed Ansari Vs. Ishath Sanjeeda & Ors. (AIR 1983 AP 106)

6. Abdulsattar Husen Kudachikar Vs. Shahina Abdulsattar Kudachikar (AIR 1996 Bom 134)

7. Smt. Kahkashan Bano Vs. Abdul Moiz Ansari ((1990) 16 ALR 401)

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

1. Heard, Sri S.P.Singh, learned Counsel for the appellant and Ms. Archana Singh Advocate, holding brief of Sri Ziauddin Khan, learned Counsel for the respondent.

2. Facts in brief of the present case, as per record, are that marriage between appellant Israr Ahmad and Smt. Zaafrana was solemnized on 03.06.2006 as per Muslim rites and customs and out of the wedlock of appellant and Smt. Zaafrana and on 16.05.2007 one baby boy was born namely Azazul Hussain. Matrimonial relation between the appellant Israr Ahmad and Smt. Zaafrana became strained and on 26.04.2008 Smt. Zaafrana left her matrimonial home. In view of the said factual background, the appellant Israr Ahmad filed a case bearing Misc. Case No. 30 of 2010 (Israr Ahmad Vs. Izazul Hussain) before the Principal Judge, Sitapur for custody of his minor child i.e. respondent no. 1-Azazul Hussain.

3. On 07.08.2018, Principal Judge, Family Court, Sitapur dismissed the case of the appellant for custody of minor child namely Azazul Hussain.

4. Challenging the judgment and order dated 07.08.2018, the present appeal has been filed.

5. Learned Counsel for the appellant submits that the matter pertains to the Mohammadan Law and the question of guardianship was to be considered by the Principal Judge, Family Court in the light of the Mohammadan Law, in which it has

been provided that in respect of custody of a male child the father is entitled to its custody after the male child attains the age of seven years and the mother has no right and authority to retain custody of a male child after it attains the age of seven years. Learned Counsel for the appellant further submits that plaintiff-appellant has specifically pleaded and led evidence to the effect that the future of defendant-respondent no. 1 under the guardianship of defendant-respondent no. 2 is in dark as she is unable to give proper eduction. This fact remained uncontroverted and it amounts to admission by the defendant-respondent no. 2, but the learned Principal Judge, Family Court, Sitapur has failed to consider the undertaking, the fact and the evidence led by the plaintiff-appellant and recorded a perverse finding to the effect that welfare of defendant-respondent no. 1 is with defendant-respondent no. 2.

6. Learned Counsel for the appellant further submits that the judgments which have been cited in the order impugned are not related with the Muslim law and have been misinterpreted while specific undertaking was given by the plaintiff-appellant before the Court that he will look after the defendant-respondent no. 1 and provide good education and facilities to defendant-respondent no. 1.

7. Learned Counsel for the appellant further submits that the impugned judgment and order dated 07.08.2018 has been passed ex-parte and as such, the fact which was pleaded by the plaintiff-appellant and the evidence which was led by the plaintiff-appellant amounted to admission and, as such, on the basis of the uncontroverted fact and evidence, learned Principal Judge, Family Court, Lucknow ought not to have dismissed the application filed by the appellant, rather the same was liable to be allowed.

8. In rebuttal, Ms. Archana Singh Advocate, holding brief of Sri Ziauddin Khan, learned Counsel for the respondent submits that there is no illegality or infirmity in the impugned order dated 07.08.2018 passed by the Principal Judge, Family Court, Sitapur and in its order the learned court below has specifically mentioned that divorce/talak has already been taken place between the appellant Israr Ahmad and Smt. Zaafrana on 06.07.2013 and since 2008, when the respondent no. 1 was born, he is living with his mother Smt. Zaafrana and at the time of passing of the order dated 07.08.2018, he was 10 years old and her mother is giving proper care and education, therefore, the present appeal is liable to be dismissed.

9. We have considered the submissions of learned Counsel for the parties and perused the records. Point for consideration in the present appeal is "whether learned court below rightly held that father/appellant is not entitled to the custody of the minor/ respondent no. 1 i.e. Master Azazul Hussain.

10. In order to decide the controversy in the present case, we feel it appropriate to take note of the relevant portion of ***Chapter XVIII*** *of* ***Guardianswhip of Person and Property, page 445 of Mulla Principals of Mahomedan Law,*** which reads as under:-

Para 351. *Matter to be considered by the court in appointing guardian :-*

(1) in appointment or declaring the guardian of the minor, the court shall,

subject to the provision of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) in considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness to kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relation of the proposed guardian with the minor of his property.

(3) if the minor is old enough to from an intelligent preference, the court may be consider that preference.

It is true that the father is not proved to have lost the right to being appointed as the guardian of the minor. He has no defect and he being the natural guardian of the minor could be appointed provided it was the interest of the minor . Minor can not be forced to live with the father because that may cause psychological deterioration to the minor and may eventually affect his health also because of at this age he needs love and affection. He being of the age of seven cannot show his preference as to with whom he wants to live. If he is give affection and love which he need at this age by the respondent or the appellant No.1, then he should be permitted to have the affection and love of any one of them. For that purpose it is necessary to ascertain the wishes of the minor.

If the minor is capable of making the preference, he should be brought to the court and thereafter order of appointment of guardian should be made.

Welfare of the minor - the above section is a reproduction in terms of s. 17 clauses(1),(2) and (3), of the Guardian and Ward Act. It impose a duty upon the court in appointment a guardian to make the appointment consistently with the law to which the minor is subject. The central idea is the welfare of the minor, and the Allahabad and J&K High Courts have said that though the rules of the mahomedan law have to taken into consideration the main question to be considered is what would be conducive to the child's welfare. In a Randoon case, the mother has lost her right under Mahomedan law as she has been divorced and had remarried a Buddhist. She was nevertheless appointed guardian, as the court considered that the interest of the minor would be best promoted by leaving with the mother. The mother would be the proper guardian for children of tender years, even though she lived separate from her husband owing to disputes over property, provided that she had not been guilty of misconduct.

Under the Muslim Personal Law, the mother is entitled to the custody (Hizanat) of her male child until he has competed the age of seven years and the female child until she has attained puberty. Puberty is attained at the age of 14 or 15 years.

Another principle of law which is too well established is that, in a proceeding for appointment of guardian, it is not the guardianship of the minor which is important, but it is the welfare of the minor that has to be taken into consideration. If there is no conflict between the personal law to which the minor is subject and the consideration of the minor's welfare, the latter must prevail.

In appointing the respondent grandmother as the guardian of the minor children, the court below was not guided by what in the circumstance was

conducive to the welfare of the minor and this order, therefore, cannot be upheld. The mother's application has to be allowed and the mother be appointed as guardian. Nigher the mother nor the grandmother can be the guardian of the property of the minors.

11. Hon'ble the Apex Court in the case of ***Athar Husain vs. Syed Siraj Ahmed and others, (2010) 2 SCC 654*** held as under:-

"25. In case of custody of the minor children, the family law i.e. the Mohammedan Law would apply in place of the Act. Considering the provisions under Section 353 of the Mohammedan Law, the High Court had held that the preferential rights regarding the custody of the minor children rest with the maternal grandparents. After making a doubtful proposition that in case of a conflict between personal law and the welfare of the children the former shall prevail, the High Court held that in the case at hand there is no such conflict. For the reasons aforementioned, the High Court by its impugned order set aside the order of the Family Court, Bangalore which vacated the interim order of injunction issued against the appellant. It is this order of the High Court, which is challenged before us by way of a special leave petition Hon'ble the Apex Court in the case of Athar Husain vs. Syed Siraj Ahmed and others, (2010) 2 SCC 654 held as under which on grant of leave has been heard by us in the presence of the learned counsel appearing on behalf of the parties.

26. It was the contention of the appellant before us that the Act will apply to the present case because there is a conflict between the preferential guardian in the Mohammedan Law and the Act. It was pointed out that while deciding the custody of the minor children, the welfare of the children had to be taken into consideration and that it was guaranteed by the Act. They have placed their reliance on Rafiq v. Bashiran [AIR 1963 Raj 239] . The Rajasthan High Court in the cited case held that where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act, 1890 the latter shall prevail over the former.

27. Relying on Brijendra Narayan Ganguly v. Chinta Haran Sarkar [AIR 1961 MP 173] , it was contended by the learned counsel for the appellant that there is a presumption that parents will be able to exercise good care in the welfare of their children.

28. It was argued by the learned counsel on behalf of respondents that the impugned order warrants no interference. Before passing the impugned order, the learned Judge had spent over one hour with the children to ascertain their preferences. The children have been living with the respondents since their mother's death in June 2006 as the High Court had stayed the order of the Family Court vacating the injunction order. While the respondents had been complying with the visitation rights granted to the appellant, the children were not happy with the treatment meted out to them during the time they spent with their father and stepmother. In contrast, Respondent 3, contrary to the apprehensions expressed by the appellant has stated on record that she had no intention to marry and would devote her life towards the welfare of the children. The respondents further asserted that the cases of Rafiq v. Bashiran [AIR 1963 Raj 239] and B.N. Ganguly [AIR 1961 MP 173] are not applicable to the facts of this case.

29. We have heard the learned counsel for both the parties and examined the impugned order of the High Court and also the orders passed by the Family Court. After considering the materials on record and the impugned order, we are of the view that at this stage the respondents should be given interim custody of the minor children till the disposal of the proceedings filed under Sections 7, 9 and 17 of the Act.

30. Reasons are as follows: Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper". (emphasis supplied) In matters of custody, as well settled by judicial precedents, the welfare of the children is the sole and single yardstick by which the court shall assess the comparative merit of the parties contesting for the custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the court to make any order as it deems proper.

31. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the Guardians and Wards Act, unless the father is not fit to be a guardian, the court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations levelled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.

32. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840 : (1973) 3 SCR 918] , keeping in mind the distinction between right to be appointed as a guardian and the right to claim custody of the minor child, this Court held so in the following oft quoted words: (SCC pp. 854-55, para 15)

"15. ... Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them."

33. In Siddiqunnisa Bibi v. Nizamuddin Khan [AIR 1932 All 215] , which was a case concerning the right to custody under the Mohammedan Law, the Court held: (AIR p. 218)

"A question has been raised before us whether the right under the Mahomedan Law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that

she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father.

35. Keeping in mind the paramount consideration of the welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship.

36. The appellant placed reliance on R.V. Srinath Prasad v. Nandamuri Jayakrishna [(2001) 4 SCC 71 : AIR 2001 SC 1056] . This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held: (SCC pp. 76-77, para 10)

"10. ... The Division Bench appears to have lost sight of the factual position that at the time of death of their mother the children were left in custody of their paternal grandparents with whom their father is staying and the attempt of Respondent 1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."

(emphasis supplied)

What is important for us to note from these observations is that the court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the court to change the custody of the minor children with immediate effect.

37. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in Mausami Moitra Ganguli v. Jayant Ganguli [(2008) 7 SCC 673 : AIR 2008 SC 2262] . This Court held: (SCC pp. 679-80, para 24)

"24. ... We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him."

After taking note of the marked reluctance on the part of the boy to live with his mother, the Court further observed: (Mausami Moitra case [(2008) 7 SCC 673 : AIR 2008 SC 2262] , SCC p. 680, para 26)

"26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to

the father with visitation rights to the mother deserves to be maintained."

(emphasis supplied)

38. The children have been in the lawful custody of the respondents from October 2007. In Gaurav Nagpal v. Sumedha Nagpal [(2009) 1 SCC 42] , it was argued before this Court by the father of the minor child that the child had been in his custody for a long time and that a sudden change in custody would traumatise the child. This Court did not find favour with this argument. This Court observed that the father of the minor child who retained the custody of the child with him by flouting court orders, even leading to institution of contempt proceedings against him, could not be allowed to take advantage of his own wrong. The case before us stands on a different footing. The custody of the minor children with the respondents is lawful and has the sanction of the order of the High Court granting interim custody of the children in their favour. Hence, the consideration that the custody of the children should not undergo an immediate change prevails.

. The question with whom they remained during the period from the death of their mother till the institution of present proceedings is a matter of dispute between the parties and we are not in a position to reach a conclusion on the same without going into the merits of the matter. At any rate, the children are happy and are presumably taken care of with love and affection by the respondents, judging from the reluctance on the part of the girl child to go with her father. She might attain puberty at any time. As the High Court has rightly observed, it may not be in the interests of the children to separate them from each other. Hence, at this juncture, we are not inclined to disturb the status quo, as we are only concerned with the question of interim custody at this stage.

40. The learned counsel for the appellant has placed reliance on Rafiq v. Bashiran [AIR 1963 Raj 239] . In that case, the High Court had set aside the order of the Civil Judge granting the custody of the child to her mother's paternal aunt, while the father was not proven to be unfit. Quoting from Tyabji's Mahomedan Law, 3rd Edn., Section 236 (p. 275) the Court observed:

"The following persons have a preferential right over the father to the custody of (sic) minor girl before she attains the age of puberty:

1. Mother's mother.

2. Father's mother.

3. Mother's grandmother, howsoever high.

4. Father's grandmother, howsoever high.

5. Full sister.

6. Uterine sister.

7. Daughter of full sister, howsoever low.

8. Daughter of uterine sister, howsoever low.

9. Full maternal aunt, howsoever high.

10. Uterine maternal aunt, howsoever high.

11. Full paternal aunt, howsoever high."

41. However, the High Court of Rajasthan held that in the light of Section 19 which bars the court from appointing a guardian when the father of the minor is alive and not unfit, the Court could not appoint any maternal relative as a guardian, even though the personal law of the minor might give preferential custody in her favour. As is evident, the aforementioned decision concerned

appointment of a guardian. No doubt, unless the father is proven to be unfit, the application for guardianship filed by another person cannot be entertained. However, we have already seen that the question of custody was distinct from that of guardianship. As far as matters of custody are concerned, the court is not bound by the bar envisaged under Section 19 of the Act.

42. In our opinion, as far as the question of custody is concerned, in the light of the aforementioned decisions, the personal law governing the minor girl dictates her maternal relatives, especially her maternal aunt, shall be given preference. To the extent that we are concerned with the question of interim custody, we see no reason to override this rule of Mohammedan Law and, hence, a prima facie case is found in favour of the respondents. Further, the balance of convenience lies in favour of granting the custody to the maternal grandfather, aunt and uncle.

43. A plethora of decisions of this Court endorse the proposition that in matters of custody of children, their welfare shall be the focal point. Once we shift the focus from the rights of the contesting relatives to the welfare of the minor children, the considerations in determining the question of balance of convenience also differ. We take note of the fact that Respondent 3, on record, has stated that she has no intention to get married and her plea that she had resigned from her job as a technical writer to take care of the children remains uncontroverted. We are, hence, convinced that the respondents will be in a position to provide sufficient love and care for the children until the disposal of the guardianship application.

44. The second marriage of the appellant, though a factor that cannot disentitle him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate on our part to place the children in a predicament where they have to adjust with their stepmother, with whom admittedly they had not spent much time as the marriage took place only in March 2007, when the ultimate outcome of the guardianship proceedings is still uncertain.

45. The learned counsel for the appellant placed reliance on Bal Krishna Pandey v. Sanjeev Bajpayee [AIR 2004 Utt 1] wherein the maternal grandfather of the minor contested with the father of the minor for custody of a girl aged about 12 years. The Uttaranchal High Court in that case gave the custody of minor to the father rejecting the contention of the grandfather (the appellant) that the father (the respondent) after his remarriage will not be in a position to give fair treatment to the minor. However, in that case, the second wife of the father had been medically proven as unable to conceive. Hence, the question of a possible conflict between her affection for the children whose custody was in dispute and the children she might bear from the father did not arise. In the case before us, the situation is not the same and the possibility of such conflict does have a bearing upon the welfare of the children.

46. As this is a matter of interim custody till the final disposal of the application GWC No. 64 of 2007, we are of the opinion that the interests of the children will be duly served if their current residence is not disturbed and a sudden separation from their maternal relatives does not come in their way. Irreparable injury will be caused to the children if

they, against their will, are uprooted from their present settings.

47. The learned counsel for the appellant placed strong reliance on Hassan Bhat v. Ghulam Mohamad Bhat [AIR 1961 J&K 5] which held that the words "subject to the provisions of this section" in sub-section 1 of Section 17 of the Act clearly indicates that the consideration of the welfare of the minor should be the paramount factor and cannot be subordinated to the personal law of the minor. The view expressed by the High Court is clearly correct. As far as the question of interim custody is concerned, we are of the view that there is no conflict between the welfare of the children and the course of action suggested by the personal law to which they are subject.

49. According to the appellant, from the fact that the respondents raised the issue of death of his wife ten months after her death and one month after he refused the marriage offer of Respondent 3, it must be inferred that the respondents have raised this issue merely to obtain the custody of children and that the respondents did not come to Court with clean hands. As far as the question of denying the respondents the interim custody of children on the ground that they had not approached the Court with clean hands, we are constrained to say that we are not in a position to conclusively infer the same. The alleged refusal on part of the appellant to marry Respondent 3 which is said to have led the respondents to file the application for guardianship, is again a question of fact which is yet to be proved.

50. In Nil Ratan Kundu v. Abhijit Kundu [(2008) 9 SCC 413] this Court had enumerated certain principles while determining the custody of a minor child. This Court in para 52 observed: (SCC p. 428)

"52. ... A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child."

Thus the strict parameters governing an interim injunction do not have full play in matters of custody."

12. Hon'ble the Apex Court in the case of ***Anjali Kapoor (SMT) vs. Rajiv Bailaj, (2009) 7 SCC 322*** held as under:-

"15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. [See Sumedha Nagpal v. State of Delhi [(2000) 9 SCC 745 : 2001 SCC (Cri) 698] (SCC p. 747, paras 2 & 5).]

16. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840] this Court has observed that: (SCC p. 847, para 7)

"7. ... the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors."

This Court considering the welfare of the child also stated that: (SCC p. 855, para 15)

"15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right

of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society...."

17. In Elizabeth Dinshaw v. Arvand M. Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Cri) 13 : AIR 1987 SC 3] this Court has observed that whenever a question arises before court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

18. At this stage, it may be useful to refer to the decision of the Madras High Court, to which reference is made by the High Court in the case of Muthuswami Moopanar [Muthuswami Chettiar v. K.M. Chinna Muthuswami Moopanar, AIR 1935 Mad 195] wherein the Court has observed, that, if a minor has for many years from a tender age lived with grandparents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fides of the petition by the father for their custody. In our view, the observations made by the Madras High Court cannot be taken exception to by us. In fact those observations are tailor-made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision.

19. In McGrath (infants), Re [(1893) 1 Ch 143 : 62 LJ Ch 208 (CA)] it was observed that: (Ch p. 148)

"... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

20. In American Jurisprudence, 2nd Edn., Vol. 39, it is stated that:

"... An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment."

21. In Walker v. Walker & Harrison [1981 New Ze Recent Law 257] the New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that:

"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development

of the child's own character, personality and talents."

13. This High Court in the case of ***Smt. Nazma vs. Abdual Wahab (2012) 91 ALR 815*** held as under:-

"13. In Immambandi v. Mutsaddi, (1917-1918) 45 IA 73 their Lordships of the privy council said "It is perfectly clear that under the Mohamedan law the mother is entitled only to the custody of the person of her minor child upto a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni Law) is the legal guardian." It would thus appear that father is the primary and the natural guardian of his minor child and that the right of the custody of mother is only upto a certain age of the minor i.e. 7 years in the case of male child and till the attainment of puberty in the case of female child.

14. In Mt. Ulfat Bibi v. Bafati, AIR 1927 Alld. 581 a division Bench of this court laid down that under the Mohamedan law father is the natural guardian of his minor boy but side by side with the right of the father as lawful guardian exists the recognized right of the mother to have the custody of the child upto the age of seven years. Thus, the right of the mother to have custody of her minor son is limited upto 7 years of his age under the Mohamedan law.

15. In case at hand, the minor is a male child aged above 7 years and therefore, as per the Mohamedan law the father is the natural guardian and is entitled to his custody.

16. The court below in view of the compromise dated 16.10.09 allegedly between the appellant and the respondent accepted the version of the respondent that there is a divorce between the two.

17. The court below further found that the name of the appellant appears in the family register as the wife of one Mehboob and on its basis inferred that the appellant has remarried.

18. The aforesaid findings are not acceptable to the appellant but in the absence of any positive evidence to prove otherwise, this court is at a loss to interfere with the same.

19. In view of the aforesaid facts and circumstances, under the Muslim law, the father being the natural guardian is entitled to the custody of the minor in question and the mother stand ousted from getting the custody particularly in view of her remarriage. However, the personal law of the parties is merely a guiding factor in deciding the custody of the minor as is evident from the plain reading of Section 17 of the Act as well as Section 351 of the principles of Mohamedan law.

20. Section 7 read with Section 17 of the Act mandates the court to consider the welfare of the minor and to be guided by the law to which the minor is subject in appointing a guardian of a minor. The Supreme Court in JT 1993 (1) SC 229 Ms. Chandra Lekha v. Capt. Vipul Menor has laid down that the question regarding custody of minor cannot be decided on the basis of the legal rights of the parties but on the sole and pre-dominant criteria of what would best serve the interest and welfare of the minor.

21. In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544 : AIR 1982 SC 1276, the Apex Court laid down that the principle of law in relation to the custody of a minor is well established and well settled and that the matter has to be considered and decided from the point of view of the welfare and

interest of the child and it is the duty of the court to protect the interest of the minor.

22. Similarly in Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : AIR 1987 SC 3 it was held that in deciding about the custody of the minor, interest and welfare of the minor is the predominant criteria and legal rights of the parties may not come in way.

23. In M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Madras 315 the dispute was regarding the custody of a female child aged about 10 years between the maternal and parental grandfathers, both the parents of the child having died in an accident, the child having expressed willingness to live with the respondent with whom she had been living since 1998, the court in view of willingness expressed by the child and the fact of her living with the respondent for over 4 years held that the interest and welfare of the minor child would be with the respondent and it is not proper to change the custody of the child.

24. In Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840 : AIR 1973 SC 2090 there lordships of the Supreme Court observed that where there is dispute between mother and father regarding custody of a minor the court is expected to strike a just and proper balance between requirement of the welfare of the minor and rights of the parents over the minor child. In striking such a balance it may be kept in mind that there is really no substitute for the mother's love, affection and care for her infant which the infant is most unlikely to get if its custody is entrusted to the father and therefore, in such cases the court should lean in favour of the mother in matter of custody of the minor rather than in favour of the father. The controlling factor is the welfare of the child and not the right of the parents.

25. In view of the above the personal laws of the parties or the legal rights are only a guiding factor for determination of the custody of a minor but such rights would not prevail over the interest and welfare of the minor which is the primary and the predominant criteria for deciding about the person with whom the custody of the minor would lie.

26. The legal position which emerges from the above discussion can be summarized as under:--

(i) In Muslim law father is the primary and the natural legal guardian of his minor child though mother is entitled to custody upto certain age and her right to custody is not affected even if she is divorced but comes to an end on her remarriage;

(ii) The welfare and the interest of the minor is the predominant criteria in deciding about the custody of the child;

(iii) The personal rights of the parents are only the guiding factors and would not override the interest and welfare of the minor;

(iv) The personal wishes of the child of an understandable age carries weight; and

(v) The courts should avoid and be slow in disturbing the prevailing system in striking the balance between the interest of the minor vis-avis the rights of the parties/parents.

27. In the instant case, the minor who is now aged about 10 years ever since his birth is living with her mother who is taking good care of him though father may take still better care, coupled with the fact that he has appeared before the court and has clearly expressed his willingness to live her mother, I am of the view that the interest and welfare of the child is with the mother.

28. In such circumstances when the interest and welfare of the minor is with the mother the personal rights under the Muslim law which are only the guiding factors in the matter of custody of a minor would not override the interest of the minor.

29. The court below as such committed an error in allowing the application and granting custody of the minor to the father primarily in view of the legal right of the father under the Muslim law. The court in passing the impugned order completely ignored the wishes of the child, his long stay with the mother and his welfare and at the same time was swayed away by the legal rights of the parties. Such an approach on part of the court below cannot be approved of and is rather strange and against the settled principle."

14. Kerala High Court in the case of ***smt. Nazma vs. Abdual Wahab (AIR 2005 Ker 68)*** held as under:-

"2. Senior Counsel appearing for the maternal grandmother Sri K.C. John submitted that the order passed by the Court below is in violation of Sections 352 and 353 of the Mulla's Principles of Mahomedan Law with regard to guardianship. Counsel appearing for the respondent-father Smt. Molly Jacob on the other hand contended that the abovementioned provisions would give way to the provisions of the Guardians and Wards Act with regard to the welfare of the child. Father of the child filed O.P. before the Family Court, Manjeri for custody of his minor son who was in the custody of the maternal grand-parents. Mother of the child had committed suicide and after her death child was brought up by the maternal grandparents. Father had filed an application for the custody of the child which was earlier allowed by the Family Court. Matter was taken up before this Court by the maternal grand-parents by filing M.F.A. No. 847 of 2002 before this Court. This Court modified the order and father was only permitted to have visitation rights to take the child occasionally during festival sessions as well as on holidays. While holding so, this Court held as follows:

"The child is, since the death of its mother, living with the maternal grand-parents. If a transplantation is made at this age of the child, it will badly affect the child especially when the father has remarried and a child is born to him in the new marriage. He had already been allowed, as per the interim order, to have visits at his choice, at the house of the appellant. That is being continued. In such circumstances, he can surely win over the affection of the child in due course and the child will also be aware in due course of the fact that its betterment will always be in the hands of the respondent.

Later maternal grandfather died. Father then preferred I.A. No. 483 of 2004 for custody of the child. Change of circumstances were brought before the Family Court for seeking custody of the minor son. It was pointed out that on the death of the maternal grandfather grandmother alone would not be able to look after the child and for the welfare of the child it is necessary that the child be put in the custody of the father. Family Court on evidence found that for the welfare of the child it is necessary that the child be in the custody of the father. Petition was allowed giving custody of the child to the father. Right of the mother for custody of the infant children is dealt with under the Mahomedan Law.

3. Section 352 of the Mahomedan Law states as follows:

"352. Right of mother to custody of infant children.--The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she marries a second husband in which case the custody belongs to the father (f)."

Section 353 is also relevant and the same is extracted below.

353. Right to female relations in default of mother.--Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:--

1) mother's mother, how highsoever;

2) father's mother, how highsoever;

3) full sister;

4) uterine sister;

5) consanguine sister;

6) full sister's daughter;

7) uterine sister's daughter;

8) consanguine sister's daughter;

9) maternal aunt, in like order as sisters; and

10) paternal aunt, also in like order as sisters.

Section 353 would indicate that in default of mother as per the Personal Law of Muslims, child has to be in the custody of the mother's mother and then father's mother, how highsoever. Father is not included in Section 353. Contention was raised that on the basis of the abovementioned provisions of Personal Laws of Muslims mother's mother is entitled to have the custody of the minor son.

4. We are of the view when the question of the custody of the child is involved, the primary consideration which weigh with the Court is the welfare of the child. Legal position is well-settled by a catena of decisions of this Court as well as that of the Apex Court. Reference may be made to the decisions of the Apex Court in Jai Prakash Khadria v. Shyam Sunder Agarwalla, (2000) 6 SCC 598: (AIR 2000 SC 2172) and R.V. Srinath Prasad v. Nandamuri Jayakrishna, 2001 (4) SCC 71: (AIR 2001 SC 1056). It is settled principle of law that custody orders, by their very nature, can never be final but a challenge should only be made if it is in the paramount interest of the child concerned. Custody of a minor is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between the attachment and sentiments of the parties towards the minor children and the welfare of the minors which is of paramount importance. Principles exported by Personal Law and the provisions referred to hereinbefore cannot read in isolation and be divorced under the provisions of the Guardians and Wards Act. The overriding consideration is welfare of the child and the Personal Law would yield the provisions of the Guardians and Wards Act. Several decisions were cited at the bar for and against. See: Rafiq v. Smt. Bashiran (AIR 1963 Raj 239); Salamat Ali v. Smt. Majjo Begum (AIR 1985 All 29); Mohammed Yunus v. Smt. Shamshad Bano (AIR 1985 All 217); Zynab Bi alias Bibijan v. Mohammad Ghouse Mohideen AIR 1952 Mad 284); Baby Sarojam v. S. Vijayakrishnan Nair (AIR 1992 Ker 277); Yusuf v. Sakkeena (1998 (2) Ker LT 573); Merlin Thomas v. C.S. Thomas, (2003) 1 Ker LJ 633: (AIR 2003 Ker 232) and

Chakki v. Ayyappan (1988 (1) Ker LT 556).

5. The Court would always respect the sentiments of the grandmother. Child's mother has committed suicide. Father later remarried and has got children. Conduct of remarriage by the father of the child itself is not a ground to reject the prayer for custody. Welfare of the child is of paramount consideration. By giving due respect to the sentiments expressed by the grandmother, we are of the view, it is for the welfare of the child that the child be with the father.

6. Grandmother is a diabetic patient and she is residing with her another daughter Amina. Petitioner's son is residing in Amina's house and grandmother is also depending on her. We are of the view, the mere fact that the father has remarried and has got children in that wedlock is not a ground to deny custody to him. In the second marriage he has got a child aged 1½ years and that he would be a good company for his child also. In fact we are convinced the Family Court has taken the welfare of the child is of prime importance and ordered custody to the father. We find no reason to upset the order. The appeal is accordingly dismissed. The appellant can always move the Family Court for visitorial rights."

15. Andra Pradesh High Court in the case of ***Mohammed Jameel Ahmed Ansari v. Ishath Sanjeeda and others. (AIR 1983 AP 106)*** held as under:-

"11. In the face of the evidence the question is what is the approach of the Court? This aspect was considered by this court in the decisions collected is L. Chandran v. Mrs. Venkatalakshmi, 1980 (2) APLJ 310 : (AIR 1981 Andh Pra 1). The old cases are collected in Reginald Danieal v. Sarojam, AIR 1969 Mad 365 where it is observed that only if the father is unfit to be the guardian, can the question of the welfare of the child come into consideration by the Courts. It is observed, "in the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship; the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations."

In Atchayya v. Kosaraju Narahari, AIR 1929 Mad 81 on the same aspect, it is observed:

"When the guardian of the person of a ward applied for the custody of the ward, he is only seeking the Court to help him to discharge the duty cast on him by law, with reference to his ward and it is for those who oppose such an application to make out that the welfare of the ward will be better served by its being kept out of the custody of its guardian and retained in the custody of the person against whom the application is made, the father has, therefore, a paramount right to the custody of his children of which he cannot be deprived unless it is clearly shown that he is unfit to be their guardian."

The cases of the court in M. Basavalingam v. Swarajayalakshmi, AIR 1957 Andh Pra 704; Narasima Rao v. Manikyamma, (1968) 1 Andh LT 132; V.V.N. Narasaiah v. Ch. Peddi Raju (AIR 1971 Andh Pra 134) were referred in case (AIR 1981 Andh Pra 1) and it is held:

"..... We do not therefore consider that it would be in the interests of the minor child to be handed over from the care and custody of the active and loving maternal grand-mother to the passive and

silent paternal parents. We have seen the child in this Court. It looks not only very healthy but also very happy with its maternal grand-mother. The maternal grand-mother appears to us to be rearing up the child for all these months with great love and affection."

It is in this regard the case in Dr. Mrs. Veena Kapoor v. Varinder Kumar Kapoor, (1982) 1 APLJ 19 (SC) : (AIR 1982 SC 792) and the observations made therein and in regard to a Parsi family in the case of Thirty Hoshie Dolikuka v. Hosmiam Shavaksha Dolikuka, AIR 1982 SC 1276 were cited.

12. The observations in case (AIR 1981 Andh Pra 1) were heavily relied on by the learned counsel for the maternal grand-parents to contend that if father has the right, the Court can ignore the rights of the father and hold the interests of the minor are better served, if the child is allowed to remain in the custody of the maternal grand-parents.

13. We have understood the law on this aspect to be in the following terms: That children are normally expected in the custody of the legal guardians. Under Muslim law, after the age of 7 years, it is the father who is entitled to the custody of the child, unless the Court holds on evidence, the father is not a fit person or that it is not conducive to the health whether physical or mental of the child. Ordinarily, the children are to be with the father.

14. In the instant case, it is the father who is seeking the child. The child is above seven years. The trial court in the instant case, has not recorded a finding that the father is not a fit person or that it is not conducive for the child to remain with the father. The learned single Judge observed for eleven years, the child was not taken care of, cannot be sustained for the reason that till the child attained seven years, the child was to remain with the mother because she was the legal guardian. Even in the "Khula' agreement, it was understood between the parties, if for some reason, within the "Sharai' period, she was to deliver the child, the father was willing to take the child. When he was married, he informed his second wife that it was her duty to maintain the child. The second wife agreed. She was willing. She swore to that fact in the box. The father made attempts sent has friends, his brother-in-law, his sister, his father to see the child. All of them in the evidence state, they were not received; they were not allowed inside the house to see the child. The contention that he has not maintained the child properly or that has not cared to maintain the child is unsustainable for it was agreed, till the child attains seven years of age, the mother will not claim any maintenance. In 1973, the father sent money; that was refused. His friends informed him that the grand-parents communicated them, he may treat for intents, the son does not exist for him. There is no credible evidence to hold, if the child is entrusted to his custody, he is likely to hand over the child to his elder sister. The grandparents from the paternal side, both, are anxious to have the child. In the face of this evidence, when the father is not stated as not a fit person, what is the course to be adopted? The learned single Judge had not adverted to evidence: did not hold the father is not a fit person. We have considered the evidence to see whether anything was suggested to show the father was not a fit person. It is seen, he is a practising Advocate. His parents are living with him at Hyderabad since 1975 and they are willing to have the custody of the child. Whether in the counter or in reply notice

on May 29, 1973 or On June 24, 1973 nothing is stated as to the fact that the father is not a fit person. In the face of such a record, we are unable to hold, the welfare of the child is not served better if the child is entrusted to the father. The courts will have to give proper regard to the circumstances that he is willing to take the child. He has examined his second wife; he has examined his parents who are willing to take the child. There is thus nothing to hold the father is not a fit person or it is not conducive to the safety and health of the child to entrust the child.

15. In the decision in Audiappa v. Nalledran AIR 1916 Mad 605, the following observations are apposite:

"The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children. The learned vakil for the appellant relies on Bindo v. Shamlal, (1907) ILR 29 All 210 which seems to lay down that if the father marries again, he ought to be deprived of his legal right of guardianship. The learned Judges refer only to S. 17 and say that the welfare of the girls is the primary consideration. There is no doubt that would be the consideration which would influence the Court ultimately; at the same time, it ought not to be forgotten that the legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of her near relations on the other. In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty the same sanctity does not attach to the rights claimed by the other relations....."

16. Bombay High Court in the case of ***Abdulsattar Husen Kudachikar v. Shahina Abdulsattar Kudachikar (AIR 1996 Bom 134)*** held as under:-

"7. On this evidence on record, the learned trial Judge has come to the conclusion that the respondent mother was entitled to the custody of the son and accordingly, the respondent's application for custody of her son was allowed on September 20, 1994, which order has been challenged before me.

8. I have heard both the learned Counsel -- Mr. Sawant for the appellant-father and Mr. Ingale for the respondent-mother. I have perused the entire record that was placed before me; the pleadings and the entire evidence has been perused by me. The only point which arises for my consideration is, who is entitled to the custody of the son Mohd. Wasim, who is aged 5 years? My answer to this point is that it is the respondent-mother, who is entitled to the custody of her son. The reasons are as follows.

9. There is no dispute that in accordance with the principles of Mohammedan Law, which is the law applicable to the parties, it is the mother who is entitled to the custody of a male child until he has completed the age of 7 years or of a female child until she attains puberty. This right continues though she is divorced by the father of the child, unless she married a second husband, in which case the custody belongs to the father. If we refer to "Mulla's Principles of Mohammedan Law", 19th Edition, in Chapter XVIII under the Heading (B) Guardians of the Person of a Minor, Para 352 at page 287 reads as under:--

"352. Right of mother to custody of infant children. -- The mother is entitled to the custody (hizanat) of her male child

until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she married a second husband in which case the custody belongs to the father (f)".

I need not elaborate the Case Law on this point, because this position was not disputed before me.

10. Admittedly, Mohd. Wasim is aged 5 years. The respondent-mother is, therefore, the guardian of her son as at this moment. The respondent is employed and earning more than Rs. 3000/- per month. She is staying with her father at Sangli and has been able to look after her daughter Heena Kausar, aged 4 years. Her evidence shows that she has all the concern for her children. There is no allegation that the respondent is likely to remarry or is indulging in any affair with any one which would result in her neglecting her children. On the other hand, it is clear from the evidence on record that the appellant was having an affair with Noorjehan Tahasildar and it is admitted before me now that he has married her. The appellant is a Medical Representative and by the very nature of his job he is required to tour not only in and around Miraj Town but also Sangli District. It is true that he is drawing a higher salary than that of the respondent inasmuch as he is drawing Rs. 4500/- per month as against Rs. 3000/- drawn by the respondent. But for children of tender years, it is not money alone which matters. It is the natural love and affection and particularly, the care which the mother can take which is more important and which has no substitute.

11. It is well-settled that in proceedings under the Guardians and Wards Act, 1890, what is of paramount consideration is the welfare of the child. Section 4 of the Guardians and Wards Act, 1890 is the defining section. It defines words such as "Minor", "Guardian", "Ward" etc. "Minor" is defined to be a person who, under the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority. "Guardian" means a person having the care of the person of a minor or of his property or of both his person and property. "Ward" means a minor for whose person or property or both there is a guardian. Section 7 provides that where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or of his property or both;

(b) declaring a person to be such guardian,

The Court may make the order accordingly.

12. Section 8 deals with the persons, who are entitled to apply for an Order under Section 7. Section 17 is of some importance, and it reads as under:--

"17. Matters to be considered by the Court in appointing guardian. -- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provision of this section, be guided by what, consistently with the law to which the minor is subject appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the

proposed guardian with the minor or his property.

(3) If minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) - - -

(5) The Court shall not appoint or declare any person to be a guardian against his will."

Similarly, Section 25 reads as under:--

"25. Title of guardian to custody of ward. -- (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship".

13. On a true construction of the provisions of Section 17 and Section 25, there can be no doubt that in appointing or declaring a guardian of a minor, the court must have regard to the welfare of a minor which is of paramount consideration. Taking into account all the relevant facts such as age, sex, religion, character and capacity of the proposed guardian, nearness of kin to the minor, the paramount consideration is the welfare of a minor. It is for deciding this paramount consideration of the welfare of a minor that all other factors must be taken into account. In this behalf, a reference may be made to some of the decisions of the Supreme Court briefly:--

(i) In Rosy Jacob v. Jacob A. Chakramakkal, reported in (1973) 1 SCC 840 : AIR 1973 SC 2090, it has been observed that whether the proceedings were under one Act or the other viz. the Guardians and Wards Act or the Indian Divorce Act (which was relevant in that case), what was of paramount consideration was the question of welfare of the minor. It may be useful to reproduce the observations in Para 14 of the Supreme Court decision at pages 2098 and 2099:--

"In our opinion, Section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hypertechnicalities should not be allowed to deprive the guardian of the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under Section 19 during his lifetime, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is Section 25.....

But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents". It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under Section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom -- if ever -- identical".

(ii) In Smt. Mohini v. Virendra Kumar, reported at (1977) 3 SCC 513 : AIR 1977 SC 1359, which was the case under the Hindu Minority and Guardianship Act, 1956, it was again reiterated by the Supreme Court that the welfare of a minor was the paramount consideration. Considering all the facts of the case, it was found that the minor's welfare was financially and affectionately safer in the hands of the mother.

(iii) Again, in Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, reported at (1982) 2 SCC 544 : AIR 1982 SC 1276, it was reiterated that any matter concerning the custody of a minor has to be considered and decided only from the point of view of the welfare and custody of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. These observations are to be found in para 17 of the Judgment at page 1289 of the Report. In para 19 of the Judgment in Thrity Hoshie Dolikuka's case, a reference has been made to Rosy Jacob's case, reported at (1973) 1 SCC 840 : AIR 1973 SC 2090 (supra).

(iv) Then, in the case of Poonam Datta v. Krishanlal Datta, reported at 1989 Supp (1) SCC 587 : AIR 1989 SC 401, the Supreme Court decided the question of custody of the minor having regard to the consideration of welfare of the child and the parties were directed to consider the interests of the child as paramount and do nothing which would adversely affect the interest or affect the child physically or mentally in any manner.

(v) Recently, in the case of Chandrakala Menon (Mrs.) v. Vipin Menon (Capt.), reported at (1993) 2 SCC 6 the Supreme Court again reiterated that the custody of child has to be decided on the sole and predominant criterion as to what would serve best the interest of the minor. This has been categorically observed in Para 7 of the decision at Page 8 of the Report where in the facts of the case, the custody was given to the mother, who was residing abroad, though the father was residing in India.

14. Having regard to the above guidelines laid down by the Supreme Court, there is no doubt in my mind that in the facts of the present case the welfare of the child Mohd. Wasim is safer with the mother. The father has admitted that he married a second wife. He has a touring job. Leaving his only son from his first wife to the care of his second wife, in preference to the natural mother of the

child, would not be in the best interest of the child. The child certainly needs the love and affection of his natural mother, who is anxious to bestow it upon her child. The child has been forcibly snatched from her on 22nd May, 1994, resulting in initiation of the proceedings soon thereafter on 13th June, 1994. Under the circumstances, no objection can be taken to the impugned decree passed by the trial Court.

15. Mr. Sawant, however, contended that in the event of this Court not accepting the father's version, the father would, at least, be entitled to access to the child on week-ends and during vacations. The father is living at Miraj and the mother is at Sangli. I see no difficulty in permitting the father to meet the child on week-ends or during vacations. Both the spouses are available on phone in their respective offices. It would be in the interest of the child if the father informs the mother in advance and meets the child either at week-ends or during vacation. I am reminded of the caution sounded by the Supreme Court in Poonam Datta's case, reported at 1989 Supp (1) SCC 587 : AIR 1989 SC 401 (supra). I can do no better than to reproduce Para 7 of the decision of the Supreme Court in that case at page 402 of the Report--

"7. Parties are directed to consider the interest of the child as paramount and do nothing which would be adverse to its interest or affect it physically or mentally in any manner".

17. This Court in the case of ***Smt. Kahkashan Bano v. Abdul Moiz Ansari ((1990) 16 ALR 401)*** held as under:-

"15. This is also the settled law that the welfare of minor is to be the paramount consideration for the Court and not the legal right of either the appellant or the respondent. The interest of the minor is supreme.

16. In the case of Dr. Mrs. Veena Kapoor v. Varinder Kumar Kapoor it has been held that in matters concerning the custody of minor children the paramount consideration is the welfare of the minor and not the legal right of this or that particular party.

17. In the case of Rosy Jacob v. Jacob A. Chaoramakkal it was held that the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents. The dominant consideration in making orders under Section 25 of the Act is the welfare of the minor children. It has to be seen that who would be in a better position to be able to impart natural and selfless affection. Further in case of a conflict or dispute between the mother and the father about the custody of the minor the Court has to adopt a somewhat different but more pragmatic approach. No doubt the father may have a legal right to claim the custody of the child but at the same time fitness of father has to be considered, determined and weighed predominantly in terms of the welfare of the minor. If it is found that the father cannot promote the welfare equally or better than the mother, he cannot claim indefeasible right to such custody. Merely father's fitness to maintain the minor cannot override considerations of the welfare of the minor. Statute has presumed that the father is generally in a better position to look-after the minor being the head of the family earning bread for it. In any case it has to be seen primarily the welfare of the minor while determining the question of his custody. But merely, because the father agrees to maintain the minor showing all affection would not

necessarily lead to the conclusion that the welfare of the minor would be batter promoted by granting custody to him. The mother may be equally affectionate towards the minor. If she is possessed of requisite financial resources, she would be always in advantageous position of guaranteeing better health education and maintenance for the minor. A minor is not a mere chattel nor a play thing. A child has to grow up in a normal balanced manner. In the case of Subrabi v. D. Mahammed, it has been held that merely because the respondent (father) is better placed economically, the custody of the child cannot be denied to the petitioner (mother). Further merely that the mother is not financially solvent as the father custody of the child cannot be deprived of from its mother.

18. In the of Mohammed Khalid v. Smt. Seenat Parveen a similar view was taken. It is well established that in a proceeding under the Act for the custody of a minor it is the welfare in the widest sense of term that is to be considered, though the father as natural guardian may have a prima facie right to a minor's custody. It can be negatived if minor's welfare lies in keeping him in the custody of his mother. Merely because the father is the natural guardian under the personal law applicable to him, the custody of the minor cannot be entrusted to him having in mind overall consideration of his physical and material well being, education, up-bringing, happiness etc., the dominant consideration shall be the interest of the minor than the claims of the rival parties. Humanitarianism would also permit as the mother is the most competent and suitable person to protect the interest of the minor and safeguard his welfare. To the affection and love of a mother there is no substitute. Universal phenomenon and human approach have acknowledged that the mother's affection for the child is unparalleled, it cannot be bartered away nor can be shared either by the father or by any-one.

19. The respondent divorced the appellant after consumating marriage for a very short span of time that is about 3 years. The minor born of this wedlock at the time of the divorce was only 1 1/2 years old. It is indisputable that a child of one year cannot remember the father. The appellant has reared the child for 7 years showerig all affections and protecting his welfare by imparting him better education and maintaining him to her utmost. Admittedly, the applicant is not economically week. She is a teacher in a school earning more than Rs. 1000/-. The respondent is a private practitioner. He may be having sufficient resources to maintain the child. The respondent has claimed that he is residing with his other family members which has been seriously challenged by the appellant. Rather the appellant staying with her mother, brother and other family members is not disputed. Even the child has admitted that he is residing with his mother who is staying with her brother and mother and other family members and such members of the family are showering affection and love on him. Another aspect of the case is that after divorcing the appellant the respondent married again. Such marriage went on the rocks-leaving the respondent alone. It has also to be considered that the respondent is still in the psalon of his life and may marry again much to the detriment of the minor. Human complexities and trivialities of the societies cannot be ignored. If the respondent marries again and have children from such wife, the affection and love to the minor would gradually

diminish. Courts cannot keep a close eye to the vicissitudes of such a situation. Human frailties have been resulted in causing miseries to such minor.

20. In the case of Smt. Anjunnisa v. Mukhtar Amad it has been held that where a minor aged about 10-11 years is in the custody of his mother and has intelligently exercised his preference to continue to stay with her, his custody cannot be disturbed and come to his father though he is legal guardian of the minor in the personal law (Mohammadan Law). A mere claim to legal guardianship after such a situation will not stand on a higher footing than the claim of the real mother to continue to have custody of the minor who has remained in her custody since the birth of the child, Presently the minor Mohd. Shoeb Ansari from the time' of his birth is residing with his mother. Merely because the respondent is legal guardian even then the child cannot be extracted from the custody of the appellant. In a proceeding under Section 25 it is too well established. It is not the guardianship of the minor which has to be taken into consideration. The minor was examined by this Court. He was found to be intelligent and smart. He preferred to stay with his mother. Defiantly he expressed not to live with his father. To the suggestion that in case he is directed to live with his father, the minor openly stated that he would run back to his mother. Merely because he was produced in court from the custody of the mother that will not cause dent the truthfulness of his statement. It is an innocent expression of a minor. It can also not be said that the child was tutored. He was asked questions by the court to which he replied. Further the minor never lived with the respondent who admittedly may not be alien to the minor but is certainly a stranger. It would take years for the child to grow affection for the respondent. It will certainly affect his natural growth Such an artificial exercise of showing affection by father would not inspire the minor howsoever genuine the affection may be, but to the child it would always be artificial. The over zealousness with which the affection would be shown would further retard the natural growth of the minor. The welfare of the child in any case would be with the mother.

21. In the case of Mt. Siddiqunisa Bibi v. Niza muddin Khan a Division Bench of this court headed by Hon. Sulaiman ACJ it was held that the necessary condition in the exercise of discretion under Section 25 is that the ward should have left or have been removed from the custody of the guardian of his person. If the ward has not left or has not been removed from such custody. Section 25 does not apply. The minor since the time of his birth is staying with his mother and has neither been removed nor was ever residing with his father (respondent).

22. In the case of Mt. Haliman Khatoon v. Ahmadi Begum it has been held that the mother imparts natural affection. Her natural affection for her son cannot be excelled by anyone else.

23. From the above it is crystal clear that the appellant is in a better position to protect the welfare of the minor as he cannot form intelligence preference in matter relating to his custody. Reliance has been placed in the case of S. Rama Iyer v. K.V. Natraja and Smt. Hafizur Rahman v. Smt. Shakila Khatoon.

24. In the case of S. Rama Iyer v. K.V. Natraj Iyer (supra) it has been held that the child of 12 to 14 years cannot form intelligent preference in matters relating to his custody. This court while considering the lis between the parties was

not only swayed by the statement of the child but by the intelligence, which is not the monopoly of any one. In any case a child is always intelligent enough to where he would receive affection and love. He may not be conscious as regard the future but his upbringing and affection as has been found to be with the mother (respondent) cannot be assailed.

25. The case of Hafizur Rahman v. Smt. Shakila Khatoon, does not help the respondent. It has been held that the object recognising the custody under law is in a nut-shell to rear the child for which the mother is best suited and is preferred in comparison to the father. Looking to the entire surrounding circumstances of the case it will be in the interest of the child that he stays with his mother who would be seized with his welfare instead to permit him to live with the respondent. The trial court only considered the aspect as regards the legality of the respondent to claim the custody. The paramount consideration as regards the welfare of the child was illegally ignored. This appeal thus deserves to be allowed and the order of the trial court is liable to be set aside. In the result the appeal is allowed. The judgment and order dated 1.9.88 is hereby set aside. The child is directed to remain in the custody of the appellant. However, the appellant may permit the respondent to visit his child twice a month on the date and time intimated 3 days in advance for a period of half an hour."

18. A perusal of the judgment and order dated 07.08.2018 passed by the Principal Judge, Family Court, Sitapur, whereby the case of the appellant has been dismissed, it appears that the court below while dismissing the case for custody of minor, considered the following facts:-

(a) Appellant and respondent no. 2 married on 03.06.2006.

(b) Out of wedlock Master Azazul Hussain/respondent no. 1 was born on 16.05.2007.

(c) Respondent no. 2 alongwith respondent no. 1 left the matrimonial home on 26.04.2008 and since then living separately alongwith minor/respondent no. 1.

(d) On 26.04.2008, the date on which the respondent no. 2 (wife of appellant) left the matrimonial home alongwith minor/respondent no. 1 i.e. Azazul Hussain, the minor, was about 11 months old.

(e) In the intervening period the appellant never tried to meet his son nor provided any financial support to him.

(f) Appellant has not disclosed the source of his income nor monthly income.

(g) The plaintiff-appellant has not even bothered to know about the welfare of the child.

(h) Divorce/talak has already been taken place between the appellant and respondent no. 2 on 06.07.2013.

(i) The respondent no. 1 i.e. Azazul Hussain is getting proper care by his mother.

19. After considering the aforesaid, the court below came to the conclusion that looking into the welfare of the minor child it would be appropriate that the custody of minor child should not be given to the appellant and accordingly dismissed the claim of the appellant.

20. Considering the facts of the case and reasons given by the court below while dismissing the case of the appellant for custody of minor Azazul Hussain in the light of principles settled on the issue

of custody of minor, referred hereinabove, we are of the view that the conclusion drawn by the court below vide judgment and order dated 07.08.2018, is not liable to be interfered. We do not find any infirmity or illegality in the impugned judgment and order dated 07.08.2018 passed by Principal Judge, Family Court, Sitapur by which custody/guardianship of the minor child-Azazul Hussain has been denied to appellant.

21. Accordingly, this appeal is dismissed.

22. No order as to costs.

(2020)1ILR 321

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019 & 14.11.2019

BEFORE
THE HON'BLE AJAY BHANOT, J.

Second Appeal No. 621 of 2016 & Civil Misc. Correction Application No. 10 of 2019

Ashfaq Ali ...Appellant
Versus
Smt Tahira & Ors. ...Respondents

Counsel for the Appellant:
Sri Udai Chandani

Counsel for the Respondents:
Sri Chandra Kant Parekh, Sri C.K. Parekh, Sri Vivek Mishra

A. An unauthorised occupant or third person is not entitled to an injunction against the true owner. (Para 14)

B. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously even by long possession such as caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. (Para 58)

C. Code of Civil Procedure, 1908 - Section 100 - challenge to-decree of suit-trial court injucted the defendant from evicting the plaintiff except in accordance with law-plaintiff is an unauthorised occupant in the shop resisting the claim of true owner- eviction in accordance with law was substantial question of law-procedure which upholds the law and promotes the ends of justice-this obligates every trial court and executing court to adjudicate the matter in strict adherence to a stipulated time frame, under all circumstances-appellate court acted in conformity with law by granting decree of eviction against the plaintiff and in favour of the defendant on the counter claim. (Para 10, 21, 30 to 33, 53, 59)

D. Due process of law means nobody ought to be condemned unheard. The due process of law means a person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity for the Defendant to file pleadings including written statement and documents before the Court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court. (Para 58)

Second Appeal dismissed. (E-6)

List of cases cited: -

1. Sri Venkataramana Devaru & Ors. Vs. St. of Mysore & Ors. AIR 1958 SC 255

2. Santosh Hazari Vs. Purushotam Tiwari, 2001 (3) SCC 179

3. Thomas Cook (India) Ltd. Vs. Hotel Imperial, 2006(88) DRJ 545

4. Maria Margarida Sequeira Fernandes (supra)

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

1. This second appeal arises out of the judgment and decree dated 17.05.2016 passed by the learned Additional District Judge/Special Judge(Prevention of Corruption Act), Varanasi in Civil Appeal No. 45 of 2014, Mohd. Hussain Vs. Ashfaq Ali and another, which reverses the judgement and decree dated 18.02.2014 rendered by the learned Additional Civil Judge, Varanasi in Original Suit No. 472 of 1986, Ashfaq Ali Vs. Smt. Tahira and Others.

2. This second appeal has been filed by the plaintiff in the suit registered as Original Suit No.472 of 1986, Ashfaq Ali Vs. Smt. Tahira.

3. Civil action was brought by the plaintiff-appellant against the defendants-respondents, by instituting a suit registered as Case No. 472 of 1986 (Ashfaq Ali Vs Smt. Tahira and Others), before the learned Additional Civil Judge, Varanasi.

4. The plaint states that the plaintiff-appellant is a tenant in the disputed shop w.e.f. 1980-81, which is an integral part of House No. CK-67/25 at Dal Mandi, District Varanasi. The defendants-respondents were the landlords.

5. The cause of action for the suit arose on 24.04.1996, when the defendants-respondents tried to take forcible possession of the disputed premises by physically evicting the plaintiff-appellant. The attempted eviction was foiled. Relief was claimed by the plaintiff-appellant to permanently injunct the defendants-respondents from interfering with the possession of the plaintiff-appellant over the shop in dispute, by adopting means which are contrary to law. The plaintiff-appellant also prayed that his peaceful possession over the shop in dispute may not be disturbed by the defendants-respondents.

6. The defendant no. 2-respondent no. 2 resisted the suit by filing a written statement and a counter claim for eviction of the plaintiff-appellant.

7. The written statement while denying the case of the plaintiff-appellant stated that the parties commenced their partnership business in the aforesaid shop from the month of August, 1995. The intentions of the plaintiff-appellant became dishonest and the business folded up. The written statement categorically denied the landlord tenant relationship between the plaintiff-appellant and defendant no. 2-respondent no. 2. The defendant no. 2-respondent no. 2 asserted that the plaintiff-appellant was earlier a licensee in the shop. However on the date of institution of the suit, was the plaintiff-appellant was an unauthorized occupant. The defendant no. 2-respondent no. 2 made a counter claim to evict the plaintiff-appellant.

8. The issues relevant, framed by the learned trial court for determination which remain relevant are as under:

I. Whether the plaintiff-appellant is the lawful tenant of the disputed shop?

II. Whether the defendant no. 2-respondent no. 2 is the sole owner of the disputed property?

III. Whether the defendant no. 2 respondent no.2 is entitled for eviction of the plaintiff-appellant from the disputed shop and to obtain possession of the same on the foot of the assertions made in the counter claim?

9. The trial court concluded that there was no dispute about the ownership of the shop property in issue. The learned trial court opined that the plaintiff-appellant could not prove his tenancy. The landlord-tenant relationship between him and the defendant no. 2-respondent no. 2 was not established. The learned trial court also found that the plaintiff-appellant was an unauthorized occupant. The plaintiff-appellant was able to establish his possession over the disputed shop, before the trial court.

10. In the wake of the aforesaid findings, the learned trial court held that the plaintiff-appellant was entitled to be protected from eviction by a procedure contrary to law. Partly decreeing the suit, the learned trial court issued a permanent injunction to the defendants-respondents injuncting them from evicting the plaintiff-appellant by adopting a procedure which is contrary to law.

11. The counter claim of the defendant no. 2- respondent no. 2 was dismissed. The defendant no. 2-respondent no. 2 was granted liberty to file a suit for eviction, which in the undertaking of the learned trial court was the only procedure know to law.

12. The defendant no. 2-respondent no.2 carried the judgement of the learned trial court in appeal. The appeal was registered as Civil Appeal No. 45 of 2014, Mohd. Hussain Vs. Ashfaq Ali and another before the Additional learned District Judge, I, Varanasi. A cross objection was filed by the plaintiff-appellant in the aforesaid appeal.

13. The learned appellate court after independent consideration of pleadings and the evidence found that the plaintiff-appellant could not establish his tenancy in the shop in dispute. The finding of the learned trial court that the plaintiff-appellant was not a tenant in the shop in dispute was upheld. The appellant court was also in agreement with the learned trial court that the plaintiff-appellant was an unauthorized occupant in the shop in dispute. The learned appellate court gave weight to the admission made by the plaintiff-appellant in his plaint, that the defendant no. 2-respondent no. 2 was the owner and the landlord of the disputed shop. The ownership of the defendant no. 2-respondent no. 2 of the property in issue was undisputed.

14. The learned appellate court applying the well settled position of law to this case, held that the plaintiff-appellant being an unauthorized occupant, is not entitled to seek an injunction against the defendant no.2-respondent no.2 who is the true owner.

15. There was another aspect to the controversy which was noticed by the learned appellate court. The plaintiff-appellant had stated in the plaint that he was a tenant in the shop in dispute from 1980-81. The learned appellate court took noticed from the record details of P.A. Case No. 111 of 1980 (Tahira Bibi Vs. Saeed Ahamad Khan) before the prescribed authority, in regard to the disputed premises. The records bears out the judgment entered by the prescribed authority on 09.01.1981 directed eviction of the then tenant Saeed Ahmed and the fact of restoration of vacant possession to the landlord on 14.03.1981. The learned appellate court thus found that till 14.03.1981 the disputed premises was not in the possession of the plaintiff-appellant. The documentary evidence in this regard marked as Paper no. 110-GA attested the aforesaid stand of the defendant no. 2-respondent no. 2 as pleaded in the written statement was also appreciated while returning the finding.

16. Thus, the learned appellate court found that the assertion in the plaint that the plaintiff-appellant was tenant in the premises from 1980-1981 was false. The plaintiff-appellant had instituted the suit by stating false facts and concealing material evidence. The suit was liable to be dismissed on the foot of this finding.

17. There were incurable faultlines in the judgment of the learned trial court, when it dismissed the counter claim of the defendant-appellant no. 2.

18. Accordingly, the appellate court found that the judgment of the learned trial court rejecting the counter claim of the defendant no. 2- appellant to be at variance with law and was liable to be interfered with. The counter claim of the defendant no. 2- appellant was accordingly allowed.

19. The learned first appellate court decreed the counter claim of the defendant no. 2-respondent no.2 and set aside the judgment dated 18.02.2014 and decree dated 01.03.2014 passed by the learned trial court.

20. The plaintiff-appellant was directed by the learned appellate court to make over the vacant possession of the disputed shop to the defendant no. 2-respondent no. 2 within a period of three months from date of the judgment. The appellate court also awarded damages payable by the plaintiff-appellant.

21. Sri Udai Chandani, learned counsel for the plaintiff-appellant contends that the learned trial court as well as the learned appellate court erred in law by disbelieving the claim of the plaintiff-appellant that he was a tenant in the disputed premises. He further contends that the plaintiff-appellant has been in possession over the disputed property since 1995 and the learned trial court rightly injuncted the defendant no. 2-respondent no. 2 from evicting the plaintiff-appellant except in accordance with law. The plaintiff-appellant could be evicted only by instituting a civil suit for eviction and not on the foot of a counter claim.

22. Sri Udai Chandani, learned counsel for the plaintiff-appellant submits in the alternative that the plaintiff-appellant is a licensee and not an unauthorized occupant in the shop.

23. Per contra, Sri C. K. Parekh, learned Senior Counsel assisted by Sri Vivek Mishra, learned counsel for the defendant no. 2-respondent no. 2 submits that the findings against the claim of tenancy made by the plaintiff-appellant are findings of fact which were returned in light of the pleadings after appreciation of evidence. There is no perversity in the findings. He further contends that the plaintiff-appellant had admittedly not come to the learned trial court with clean hands and stated false facts in the plaint. The suit was liable to be dismissed on this ground alone.

24. Lastly Sri C. K. Parekh, learned Senior Counsel submits that the law is well settled that an unauthorized occupant or third person is not entitled to an injunction against the true owner.

25. Both the courts concurrently found upon consideration of pleadings and appreciation of evidence, that the plaintiff-appellant was not a tenant in the disputed shop. The landlord tenant relationship between the parties was not established. The learned counsel for the appellant could not point out any substantial question of law which arises from the said

factual determination. This Court finds that these pure findings of facts are impeccable and no substantial question of law arises for determination on these findings.

26. The issue of oral partnership between the parties and the status of the plaintiff-appellant as licensee was not posed for determination before the both learned courts of earlier instance. This point was never pressed by the parties before both the courts of earlier instance.

27. Plaintiff-appellant never claimed to be a licensee at any stage. There is no foundation to support a claim of licensee in the plaint. Evidence in this regard is absent. On the contrary, the plaintiff-appellant affirmatively asserted that he was a tenant of the premises in dispute. Both the courts of earlier instance did not enquire into nor return any finding on this point. This point was clearly abandoned by both parties in the earlier stages of litigation. The plaintiff-appellant cannot resile from his earlier stand and set up a new case at this stage to the detriment of the defendant no. 2-respondent no. 2, after his defence was invalidated by both courts.

28. A substantial question of law has to emerge from reading of the judgments of the courts of earlier instance, in light of the material before the courts, issues framed for determination and findings thereon. Issues of disputed facts which require evidence for adjudication, and which were not posed for determination before the courts of both instances, are not substantial questions of law under Section 100 of the Civil Procedure Code.

29. In this regard, a reference may be made with profit to the law laid down by the Hon'ble Supreme Court in the case of ***Sri Venkataramana Devaru and others v. The State of Mysore and others,*** reported at ***AIR 1958 SC 255.***

"14. Mr. M. K. Nambiar invited our attention to Exhibit A-2, which is a copy of an award dated November 28, 1847, wherein it is recited that the temple was originally founded for the benefit of five families of Gowda Saraswath Brahmins. He also referred us to Exhibit A-6, the decree in the scheme suit, O.S. No. 26 of 1915, wherein it was declared that the institution belonged to that community. He contended on the basis of these documents and of other evidence in the case that whether the temple was a private or public institution was purely a matter of legal inference to be drawn from the above materials, and that, notwithstanding that the point was not taken in the pleadings, it could be allowed to be raised as a pure question of law. We are unable to agree with this submission. The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding. We have accordingly declined to entertain this contention. We hold, agreeing with the Courts below, that the Sri Venkataramana Temple at Moolky is a public temple, and that it is within the operation of Act V of 1947.

30. The phrase substantial question of law occurring in Section 100 of the Code of Civil Procedure has been

interpreted by the Hon'ble Supreme Court in a long line of consistent authorities. The Hon'ble Supreme Court in the case of ***Santosh Hazari v. Purushotam Tiwari, reported at 2001 (3) SCC 179*** held as under:

"14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial', a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any list.

31. The issue whether the plaintiff-appellant was a licencee or not, is a factual issue in this case and does not satisfy the tests of a substantial question of law, as laid down by Hon'ble Supreme Court in **Santosh Hazari (supra)** and cannot be entertained view of the restriction posed in ***Sri Venkataramana Devaru (supra).***

32. In these facts the plaintiff-appellant cannot urge at this stage that he was a licensee. The plaintiff-appellant cannot introduce a pure question of fact for the first time which requires evidence for determination under the guise of a substantial question of law.

33. The learned counsels for the parties then agree that the following questions of law arise for determination in this second appeal:

I. Whether the suit was liable to be dismissed on the ground that the plaintiff did not come to the court with clean hands, by asserting false facts in the plaint and concealing material facts and evidence from the court?

II. Whether the learned appellate court erred in law in granting the decree of eviction against the plaintiff-appellant and in favour of the defendant no.2-respondent no.2 on the counter claim of the latter and whether failure of defendant no.2-respondent no.2 to file a separate suit for eviction of the plaintiff-appellant was fatal to the case of eviction against the plaintiff-appellant? As a corollary what is the import of the phrase "eviction in accordance with law" when the claim of a lawful owner is pitted against an unauthorised occupant in terms of the pleadings?

Substantial Question of Law No. 1

34. The learned appellate court found that the plaintiff-appellant had stated false facts and concealed material evidence before the court. The finding is made on the foot of admitted facts and unimpeachable evidence. The

consequences of such conduct of the plaintiff-appellant is the key to answering the first substantial question of law.

35. Truth to facts is the first rule of equitable conduct. To keep the stream of justice pure and to protect the credibility of the process of law equitable conduct of parties is non negotiable. The court will investigate whether the party did its utmost to preserve fidelity to the facts. Preserving fidelity to the facts is the essence of equitable conduct.

36. Fair conduct of a party before the court alone entitles it to discretionary relief from the court, while unfair conduct would preclude grant of relief by the court.

37. The learned appellate court followed the right line of enquiry and correctly found that the plaintiff-appellant had not come to court with clean hands.

38. The learned appellate court in light of the facts established above and the settled position of law recorded that the relief of injunction is an equitable relief and the conduct of the plaintiff-appellant disentitled him to the equitable relief of grant of injunction. The finding of fact by the learned appellate court is beyond reproach and the statement of law is unassailable.

The substantial question of law no. 1 is accordingly answered as follows:

39. The plaintiff-appellant was not entitled to the equitable relief of grant of injunction, since he had stated false facts and come to the court with unclean hands and his suit was liable to be dismissed on this ground alone.

Substantial Question of Law No. 2

40. The answer to the second substantial question of law would turn on the interpretation of the phrase "eviction in accordance with law."

41. Claims of lawful owners against unauthorized occupants of the properties of the former, take long years to decide in our judicial system. This Court takes notice of the fact that even where the title of the true owner against an unauthorized occupant is not in serious dispute, the claims of the former are decided after many decades. The unauthorized or unlawful occupants are the only beneficiaries of this anomaly. Such unlawful or unauthorized occupants retain illegal possession against true owners simply by delaying adjudication by courts. The defence of illegal occupants against their eviction by true owners is "rule of law"! The delay in such cases perverts law and defeats justice. Perversion of law has to be prevented, rule of law has to be established and justice has to be dispensed.

42. Further, as a corollary what is the true import of the phrase "eviction in accordance with law", in matters where the claim of a true owner for possession is resisted by an unauthorized occupant in courts of law.

43. The question as we have seen is not only a substantial question of law but a question of public importance.

44. Inordinate delay in deciding the claim of a lawful owner against an unauthorised occupant indefinitely prolongs the illegal occupation of the latter and negates the lawful title of the former. The delay misdirects the process of law to a point, where force of possession prevails over the legitimacy of title and the distinction between lawful title and illegal

possession ceases. This state of affairs dents the faith in the legal process. It impairs the credibility of the process of the courts and incentivizes resort to means which are not lawful. In short, such delay is fatal to the rule of law and causes complete miscarriage of justice. The phrase "eviction as per law" has to mean a procedure which upholds the law and promotes the ends of justice. This obligates every trial court, appellate court and executing court to adjudicate the matter in strict adherence to a stipulated time frame, under all circumstances. While deciding this appeal this Court is called upon to determine the said time frame and procedure.

45. The courts are charged with the duty of upholding the law and dispensing justice. These twin objectives can be fulfilled in the facts situation discussed in the preceding paragraphs, only if the courts evolve speedy procedure and dispense justice in a reasonable period of time, without compromising the standards of law.

46. Considering the situation being faced by the courts today because of delay in deciding such matters and the threat such delayed possesses to the root of law, the phrase "reasonable period of time" cannot be left to be defined by individual preference. The succeeding paragraphs will define the phrase "reasonable period of time" by stipulating the specific time frame within which matters in which a true owner has made a claim against an unauthorized occupant and where there is no serious dispute of title shall be decided.

47. No party which seeks to benefit from unauthorized occupancy, shall be granted any unnecessary adjournment. In fact, in such cases, the courts may well be advised to decline any adjournments. Adjournments if any shall be granted only in the rarest of rare cases after full satisfaction of the court is recorded that it is solely in the interests of justice and after payment of exemplary costs.

48. The claim of eviction made by the lawful owner and the claim of damages/compensation for unauthorized occupancy shall be divided into the parts. The courts shall decide the issue of unauthorized occupation as the first issue and in case the courts find that the occupation of the property was unauthorized, the eviction of such unauthorized occupant shall be ordered forthwith along with the decree of eviction. This process of deciding the issue of unauthorized occupation and the eviction of such occupant shall be completed by the learned trial court in strictly within a period of one year from the date of institution of the suit. The legality of defence of the unauthorized occupant be that of valid tenancy, or license or a tenant who is holding or any other claim in defence of possession howsoever tenors, shall be decided within the aforesaid period of one year. The courts shall proceed with the hearing of such suits on a day to day basis if necessary to adhere to the stipulated time period of one year. Similarly, the executing courts shall also proceed on a day to day basis and complete the execution proceedings in all circumstances within a period of six months. The claim of compensation/damages shall be decided alongside or if possible within the stipulated period of time or may be decided soon thereafter.

49. The appellate court shall decide the appellate within six months. All courts

shall ensure this stipulated time frame is not deviated from and is adhered to in all circumstances.

50. This is the essence of the rule of law. The eviction by rule of law obligates the courts to be alerted to the existing realities and evolve timely responses. Adherence to the aforesaid procedure, is the full and true import of the phrase "eviction in accordance with law".

51. The high purpose of law is to dispense justice in a speedy manner and not to draw parties into endless litigation. Courts have looked askance at multiplicity of litigation on the same cause of action.

52. The issue of possession of an unauthorized occupant was pitted against the claim of the true owner of the property before the both courts of earlier instance in this case. Both the courts after adjudicating the controversy found that the plaintiff-appellant was an unauthorized occupant who was resisting the claim of the true owner defendant no. 2-respondent no. 2 for possession over the property.

53. A judgment by a court, holding a person to be an unauthorized occupant against the claim of a true owner fully constitutes the lawful basis of eviction of the unauthorized occupant. This determination is conclusive for securing the eviction of an unauthorized occupant. In the face of the said adjudication, it does not matter who brought the suit. No further judicial enquiry or adjudication by the courts is required for eviction of the unauthorized occupant.

54. In the wake of these established facts, it then was wholly contrary to law, to direct the defendant no. 2-respondent no. 2 to institute civil action afresh for eviction of the plaintiff-appellant and a travesty of justice to prolong an almost a three and a half decade old litigation.

55. The judgment of the learned trial court is a perversion of the phrase "eviction in accordance with law." The true meaning of the phrase "eviction in accordance with law" was found by the learned appellate court in its judgment.

56. The method of due process of law to be adopted to evict an unauthorized occupant and the import of the phrase, "eviction in accordance with law", fell for consideration before the Courts. The judicial authority in point will now be referenced.

57. Faced with the remedy available in law to a true owner to eject an unlawful occupant, the Hon'ble Delhi High Court in the case of ***Thomas Cook (India) Ltd. Vs. Hotel Imperial,*** *reported at* ***2006(88) DRJ 545,*** in eloquent words laid down an enduring statement of law:

"28. The expressions `due process of law', `due course of law' and `recourse to law' have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed `forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing --ejectment from settled possession can only be had by recourse to a court of law. Clearly, `due process of law' or `due course of law', here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this `due process' or `due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the `bare minimum' requirement of `due process' or `due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the `recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the Plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

58. The Hon'ble Supreme Court placing reliance of the law laid down by the Hon'ble Delhi High Court in the case of ***Thomas Cook (supra),*** reiterated the same position of law in the case of ***Maria Margarida Sequeira Fernandes (supra)*** by holding thus:

"79. Due process of law means nobody ought to be condemned unheard. The due process
of law means a person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity for the Defendant to file pleadings including written statement and documents before the Court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court.

97. Principles of law which emerge in this case are crystallized as under:

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

5. The caretaker or agent holds property of the principal only on behalf of

the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession."

59. In the wake of the preceding narrative, the substantial question of law no. 2, is answered as follows:

A. The learned appellate court acted in conformity with law by granting the decree of eviction against the plaintiff-appellant and in favour of the defendant no. 2-respondent no. 2 on the counterclaim of the latter. The defendant no. 2-respondent no. 2 was not required to file a separate suit for eviction of the plaintiff-appellant.

B. The import of the phrase "eviction in accordance with law" in a matter where the claim of eviction of an unauthorized occupant is made by the true owner, mandates the courts to adjudicate such claim within the following stipulated periods of time:

a. The suit for eviction or counterclaim for eviction, as the case may be, shall be decided within a period of one year from the date of institution of such suit or claim in all circumstances.

b. The appeal against such decree shall be decided within a period of four months from the date of institution of such appeal.

c. The execution case shall be decided and the decree shall be executed within a period of six months from the date of institution of the execution proceedings.

d. If necessary, the court shall proceed with the hearing on day to day basis to ensure strict compliance with the aforesaid timeline in all circumstances.

60. The second appeal is dismissed.

(2020)1ILR 331

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

First Appeal No. 692 of 2001
connected with
First Appeal No. 691 of 2001

Smt. Tasneem & Ors. ...Appellants
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Ashutosh Srivastava, Sri Iqbal Ahmed

Counsel for the Respondents:
Sri S.K. Singh, S.C.

Code of Civil Procedure, 1908 - Section 96 - Land Acquisition Act, 1894 - Section 51-A- registered document-presumption of genuineness-rebuttable-raising a presumption doses not amount to proof- it only shifts the burden of proof against whom the presumption operates for disproving it- transactions recorded in the document may be treated as evidence-it is for the court to weigh all the pros and cons to decide the real price of the land concerned-the parties shall not be permitted either to produce any additional evidence or lead any further evidence except rebuttal evidence in regard to certified copies of the sale deeds already produced. (Para 17 to 28)

First Appeal allowed. (E-6)

List of cases cited: -

1. Union of India Vs. Dyagala Devamma & Ors 2018 (11) SCC 485

2. Vinod Bansal Vs. St. of Haryana & Anr. 2013 (5) SCC 622

3. Mehrawal Khewaji Trust (regd.) Faridkot & Ors. Vs. St. of Punjab & Ors. 2012 (5) SCC 432

4. Mahesh Dattatray Thirthkar Vs. St. of Mah. 2009 (11) SCC 141

5. Lal Chand Vs. Union of India 2009 (15) SCC 760

6. Chimanlal Hargovinddas Vs. Special Land Acquisition Officer Poona of Punjab & Ors. 1988 (3) SCC 751

7. Vijay Kumar Moti Lal Vs. St. of Mah. 1981 (2) SCC 719

8. State of Haryana Vs. Ram Singh 2001 (6) SCC 254

9. Krishan Kumar Vs. Union of India & Ors. 2015 (1) SCC 220

10. Himmat Singh & Ors Vs. St. of M.P. & Ors. 2013 (16) SCC 392

11. A.P. Housing Board Vs. K. Manohar Reddy & Ors. 2010 (12) SCC 707

12. Lal Chand Vs. Union of India & Ors. 2009 (15) SCC 769

13. Deputy Collector, Land Acquisition, Gujarat & Ors. Vs. Madhubai Gobarbhai & Ors. 2009 (15) SCC 125

14. Cement Corporation of India Limited Vs. Purya & Ors. 2004 (8) SCC 270

15. Land Acquisition Officer & Mandal Revenue Officer 2001 (3) SCC 530

16. Ram Phal & Ors. Vs. St. of U.P. & Ors. 2019 (5) ADJ 649

17. Vimal Kumar Misra & Ors. Vs. Collector Mainpuri & Ors. 2019 (4) ADJ 463

18. Bajaj Hindustan Limited Vs. Rajendra Singh & Ors. 2019 (1) ADJ 271

19. Jasvir Singh Vs. Land Acquisition Officer, Rampur & Anr. 2014 SCC Online All 15658

20. Indian Oil Corporation Limited Vs. Risal Singh & Ors. Manu/Ph/0073/2019

21. Special Deputy Collector Vs. Kurra Sambasiva Rao 1997 (6) SCC 41

22. Land Acquisition Officer and Mandal Revenue Officer Vs. V. Narasaiah 2001 (3) SCC 530

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Ashutosh Srivastava, learned counsel for the appellant and Sri K.R. Singh, learned Standing Counsel appearing for the respondent no. 3.

2. Both the appeals are admittedly arising out of the same acquisition proceedings and learned counsel appearing for both the parties agree that the appeals may be decided together by taking the First Appeal No. 692 of 2001 as a leading case.

3. First Appeal No. 692 of 2001 has been filed challenging the judgment and order dated 19.2.2001 passed by Additional District Judge, Court No. 4, Gorakhpur in Land Acquisition Reference No. 150 of 1987 (Smt. Tasneem and others vs. State of U.P. and others) arising out of LA Case No. 32/8 of 1986 in respect of acquisition of land in Village Daudpur Tappa, Pargana Haveli, Tehsil Sadar, District Gorakhpur.

4. Plot Nos. 169/2 and 167/2 total area 3.78 acres were acquired by the Gorakhpur Development Authority for the purpose of development of IInd Phase Ramgarh Tal Pariyojana of Gorakhpur Development Authority. Notification under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) was issued on 14.5.1983. Notification under Section 6(1) of the Act was issued on 5.5.1986. Possession was taken on 28.10.1986. The Special Land Acquisition Officer (hereinafter referred to as SLAO) vide award dated 7.10.1986 awarded compensation @ Rs. 1,24,193.53. Not

being satisfied with the compensation awarded by the SLAO the claimants herein filed LAR No. 150 of 1987. Several other references were also filed against the impugned award. LAR No. 150 of 1987 was taken as a leading case. The reference was dismissed in toto by the reference court mainly on the ground that the exempler sale deed dated 1.7.1982 relied on by the SLAO for determination of market value was correctly relied on. Certified copies of the sale deed dated 9.12.1982 Ex. 4 (wrongly mentioned as 22.11.1982) in respect of Plot No. 225 filed by the claimants was discarded on the ground that the vendor and vendee were not examined. Another sale deed dated 9.2.1981 Ex. 5 (wrongly mentioned as 10.10.1980) in respect of Plot No. 125/1 area 1890 sq. ft. filed by the claimants was discarded on the ground that it was for a very small piece of area.

5. Submission of learned counsel for the appellant is that extremely low award @ Rs. 2.84 per sq. ft. has been awarded by the SLAO as against Rs. 60/- per sq. ft. claimed by the claimants. He further submits that even assuming that the land acquired was agricultural in nature, it has great potentiality because of its location as the same is located in the heart of city of Gorakhpur. He further submits that it is not in dispute that the land was acquired for the purpose of construction of open area theatre, hotel, restaurant, cafeteria, aquarium, bird santuary, children park, petrol pump, skating rink stadium, deer park, camping ground etc., which itself goes to prove that the acquisition was for the purpose of further developing developed area and as such the claimants were entitled to higher rate of compensation than what was determined by the SLAO. The court below has miserably failed to take note of these aspects of the matter which has vitiated the entire judgment and order. He further submits that oral evidence of DW-1 itself is sufficient to prove that the land was in close proximity to the heart of the city. Apart from the facts that have been asserted regarding potentiality of the land and its proximity with the city it has further been submitted that the exempler sale deed dated 1.7.1982, relied on by the SLAO for determination of market value and as affirmed by the reference court, is not even on record and therefore, merely because the same was included in the list of documents it could not have been relied on by the SLAO for determination of market value. He further submits that his certified copies of sale deed dated 9.12.1982 Ex. 4 were discarded on the ground that the vendor and vendee were not examined. He submits that the law in this regard is well settled and Section 51-A of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) clearly provides that such exempler sale deed could have been relied on or at least was liable to be considered even without examining the vendor and vendee.

6. Broadly speaking, the submission of learned counsel for the appellant is two fold: (1) the SLAO has relied on the exempler sale deed dated 1.7.1982, which is not even on record and therefore, it was no evidence in the eye of law, which could have been relied on by the SLAO for determining the market value of the acquired land and; (2) the exempler given by the claimants has incorrectly been discarded on the ground that vendor and vendee were not examined, which is contrary to the law settled by the Hon'ble Apex Court. He also sought to make submission for the purpose of

determination of market value as per Section 23 of the Act.

7. Learned counsel for the appellant has placed reliance on judgments on Hon'ble Apex Court in the cases of **Union of India vs. Dyagala Devamma and others 2018 (11) SCC 485, Vinod Bansal vs. State of Haryana and another 2013 (5) SCC 622, Mehrawal Khewaji Trust (registered) Faridkot and others vs. State of Punjab and others 2012 (5) SCC 432, Mahesh Dattatray Thirthkar vs. State of Maharashtra 2009 (11) SCC 141, Lal Chand vs. Union of India 2009 (15) SCC 760, Chimanlal Hargovinddas vs. Special Land Acquisition Officer Poona of Punjab and others 1988 (3) SCC 751, Vijay Kumar Moti Lal vs. State Maharashtra 1981 (2) SCC 719 and State of Haryana vs. Ram Singh 2001 (6) SCC 254.**

8. Per contra, Sri K.R. Singh, learned counsel appearing for the acquiring body Gorakhpur Development Authority, insofar as first argument is concerned, fairly admitted that the exempler sale deed dated 1.7.1982 is not on record of the court below. He, however, submits that since the details of such sale deed were available and therefore, no illegality was committed by the SLAO in placing reliance on the same for the purpose of determination of market value and reference court has rightly rejected the reference in toto. Insofar as rejection of certified copies of the exempler sale deeds dated 9.12.1982 Ex. 4 submitted by the claimants is concerned, he submits that the sale deeds were rightly discarded as the contents of the sale deed were not produced by producing the vendor and vendee. He submits that it is the discretion of the authority / court to place reliance on the same or not. He submits that in the present case the SLAO as well as the reference court did not find safe to place reliance on the same in absence of examination of vendor and vendee and therefore, no interference is required in the impugned judgment.

9. I have considered the rival submissions and have perused the record.

10. In this appeal two questions arise for consideration. One, whether the exempler sale deed that has been relied on by the SLAO for determination of the market value, is part of the part of the record or not, if not, can it said to be a piece of evidence; two, whether certified copy of the exempler sale deed dated 9.12.1982 relied on by the claimants was acceptable in evidence even without examining the vendor and vendee in view of Section 51-A of the Act?

11. Apart from the rulings that have been relied on by learned counsel for the appellant I have also gone through the judgments rendered in the cases of **Krishan Kumar vs. Union of India and others 2015 (1) SCC 220, Himmat Singh and others vs. State of M.P. and others 2013 (16) SCC 392, A.P. Housing Board vs. K. Manohar Reddy and others 2010 (12) SCC 707, Lal Chand vs. Union of India and others 2009 (15) SCC 769, Deputy Collector, Land Acquisition, Gujarat and others vs. Madhubai Gobarbhai and others 2009 (15) SCC 125, Cement Corporation of India Limited vs. Purya and others 2004 (8) SCC 270 (5 Judges Constitutional Bench), Land Acquisition Officer and Mandal Revenue Officer 2001 (3) SCC 530, Ram Phal and others vs. State of U.P. and others 2019 (5) ADJ 649,**

Vimal Kumar Misra and others vs. Collector Mainpuri and others 2019 (4) ADJ 463, Bajaj Hindustan Limited vs. Rajendra Singh and others 2019 (1) ADJ 271, Jasvir Singh vs. Land Acquisition Officer, Rampur and another 2014 SCC Online All 15658 and Indian Oil Corporation Limited vs. Risal Singh and others Manu/Ph/0073/2019.

12. Before considering the arguments regarding potentiality of the land and proximity of exempler sale deed in time and situation, it would be appropriate to deal with the question as to whether the exempler sale deed that has been relied on by the SLAO for determination of the market value, is part of the part of the record or not, if not, can it said to be a piece of evidence? Suffice to note that exempler relied on by the SLAO for determination of market value compensation of Rs. 1,16,666.67 per acre in respect of Plot No. 261/1 area 0.03 acres, as admitted to Sri K.R. Singh, learned counsel appearing for the Development Authority that this exempler is not part of the record, therefore, could not have been considered by the reference court. Once the document is not part of the record, mere availability of the details of the documents could not have been treated to be part of the evidence for the purpose of determining market value as it is not a piece of evidence in the eye of law. In other words, on the part of the respondent Development Authority, there was no primary or secondary evidence available on record and hence reliance placed on the same was absolutely misplaced.

13. A reference may be made in this regard to various provisions of the Indian Evidence Act, 1872. Section 3 of the Evidence Act provides as to what is "evidence". Chapter V contains provision regarding documentary evidence. Section 61 provides that the contents of documents may be proved either by primary or by secondary evidence. Section 62 provides what is primary evidence. Section 63 provides what is secondary evidence. Section 64 clearly provides that documents must be proved by primary evidence except in the cases hereinafter mentioned and Section 65 contains in which cases secondary evidence can be given. For ready reference, these provisions are quoted as under:-

"3. Interpretation clause.- .....

"Evidence" - "Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) [all document including electronic records produced for the inspection of the Court],

such statements are called documentary evidence;

61. Proof of contents of documents.- The contents of documents may be proved either by primary or secondary evidence.

62. Primary evidence.- Primary evidence means the documents itself produced for the inspection of the Court.

Explanation 1- Where a document is executed in several parts, each part is primary evidence of the document :

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties

only, each counterpart is primary evidence as against the parties executing it.

Explanation 2- Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest ; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

63. Secondary evidence.- Secondary evidence means and includes--

(1) certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.

(3) copies made from or compared with the original ;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a documents given by some person who has himself seen it.

64. Proof of documents by primary evidence.- Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Cases in which secondary evidence relating to documents may be given.- Secondary evidence may be given of the existence, condition, or contents of a documents in the following cases:-

(a) When the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved , or

of any person out of reach of, or not subject to, the process of the Court or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 40[India] to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved it the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

14. Clearly, if the Development Authority was placing reliance on a sale

deed, either original should have been produced or its certified copy could have been filed, which, as per Section 51-A of the Act was acceptable in evidence without examination of vendor and vendee (as discussed in later part of this judgment). Clearly, the contents of the exempler sale deed, i.e. the document, were not proved in accordance with the aforesaid provisions of the Evidence Act. In fact, admittedly, the document itself was not on record. Therefore, the conclusion drawn in the preceding paragraphs is inescapable.

15. Learned counsel for the respondent had submitted that the court below rightly rejected the exempler sale deed (Ex. 4) submitted by the claimants and there was cogent evidence on record to reject the reference in toto.

16. Insofar as the second question and rejection of exempler sale deed dated 9.12.1982 submitted by the claimants in respect of Plot No. 225 is concerned, as held by Hon'ble Apex Court in the case of **Cement Corporation of India Limited (supra)** in view of Section 51-A of the Act such documents are acceptable in evidence even without examination of vendor and vendee. Section 51-A of the Act is quoted as under:-

"51 A. Acceptance of certified copy as evidence- In any proceeding under this Act, a certified copy of a document registered under the Registration Act, 1908 (16 of 1908), including a copy given under section 57 of that Act be accepted as evidence of the transaction recorded in such-document."

17. Paragraphs 2, 18, 20.21, 24, 25, 26, 27, 28, 29, 31, 32, 35, 36, 37 and 39 of the **Cement Corporation of India Limited (supra)** are quoted as under:-

"2. In Kurra Sambasiva Rao's case (supra), this Court held that by introducing Section 51A in the Land Acquisition Act, 1894 (hereinafter LA Act) the Legislature only facilitated the parties concerned to produce a certified copy of a sale transaction in evidence and nothing more. This is what the Court observed in the said case:

"Section 51-A only dispenses with the production of the original sale deed and directs to receive certified copy for the reason that parties to the sale transaction would be reluctant to part with the original sale deed since acquisition proceedings would take long time before award of the compensation attains finality and in the meanwhile the owner of the sale deed is precluded from using the same for other purposes vis-a-vis this land. The marking of the certified copy per se is not admissible in evidence unless it is duly proved and the witnesses, viz., the vendor or the vendee, are examined."

18. From the above, it is seen that till the judgment of the three Judge Bench in V. Narasaiah's case (supra), the consensus of judicial opinion was that Section 51A was enacted for the limited purpose of enabling a party to produce certified copy of a registered sale transaction in evidence only and for proving the contents of the said document the parties had to lead oral evidence as contemplated in the Evidence Act.

20. The above view of the Court in Kurra Sambasiva Rao's case, in our opinion, is not the correct position in law. Even prior to the insertion of Section 51A of the Act the provisions of the Evidence Act and the Registration Act did permit the production of a certified copy in

evidence. This has been clearly noticed in the judgment in Narsaiah's case wherein the court relying on Sections 64 and 65(f) of the Evidence Act read with Section 57(5) of the Registration Act held that production of a certified copy of a registered sale document in evidence was permissible in law even prior to insertion of Section 51A in the LA Act. We are in agreement with the said view expressed by this Court in Narasaiah's case.

21. In the above background the question for our consideration would be, what then is the real object of inserting 51A in LA Act?

24. The terms 'primary and secondary evidence' apply to the kinds of proof that may be given to the contents of a document, irrespective of the purpose for which such contents, when proved, may be received. Primary evidence is an evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence when a proper explanation of its absence has been given. However, there are exceptions to the aforementioned rule.

25. Section 51A of the Land Acquisition Act seeks to make an exception to the aforementioned rule.

26. In the acquisition proceedings, sale deeds are required to be brought on records for the purpose of determining market value payable to the owner of the land when it is sought to be acquired.

27. Although by reason of the aforementioned provision the parties are free to produce original documents and prove the same in accordance with the terms of the rules of evidence as envisaged under the Indian Evidence Act the LA Act provides for an alternative thereto by inserting the said provision in terms whereof the certified copies which are otherwise secondary evidence may be brought on record evidencing a transaction. Such transactions in terms of the aforementioned provision may be accepted in evidence. Acceptance of an evidence is not a term of art. It has an etymological meaning. It envisages exercise of judicial mind to the materials on record. Acceptance of evidence by a court would be dependent upon the facts of the case and other relevant factors. A piece of evidence in a given situation may be accepted by a court of law but in another it may not be.

28. Section 51A of the L.A. Act may be read literally and having regard to the ordinary meaning which can be attributed to the term 'acceptance of evidence' relating to transaction evidenced by a sale deed, its admissibility in evidence would be beyond any question. We are not oblivious of the fact that only by bringing a documentary evidence in the record it is not automatically brought on the record. For bringing a documentary evidence on the record, the same must not only be admissible but the contents thereof must be proved in accordance with law. But when the statute enables a court to accept a sale deed on the records evidencing a transaction, nothing further is required to be done. The admissibility of a certified copy of sale deed by itself could not be held to be inadmissible as thereby a secondary evidence has been brought on record without proving the absence of primary evidence. Even the vendor or vendee thereof is not required to examine themselves for proving the contents thereof. This, however, would not mean that contents of the transaction as evidenced by the registered sale deed would automatically be accepted. The legislature advisedly has used the word 'may'. A discretion, therefore, has been

conferred upon a court to be exercised judicially, i.e., upon taking into consideration the relevant factors.

29. In V.Narasaiah's case, this Court correctly understood the said scope and object of insertion of Section 51A in the LA Act when it held thus :

"It was in the wake of the aforesaid practical difficulties that the new Section 51A was introduced in the LA Act. When the section says that certified copy of a registered document "may be accepted as evidence of the transaction recorded in such document" it enables the court to treat what is recorded in the document, in respect of the transactions referred to therein, as evidence."

31. Thus, the reasoning of this Court in Narasaiah's case that Section 51A enables the party producing the certified copy of a sale transaction to rely on the contents of the document without having to examine the vendee or the vendor of that document is the correct position in law. This finding in Narasaiah's case is also supported by the decision of this Court in the case of Mangaldas Raghavji Ruparel (supra).

32. Therefore, we have no hesitation in accepting this view of the court in the Narasaiah's case as the correct view.

35. A registered document in terms of Section 51A of the Act may carry therewith a presumption of genuineness. Such a presumption, therefore, is rebuttable. Raising a presumption, therefore, does not amount to proof; it only shifts the burden of proof against whom the presumption operates for disproving it. Only if the presumption is not rebutted by discharging the burden, the court may act on the basis of such presumption. Even when in terms of the Evidence Act a provision has been made that the court shall presume a fact, the same by itself would not be irrebuttable or conclusive. The genuineness of a transaction can always fall for adjudication, if any question is raised in this behalf.

36. Similar is the view taken by this Court in V. Narasaiah's case wherein this Court held thus :-

"the words "may be accepted as evidence" in the Section indicate that there is no compulsion on the court to accept such transaction as evidence, but it is open to the court to treat them as evidence. Merely accepting them as evidence does not mean that the court is bound to treat them as reliable evidence. What is sought to be achieved is that the transactions recorded in the documents may be treated as evidence, just like any other evidence, and it is for the court to weigh all the pros and cons to decide whether such transaction can be relied on for understanding the real price of the land concerned".

37. Having noticed the scope of Section 51A of the LA Act as understood by this Court in V. Narasaiah's case to be the correct interpretation, we will now consider whether such evidence is mandatorly binding on the authority or the court concerned or it is only an enabling provision.

39. While it is clear that under Section 51A of the LA Act a presumption as to the genuineness of the contents of the document is permitted to be raised, the same can be relied upon only if the said presumption is not rebutted by other evidence. In the said view of the matter we are of the opinion the decision of this Court in the case of Land Acquisition Officer & Mandal Revenue Officer vs. V. Narasaiah (supra) lays down the correct law."

(emphasis supplied)

18. In view of the aforesaid Five Judges constitutional Bench I do not wish to burden my judgment by referring to other judgments. Suffice to note that subsequent to the aforesaid judgment the stand taken by Hon'ble Apex Court as well as by Hon'ble Division and Hon'ble Single Judge of this Court on interpretation of Section 51-A of the Act is consistent in nature and is in the line of the aforesaid judgment.

19. I have also noticed the fact that the impugned judgment was passed by the reference court on 19.2.2001 and till that date the judgment rendered by Hon'ble Apex Court in the case of **Special Deputy Collector vs. Kurra Sambasiva Rao 1997 (6) SCC 41** was holding field as the judgment in the case of **Land Acquisition Officer and Mandal Revenue Officer vs. V. Narasaiah 2001 (3) SCC 530** was rendered subsequently on 27.2.2001. In such view of the matter, it cannot be said that at that point of time the reference court has taken illegal view in the matter in rejecting the exempler sale deed dated 9.12.1982 (Ex. 4) submitted by the claimants. However, in **Cement Corporation of India Limited (supra)** after taking into account the contrary view taken in the case of **Kurra Sambasiva Rao (supra) and V. Narasaiah (supra)** it has been held that such document is admissible in evidence. A presumption as to the genuineness of the contents of1-16 the document is permitted to be raised and the same can be relied upon only if the said presumption is not rebutted by any other evidence.

20. There is a presumption of genuineness regarding such registered document in view of Section 51-A of the Act, however, in **Cement Corporation of India Limited (supra)** Hon'ble Apex Court has also considered as to whether such evidence is mandatorily binding on the authority or court or it is only an enabling provision. It was held that it is clear that under Section 51-A of the Act a presumption as to the genuineness of the contents of the document is permitted to be raised, the same can be relied upon only if the said presumption is not rebutted by other evidence. The view taken in **V. Narasaiah (supra)** held to be the correct evidence.

21. In the present case, from perusal of record, I find that there was no evidence in rebuttal regarding such presumption. The evidence that was considered by the reference court is, admittedly, not on record of the reference court.

22. In such view of the matter, it is clear that on one hand, now the law is settled that the certified copy of the registered sale deed (Ex. 4) dated 9.12.1982 could not have been rejected merely because vendor and vendee were not examined, and on the other hand, the court below has relied on the contents of a document, which is not on record and therefore, there is no evidence in rebuttal in the eye of law to form opinion or basis for the compensation awarded.

23. In **Vinod Bansal (supra)** Hon'ble Apex Court after dealing with the provision of Section 51-A of the Act remanded back the matter to the reference court for fresh disposal. Paragraphs 7, 8 and 9 of the aforesaid judgment are quoted as under:-

"7. Since there was conflict of decisions as regards receiving of certified

copies of sale deeds in evidence in view of Sections 51-A of the Act and the position of law not being clear, the learned Single Judge of the High Court took the view that Section 51-A of the Act nowhere provides that certified copy of a registered document not properly proved can be admitted in evidence; Section 51-A of the Act only makes a certified copy of the document obtained from the registering officer admissible in evidence without production of their originals; but unless either the vendor or the vendee has been examined as witness to testify not only the consideration paid but also their specific knowledge and the circumstances in which the sale deed came to be executed, nearness to the lands, etc. the sale deeds cannot be relied on to determine the market value of the acquired lands. The learned Single Judge also held that the learned Additional District Judge had not committed any illegality in saying that the sale deeds were not admissible in evidence.

8. Having heard the learned counsel for the parties and after perusing the orders of the Reference Court, the learned Single Judge and the impugned orders, particularly, keeping in view the legal position as to the admissibility of certified copies of sale deeds in evidence in the light of the legal position stated by the Constitution Bench in Cement Corpn. of India Ltd. v. Purya aforementioned, we are satisfied that the matters are required to be remitted to the Reference Court for fresh disposal.

9. The Reference Court has to reappreciate the evidence which it had considered earlier, uninfluenced by observations made in the judgments of the learned Single Judge and the Division Bench of the High Court, including the certified copies of the sale deeds in the light of the Constitution Bench decision in Cement Corpn. of India Ltd. v. Purya5 explaining the position of law in relation to Section 51-A of the Act. The parties shall not be permitted either to produce any additional documents or lead any further evidence except rebuttal evidence in regard to certified copies of the sale deeds already produced to the extent indicated in the Constitution Bench judgment Court."

(emphasis supplied)

24. In the case of **Dyagala Devamma (supra)** Hon'ble Apex Court while considering the landmark judgment Hon'ble Apex Court in **Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona and another 1988 (3) SCC 751** reiterated what broad principles of law relating to acquisition of land under the Act should be kept in consideration to determine the proper market value. The factor which must be taken into consideration to assess the valuation of land under the Act were laid down in paragraph 4 of **Chimanlal Hargovinddas (supra),** which is quoted as under:-

"4. The following factors must be etched on the mental screen:

(1) A reference under section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition officer in his Award unless the same material is produced and proved before the Court.

(2) So also the Award of the Land Acquisition officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the Court hearing the Reference. It is merely

an offer made by the Land Acquisition officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and proved before it. It is not the function of the Court to suit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition officer, as if it were an appellate court.

(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose. (5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under sec. 4 of the Land Acquisition Act (dates of Notifications under secs. 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under sec. 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) only genuine instances have to be taken into account. (Some times instances are rigged up in anticipation of Acquisition of land). (9) Even post notification instances can be taken into account (1) if they are very proximate,(2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(l0) The most comparable instances out of the genuine instances have to be identified on the following considerations:

(i) proximity from time angle,

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has there after to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors (14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors:

Plus factors	Minus factors
1. smallness of size	1. largeness of area

2. proximity to a road. 2. situation in the interior at a
distances from the Road.
3. frontage on a road. 3. narrow strip of land with very small frontage
compared to death.
4. nearness to developed area.
4. lower level requiring the depressed portion to be filled up.
5. regular shape 5. remoteness from developed locality
6. level vis-a-vis land under acquisition 6. some special disadvantageous factor which would deter a purchaser
7. special value for an owner of an adjoining property to whom it may have some very special advantage.

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say l000 sq. yds or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approx. between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be looked up, will be longer or shorter and the attendant hazards.

(16) Every case must be dealt with on its own facts pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.

(17) These are general guidelines to be applied with understanding informed with common sense."

25. Under such circumstances, this Court is not inclined to go into the determination of market value in this appeal and is of the opinion that it would be appropriate to remand back the matter to the reference court for decision afresh.

26. As held in paragraph 9 of **Vinod Bansal (supra)** the parties shall not be permitted either to produce any additional evidence or lead any further evidence except rebuttal evidence in regard to certified copies of the sale deeds already produced to the extent indicated in the Constitution Bench judgment in **Cement Corporation of India Limited (supra).**

27. The impugned judgment dated 19.2.2001 passed by the reference court is hereby set aside. Matter is accordingly remanded back to the reference court for decision afresh on its own merits as per the law discussed above.

28. In view of the above both the appeals stand allowed.

(2020)1ILR343

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2019

BEFORE
THE HON'BLE HARSH KUMAR, J.

Second Appeal No. 1147 of 1998

Harcharan Singh & Ors. ...Appellants
Versus
Tajendra Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri P.N. Saxena, Sri Deo Raj, Sri Amit

Counsel for the Respondents:
Sri H.N. Singh, Sri R.K. Shukla, Sri Anurag Khanna, Sri Manoj Misra, Sri Shishir Kumar, Sri Shishir Tiwari, Sri Som Veer

A. Code of Civil Procedure, 1908 - Section 100 - challenge to - decree for setting aside the auction of plot-no notice served upon the plaintiffs-no procedures were followed-auctioned the land at different place- auction was taken place by the Deputy collector without confirmation of Collector on meagre amount -without opportunity of bid to persons from general public-illegal and fraudulent auction proceedings were conducted in contravention of section 285 – J of Z.A. Rules. (Para 3 to 22)

plaintiffs and defendant no.5 borrowed from state bank for purchasing a tractor, upon default in payment of loan, the land was auctioned without notice to plaintiffs, without following the procedure, fraudulently at a place distant from the land in suit auctioned.

Second Appeal dismissed. (E-6)

List of cases cited: -

1. Jagat Pal Singh Vs. St. of U.P. 1994 revenue decisions page 429

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

1. The instant appeal has been filed against the judgment and decree passed by IIIrd Additional District Judge, Bijnor on 28.07.1998 in Civil Appeal No.112 of 1998 (Tajendra Singh and another Vs. Harcharan and Another) setting aside the judgment and decree passed by the trial court on 16.03.1988 in Civil Suit No.257 of 1989 and decreeing the suit of plaintiffs.

2. The brief facts relating to the case are that defendant/respondent nos.1 and 2 filed Civil Suit No.257 of 1989 in the court of Civil Judge (Senior Division), Bijnor against defendant No.4 for obtaining (i) a decree for setting aside the auction of Plot No.80 area 13 Bigha 5 Biswas situated in village Turatpur Pargana Afzalgarh, Tehsil Nagina, District Bijnor and (ii) a decree for permanent injunction restraining defendant nos.1 to 4, their servants and agents from interfering in peaceful possession of plaintiffs over the land in dispute.

3. As per averments made in plaint, the plaintiffs and defendant No.5 borrowed a sum of Rs.48,000/- from State of Bank of India in the year 1979 for purchase of a tractor and upon default in payment of loan, the land in suit was auctioned without notice to plaintiffs, without following procedure laid down by law, and by conducting auction proceedings in surreptitiously and fraudulently at a place, distant from land in suit auctioned and different to the place mentioned in sale proclamation; that the alleged sale could have been confirmed only by the Collector, who has not passed any order of confirmation and since, the proceedings were conducted surreptitiously in fraudulent manner, the auction proceedings are liable to be set aside; that defendant no.5 is in collusion with defendant nos.1 to 4.

4. The defendant nos. 1 to 4 filed written statement denying the allegations

of plaint and contending that the suit is liable to be dismissed with costs.

5. On parties pleadings trial court framed as many as 12 issues and in view of its findings on various issues, dismissed the suit of plaintiffs with costs vide judgement and decree dated 16.03.1988.

6. Against the judgment and decree passed by the trial court plaintiffs filed Civil Appeal No.112 of 1998 before the District Judge, Bijnor, which was transferred to the court of IIIrd Additional District Judge Bijnor and was allowed by it vide impugned judgement and decree dated 28.07.1998 setting aside the judgement and decree dated 16.03.1988 passed by trial court and decreeing suit of plaintiffs. Feeling aggrieved defendant nos.1 to 4 have preferred this appeal.

7. The instant appeal was admitted vide order dated 20.08.1998 on following 3 substantial questions of law, mentioned at page 7 of the memo of appeal, which are as under:-

"1. Whether the suit of the plaintiffs was barred by section 11 C.P.C. and the lower appellate court was justified to reverse the decree of trial court without considering the arguments raised on behalf of the appellant on this point?

2. Whether the suit of the plaintiffs respondent was barred by time and the lower appellate court was justified to reverse the decree of lower appellate court without considering this aspect of the matter?

3. Whether the lower appellate court was justified to reverse the decree, though fraud neither pleaded nor proved by the plaintiff?"

8. Heard Sri P.N. Saxena, learned Senior Counsel assisted by Sri Amit, learned counsel for the defendants/appellants (hereinafter referred as defendants), Sri H.N. Singh, learned Senior Counsel assisted by Sri Som Veer, learned counsel for the plaintiffs/respondents (hereinafter referred as plaintiffs) and perused the record as well as the lower court record summoned in appeal.

9. Learned counsel for the defendants contended that lower appellate court acted wrongly and illegally in setting aside judgement and decree of dismissal of suit passed by the trial court by allowing the appeal and decreeing the plaintiffs' suit and setting aside auction proceedings; that plaintiffs had raised objections before the S.D.O., which were rejected and appeal before the Commissioner was also dismissed; that the writ filed against the order of Commissioner was dismissed with liberty to file civil suit; that lower appellate court acted wrongly in holding that procedure prescribed by law was not followed by revenue authorities, in conducting the auction proceedings; that lower appellate court failed to consider that procedure of law laid down for "recovery of arrears of land revenue" is different from procedure for "recovery of money as arrears of land revenue"; that the procedure prescribed under Sections 279 to 286 (1) of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred as Z.A. Act) is applicable to cases of recovery of arrears of land revenue, but same procedure is not applicable in matters of recovery of unpaid amount of loan etc., recoverable as arrears of land revenue, for which procedure mentioned only under Sections 286 (2) of Z.A. Act is applicable; that for recovery of money as

arrears of land revenue no notice is required to be served upon plaintiffs-respondents, who were borrowers and defaulters of Bank loan as Section 286(2) does not contemplate service of any such notice; that plaintiffs and defendant No.5 were joint borrowers and defendant No.5 was duly served with notice of recovery under Section 279 of Z.A. Act of which, his brothers, the plaintiffs had full knowledge; that the plaintiffs have neither pleaded nor proved fraud if any played on them in conducting of the auction proceedings; that the objections of plaintiffs with regard to alleged irregularities or mistakes in conducting the auction proceedings having been rejected by revenue courts, could not have been considered in civil suit, being barred by provisions of Rule 285 K of U.P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred as Z.A. Rules); that the suit was barred by time as well as by provisions of Section 11 of Civil Procedure Code and learned lower appellate court acted wrongly and illegally in not holding that the suit was barred by above provisions; that lower appellate court was not justified in reversing the decree passed by trial court, in absence of pleadings or proof of fraud; that the impugned judgment and decree are liable to be set aside, judgement and decree passed by trial court is liable to be restored and suit of plaintiffs is liable to be dismissed.

10. Per contra, learned counsel for the plaintiffs supported the impugned judgement and decree and contended that the judgement and decree passed by lower appellate court are based on correct interpretation of provisions of law; that lower appellate court has rightly held that in conducting impugned auction, procedure prescribed by law was not followed; that it was not only proved from the evidence on record, but was also admitted to defendants-appellants auction purchasers that the auction of land in dispute did not take place at village Turatpur over land in suit, the place mentioned in alleged proclamation, rather was conducted at village Qadarbad, a distant place, which is against the spirit and procedure prescribed under law; that Rule 285A of Z.A. Rules provides that every sale under Sections 284 and 286 shall be made either by Collector in person or by an assistant Collector specially appointed by him in his behalf but Rule 285-J provides that order confirming the sale shall be passed by Collector only; that it is clear from above provisions that Assistant Collector was not empowered under law, to confirm the auction sale; that undisputably, in instant case, Collector has not passed any order confirming the auction sale and the order of confirmation of sale passed by Assistant Collector is wrong illegal and without authority which is no order in the eye of law and so the alleged auction sale may not be considered to have been confirmed in accordance with law and the proceedings of alleged delivery of possession over the disputed property are fake and fictitious having no legal value; that arguments advanced on behalf of appellant, that procedure for recovery of money as arrears of land revenue is confined only to provisions of Section 286 (2) of Z.A. Act read with Rule 282 of Z.A. Rules and that provisions prescribed under Sections 279 to 286 (1) of Z.A. Act applicable only to cases of "recovery of arrears of land revenue", but not in matters of "recovery of money as arrears of land revenue" is highly misconceived and mistaken; that the trial court was misguided by defendants; that

the appeal has been filed with absolutely false and baseless allegations wherein no substantial question of law arises and is liable to be dismissed with costs.

11. Upon hearing learned counsel for the parties and perusal of record as well as the lower court record, which has been summoned in the appeal, I find that the submissions made on behalf of appellant that the procedure for "recovery of arrears of land revenue" is totally different from procedure "for recovery of money as arrears of land revenue" is entirely different has no force. It is noteworthy that legislation has laid down a procedure "for recovery of arrears of land revenue" and same procedure has been made applicable in matters "for recovery of certain types of money/dues which may also be recovered as arrears of land revenue." Hence the procedure for recovery of latter amount may not be different from the procedure which is prescribed for recovery of former, i.e. arrears of land revenue. Undisputably the provisions of Section 279(1) clause (a) to (e) relate only to the cases of recovery of arrears of land revenue and have no application in the matters of recovery of any other amount/ money as arrears of land revenue but for this reason it will not be correct to say that in matters of recovery of money as arrears of land revenue, the proceedings of auction sale may be conducted without notice to defaulters and without giving them opportunity to make payment of dues at any time before the date fixed for sale so as to avoid auction as provided under Rule 285-C of Z.A. Rules.

12. The lower appellate court in its elaborate findings has held that admittedly the auction proceedings were not conducted at village Turatpur over the land in dispute rather were conducted at a distant place in village Qadarbad which is at a distance of 3 Kms from land in suit as per plaintiffs and about 1½ kms away as per contention of defendants. It is admitted to defendants that notice contemplated under Section 279 of U.P. Zamindari Abolition and Land Reforms Act was served on defendant No.5 who is brother of plaintiffs which indicates that service of notice of auction was mandatory on plaintiffs also, but no such notice was ever served on them.

13. The contention that since defendant No.5 (one out of 3 borrowers/ defaulters) was brother of other 2 so service of notice on plaintiffs could have been waived has no force. The Court is of considered view that service of notice of auction was mandatory on plaintiffs also in view of principles of natural justice and they could not have been deprived with the opportunity to make payment of dues by date fixed as well as from their rights over the land in suit without due service of notice.

14. In the case of **Jagat Pal Singh Vs. State of U.P. 1994 Revenue decisions page 429,** this Court while considering the power to be exercised by Collector in confirming the sale under Rule 285-J of U.P. Zamindari Abolition and Land Reforms Rules 1952 held that-

"Now we take up the first point as to whether the Sub- Divisional Officer had power to confirm the sale or not. It has been seen in the earlier part of this judgment that under Rule 285-J of the U.P. Zamindari Abolition and Land Reforms Rules the Collector has to confirm the sale after expiry of the period of 30 days if the sale does not contravene

the provisions of Section 154 of the U.P.Zamindari Abolition and Land Reforms Act. The power to confirm the sale vests with the Collector and not with the Sub-Divisional Officer. Learned Counsel for the petitioner has argued that the Board of Revenue has delegated the power to the Assistant Collector/Sub-Divisional Officer on 17-1-1976 to perform the functions of the Collector which are performed by the Collector vide Revenue Board Notification No. 1/1-76(3)-6 dated 17-1-1976, a copy of which is Annexure-6 to the supplementary affidavit. A perusal of this notification goes to show that the Sub-Divisional Officer/Assistant Collector has only been authorised by this notification to conduct the auction proceedings under Section 286 of the Zamindari Abolition and Land Reforms Act subject to the condition that the confirmation of sale shall be done by the Collector. The power of the Collector, when he acts under Section 284 of the Zamindari Abolition and Land Reforms Act has not been conferred upon the Asstt. Collector/ Sub-Divisional Officer by this notification. As seen in the earlier part of this judgment the sale in the present case has taken place under the provisions of Section 284 of the Act and not under Section 286. Therefore this notification dated 17-1-1976 will not apply to the facts of the present case. Moreover, there is another ground on the basis of which it cannot be said that the Assistant Collector/Sub-Divisional Officer has been invested with the power to confirm the sale. The last sentence of the notification dated 17-1-1976 clearly goes to show that the power of conducting sale proceedings under Section 286 of the Act has been conferred upon the Assistant Collector/Sub-Divisional Officer with the condition that the confirmation of sale shall be done by the Collector, it means that only a power to auction the property or conduct the sale has been given to the Assistant Collector/ Sub- Divisonal Officer and not a power to confirm the sale which has been given to the Collector under the provisions of Rule 285-1 of the U.P.Zamindari Abolition and Land Reforms Rules. Therefore this notification does not, in any way, confer powers on the Assistant Collector/Sub-Divisonal Officer, holding the charge of a sub-division, to confirm the sale. Power to confirm the sale still vests with the Collector."

15. The lower appellate court upon analyzation of evidence has found that Sohan Singh who allegedly participated in the auction proceedings and allegedly put a bid for auction has been produced as PW3 and has stated on oath that he neither participated in auction nor gave any bid. Similarly Ram Bahal and Ram Singh, who allegedly made proclamation of impugned auction have been produced as PW2 and PW5 respectively and have stated on oath before the court that they did not conduct any proclamation proceedings. In view of above evidence on record lower appellate court has rightly come to the conclusion that the proceedings of auction were conducted surreptitiously in fraudulent manner (i) without due notice to the plaintiffs, (ii) at a place distant from land in suit which was auctioned (iii) auctioned in camera without due proclamation or bid by general public and (iv) since the auction sale, which could have been confirmed only by Collector as per provisions contained in Rule 285-J of Z.A. Rules, has not been confirmed by Collector, the auction sale proceedings are illegal and are liable to be set aside. In any case even if the S.D.O. had been delegated with powers of confirmation of auction

sale under Rule 285-J of Z.A. Rules, it will not validate the illegal and fraudulent auction proceedings conducted in contravention of procedure prescribed by law.

16. The lower appellate court in its findings in para 16 of impugned judgement has categorically narrated that a sum of Rs.88274/- was due on plaintiffs and Rs.226/- were collection charges total Rs.88500/- which was minimum/ statutory bid and the auction of huge plot of over 13 Bigha area was finalized on highest bid of defendants for same amount, which indicates that no actual auction did take place and auction proceedings were conducted in camera in surreptitious and fraudulent manner.

17. It is pertinent to mention that issue No.9 regarding suit being barred by provisions of Sections 11 of Civil Procedure Code and issue No.10 regarding suit being barred by time, were decided by trial court against the defendants. The impugned auction is alleged to have taken place on 20.05.1986 for setting aside which auction sale, suit has been filed on 16.05.1989, with the contention that plaintiffs got knowledge of auction sale on 03.08.1986 and is well within prescribed period of limitation of 3 years.

18. The lower appellate court has not carved out any new case rather plaintiffs had taken specific plea in para 14 (g) and (h) of plaint about fraudulent proceedings and there is plenty of evidence in support of above allegations which are fully proved from the evidence on record.

19. In view of discussions made above the Court is of the considered view that the auction of land in suit has been conducted (i) without serving the plaintiffs with notices of date of auction, (ii) without due proclamation at a place distant from land auctioned, (iii) in camera and not by public auction without opportunity of bid to persons from general public, (iv) by finishing auction of huge plot of over 13 Bighas on meager amount equivalent to statutory bid of amount which was due and (v) without confirmation by Collector, surreptitiously in secret/ hidden and fraudulent manner against the procedure prescribed under law. U.P. Government delegates several powers of Collector to Deputy Collectors or Assistant Collectors, through notifications from time to time. All such notifications with regard to delegation of powers of confirmation of sale under Rule 285-J of Z.A. Rules were not brought before the Court. Even assuming delegation of such powers to S.D.O./ Deputy Collector under Rule 285-J of Z.A. Rules and presuming him to be competent to confirm auction sale, the impugned auction sale which was conducted surreptitiously in secret/ hidden and fraudulent manner at a place different from the land auctioned, without notices to plaintiffs/ defaulter, even upon confirmation may not be legalized or regularized.

20. In view of discussions made above, the Court is of considered view that the learned counsel for appellants has failed to show any illegality, incorrectness or perversity in findings recorded by lower appellate court. All the 3 substantial questions of law framed in this appeal on 20.08.1998 have no force and are decided against the defendants-appellants in favour of plaintiffs- respondents. The learned counsel for appellants has failed to show any sufficient ground for setting aside impugned judgement and decree or for

interfering with the findings recorded therein.

21. The appeal is devoid of merits and is liable to be dismissed with costs throughout.

22. The appeal is accordingly **dismissed** with costs throughout. The impugned judgement and decree are affirmed.

23. Interim order, if any, stands vacated.

24. Let the lower court record be sent back to court below alongwith the copy of the judgement, after preparation of decree

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(2020)1ILR350

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Government Appeal No. 617 of 1994

State of U.P. ...Appellant
Versus
Indu Uniyal & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Opposite Parties:
Sri Pankaj Srivastava

A. Code of Criminal Procedure, 1973 - Section 378(3) & Indian Penal Code, 1860 - Sections 452, 307, 307 r/w 34 - appeal preferred by the state against order of acquittal- material contradiction- specific identification of weapon did not come out-finding of acquittal in favour of the respondents is affirmed or view taken by the trial court is justified-grant of leave to appeal is refused. (Para 21, 22 & 23)

The injured was a literate man and was head of an educational institution and he, as per his cross- examination, is very much acquainted with the nature and identity of 'gun' and 'revolver' and he categorically stated in his testimony that he can identify these weapons, therefore it means that the weapon used can be specifically identified by him. However, that specific identification has not come out establishing its nature and specification. The graver aspect of the case is that there is material contradiction on the point as to who opened the fire and, on this point, admittedly the testimony of the prosecution witnesses is vacillating and is not certain. (Para 20)

Government Appeal dismissed. (E-6)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J. & Hon'ble Gautam Chowdhary, J.)

(1) Report of the C.J.M.- Saharanpur dated 07.10.2013 reflects that accused- respondent no.1- George Rajesh- died on 15.03.2018.

(2) In view of the report of C.J.M.- Saharanpur dated 07.10.2013, this appeal stands **abated** against **accused- respondent no.1- George Rajesh** and is **dismissed.**

(3) Now, this appeal relates to the surviving **respondent no.1- Indu Unival-** for adjudication.

(4) Heard learned A.G.As for the State- appellant, Sri Pankaj Srivastava, learned counsel for the respondents, perused the impugned judgement of acquittal and record of the appeal.

(5) The instant Government Appeal has been preferred by the State of U.P.

against judgement and order of acquittal dated 25.1.1994 passed by III Additional Sessions Judge, Saharanpur in Sessions Trial No.253 of 1987, under Sections 452, 307, 307 read with 34 I.P.C., police station- Sadar Bazar, district- Saharanpur. By the impugned judgement and order, trial court acquitted both the accused persons under the aforesaid sections of Indian Penal Code.

(6) Relevant facts as discernible from the record giving rise to this appeal appear to be that- Father M.A. Joseph- Principal in Saint Merry Academy Mission Compound, Saharanpur was sitting in front of his table within the campus of Sofia Hindi Medium School (which is within the jurisdiction of Police Station- Sadar Bazar, district- Saharanpur). The electric light was illuminated in the campus of school and the room also. At that point of time, door of the room where the Father M.A. Joseph was sitting, were opened by accused- George Rajesh and Indu Unial- and suddenly accused- George Rajesh opened fire on him (Father M.A. Joseph), as a result of which, he sustained injuries and both the accused are escaped away from the scene.

(7) On hearing the noise of fire and scream of one unknown man, Father Joseph Puthath came out from his room and then he saw the injured M.A. Joseph who was seeped with blood and he was saying to him (Father Joseph Puthath) that fire was opened upon him by the accused. Thereafter, Father M.A. Joseph was taken to the District Hospital, Saharanpur by Father Joseph Puthath on taxi. In the hospital, the injured informed him that fire was made upon him by George Rajesh and accused Indu Uniyal was also present on the spot.

(8) On the written report of informant- Father Joseph Puthath, the case was registered at police station- Sadar Bazar, District- Saharanpur on 2.9.1987 at 9.30 p.m. under Sections 452, 307 of Indian Penal Code.

(9) Thereafter the Investigating Officer carried out the investigation and recorded the statement of informant- Joseph Puthath, witnesses- Martin Stephen, Father M.A. Joseph and others and after completing all necessary formalities filed charge-sheet under Sections 307, 452 IPC.

(10) Thereafter during course of hearing on the point of charge, the court concerned found the case covered under Section 452, 307/34 IPC- for accused Indu Uniyal and under Section 307 IPC- for accused George Rajesh, therefore, the court below committed the case to the Sessions Court, whereupon, accused were heard on the point of charge and charges under Sections 452, 307/34 IPC were framed against aforesaid accused persons, who denied charges and opted for trial.

(11) In order to prove its case, prosecution produced informant- Joseph Puthath (P.W.1), witness Martin Stephan (P.W.2), injured Father M.A. Joseph (P.W.3), I.O. Devraj Singh Bisnoi (P.W.4), S.I. Dr. R.K. Tayal (P.W.5) and R.K. Kashyap (P.W.6). All the aforesaid prosecution witnesses are witnesses of fact/formal witnesses and the eye-witnesses.

(12) Thereafter, evidence for the prosecution was closed and the statement of accused persons were recorded under Section 313 Cr.P.C., wherein, it was submitted that they have been falsely

implicated in this case. They categorically stated in his deposition that at the time of incident, they are in the Mussorrie and they have been challaned in the M.V. Act.

(13) In turn, five witnesses- Smt. Shanti Devi (D.W.1), Baburam (D.W.2), Rakesh (D.W.3), Girdhar Gopal (D.W.4), Kunwar Singh (D.W.5) were produced on the behalf of the defence as defence witnesses.

(14) Thereafter, the evidence for defence was closed and after considering the merit of the case, charges were found not proved beyond reasonable doubt. Resultantly, the trial court returned finding of acquittal against the accused.

(15) Consequently, this Government Appeal.

(16) The learned counsel for the appellant- State- submits that learned trial court has not properly appreciated the evidence for the prosecution and has decided the case only on the basis of conjectures and surmises. He also submits that impugned judgement and order of acquittal of the accused-respondents is not sustainable in the eyes of law and as such the same is liable to be set-aside by this Court.

(17) The contention of learned counsel for the respondents is specific to the ambit that in this case trivial and minor contradictions alone prompted the trial Judge to record specific finding that the injured Father M.A. Joseph was not in a position to identify the weapon used by the appellants at the time of the occurrence and who was the assailant, was also not ascertained by the Father M.A. Joseph and under prevailing facts and circumstances, the attack was infact sudden. How can this finding be sustained in view of specific testimony of Father M.A. Joseph- the injured that he takes and understands word 'gun' to be applicable to both 'revolver' as well as 'gun' and it was never tried to be differentiated from 'revolver'. In general parlance, the 'gun' indicates both- the 'revolver' and the 'gun'. Therefore, the difference cannot be substantiated by claiming that the weapon used in the assault was not properly identified.

(18) The moot point involved for consideration in this appeal is whether the finding of acquittal recorded by the trial court is erroneous and perverse, as alleged by the appellant- State?

(19) We have carefully considered the aforesaid submissions of both the sides as well as perused the impugned judgement/order of acquittal.

(20) We upon careful consideration cannot disagree with the finding of acquittal recorded in favour of the surviving respondent, for specific reasons that the injured was a literate man and was head of an educational institution and he, as per his cross- examination, is very much acquainted with the nature and identity of 'gun' and 'revolver' and he categorically stated in his testimony that he can identify these weapons, therefore it means that the weapon used can be specifically identified by him. However, that specific identification has not come out establishing its nature and specification. The graver aspect of the case is that there is material contradiction on the point as to who opened the fire and on this point, admittedly the testimony of the prosecution witnesses is vacillating and is not certain.

(21) For the reasons aforesaid, we have no doubt in affirming the finding of

acquittal recorded in favour of the respondents.

(22) It is established law that in case of acquittal, the finding recorded, if found to be based on material on record, and the view taken by the trial court is justified although the alternate view is also available, then the view that favours the accused is to be preferred by the Appellate Court. It being so, we have no hesitation in observing that the view adopted by the trial court in recording finding of acquittal is based on material on record.

(23) Consequently, this Government Appeal lacks merit and the same is **dismissed.**

(24) The leave to appeal is hereby refused.

(2020)1ILR 353

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

Habeas Corpus Writ Petition No. 831 OF 2019
with
Habeas Corpus Writ Petition No. 840 of 2019

Shahid Quraishi @ Maimber
...Petitioner(In Detention)
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar

Counsel for the Respondents:
A.G.A., Sri Deepak Mishra, Sri Thakur Azad Singh, Sri Prahlad Kumar Khare

A. National Security Act, 1980 - Section 3(2) & (3) - Detention – Satisfaction - Section 3(2) enables the appropriate government to detain any person if it is satisfied that with a view to prevent such a person from acting in any manner prejudicial to or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, it is necessary to do so. (Para 5)

B. Constitution of India – Article 226 – Writ of Habeas Corpus - Judicial Review - Scope of Satisfaction under National Security Act, 1980 - Satisfaction recorded by the detaining authority in respect of the breach of public order is subjective, but the same is to be based on relevant materials - Once relevant materials are existing, the courts are refrained from examining the legality / propriety of the same - Scope of judicial review in such matters is only confined to examining the existence of relevant materials upon which a person is detained for breaching of public order - Detaining authority and the State Government displayed absolute non-application of mind while issuing and approving the order of detention- Held, detention order cannot be sustained, is liable to be set aside. (Para 6 & 14)

C. National Security Act, 1980 – Cow Slaughtering - Slaughtering and consumption of beef per se, cannot attract the provisions of the National Security Act, 1980, it would be an offence under the provisions of the Cow Slaughter Act. (Para 12)

Habeas Corpus Writ Petition allowed. (E-1)

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

Heard Shri Sunil Kumar, learned counsel for the petitioners, Shri Thakur Azad Singh and Sri Prahlad Kumar Khare, for the Union of India and Shri Deepak Mishra, the learned A.G.A.

These habeas corpus writ petitions have been filed by the petitioners challenging their detentions dated

4.4.2019, under Section 3(2) & (3) of the National Security Act, 1980 by the District Magistrate, Bulandshahar, for a period of 3 months which was extended twice.

1. The grounds of detention dated 4.4.2019 served on the petitioners on 4.4.2019 alleged the following:-

(I) Bulandshahar was a host to a Muslim congregation called, "Tabligi Ijatma" from 1.12.2018 to 3.12.2018 wherein lakhs had come from all over the country for which elaborate security arrangements had been made. The congregation came to an end in the evening of 3.12.2018.

(II) Sri Subodh Kumar Singh, In-charge Inspector, P.S. Sayana on 3.12.2018 at about 10 am received information that remnants of cow's progeny have been found in the jungles of Mahav at the sugarcane fields of Raj Kumar, Pradhan. The In-charge Inspector immediately directed Constable 924 Shubham Saini, at Police Chauki, Chingrawathi to reach the scene as he too would be reaching shortly. On above information, Con. Shubham Saini and Con. 1245 Pradeep Kumar left on motorcycle to the scene who intimated the In-charge Inspector on mobile regarding recovery of the remnants of cows progeny. The Inspector along with force, soon thereafter reached the scene in their official vehicles wherein they came across a large crowd protesting to the recoveries of remnants of cows progeny, communal tension in the air, the Inspector In-charge attempted to assuage the members of the majority community that strict action would be taken against the offenders. One Yogesh Raj alleged to be present at the scene, lodged a report at P.S. Sayana at 12.43 P.M, against Sudaif Chaudhary @ Iliyas, Sharafat, Anas, Sajid, Parvez and Sarfuddin as Case Crime No.582/2018, under Section 3/5/8 of the Cow Slaughter Act and Section 295-A of the IPC.

(III) Large number of persons came from village Mahav on their tractors and trolleys towards Sayana - Bulandshahar Link Road to arrive at Police Chauki, Chingrawathi at 13.35 hrs carrying remnants of the cows progeny in their hands and raising slogans. The crowd turned violent, blocked the road, sought to be countered by public announcements by the police on loudspeakers to clear road as members of the congregation were also returning towards Garh- Amroha - Moradabad and other districts.

(IV) A challenging situation emerged before the administration as on the one hand they had to assuage the feeling of the protestors against cow slaughtering who were indulging in stone pelting, use of fire-arms, sharp weapons and lathi / danda at the police on the other they had to maintain free flow of traffic. The police personnel with a view to save their lives, attempted to hide themselves. Meanwhile, a firearm shot hit one Sunil Kumar and the crowd went beserk. One of the members of the agitated crowd attacked Inspector In-charge Subodh Kumar Singh with an axe, assaulted him with lathi / dandas, followed by fire-arm shots as a result of which he sustained grievous injuries. His licenced pistol and 3 mobile phones were snatched. The crowd also damaged the property of Police Chauki Chingrawathi by damaging wireless sets including the other properties, being set on fire. The

road was littered with shoes and chappals and people running helter - skelter. The private vehicles were also set on fire. The mob did not even spare the Circle Officer who ran for his life inside the premises of Police Chauki Sayana but the mob forcibly entered the room shouting that he be also not spared. The Police Chauki, Sayana was also set on fire. Large number of persons suffered injuries, an atmosphere of fear had developed, nearby Girls school was closed as also doors of the neighbouring houses. The injured Inspector Subodh Kumar Singh was taken to C.H.C., Lakhawati, where he was declared brought dead. On above allegations, an FIR as Case Crime No.583/2018, under Section 147/148/149/124-A/ 332/ 333/ 353/ 341/ 336/ 307/ 302/ 427/ 436/ 395 IPC, 7 of the Criminal Law Amendment Act and ¾ of the Prevention of Damage to Public Property Act was registered against 27 named and 50-60 unnamed accused on 4.12.2018 at 2.51 P.M.

(V) On 4.12.2018 at about 8 AM at village Nayabans, P.S. Sayana, remnants of a dead cow were recovered from the sugarcane fields of one Sheeshpal which on forensic examination, was found to be of cow's progeny, in respect of which an FIR as Case Crime No.584/2018, under Section 3/5/8 of the Cow Slaughter Act was registered against unknown.

(VI)

(a) During investigation of Case Crime no. 582 of 2018, 3 accused namely Nadim @ Nadimuddin, Raees and Kala Qureshi were arrested. They jointly and voluntarily stated that they along with one Haroon and others, on the night of 1.12.2018 and 2/3.12.2018 had slaughtered 1 and 3 progencies of cow in the jungles of Nayabans & Mahav and had carried its meat in their vehicle.

(b) On 5.12.2018, accused Sajid, Sarfuddin, Banne Khan and Asif Khan came to be arrested in Case Crime No.582/2018. During investigation, it transpired that informant Yogesh Raj falsely implicated 7 named accused and two others, namely, Banne Khan and Asif in view of ongoing dispute with the local matter relating to the use of loudspeaker in a Masjid. All the accused stood exonerated.

(c) Yunus @ Bol and Gulfam came to be arrested on 23.12.2018 and 26.12.2018 respectively. They also confessed that on the intervening night of 2/3.12.2018, they were present at the jungles of Mahav along with their accomplices Nadeem @ Nadimuddin, Raees, Kala Qureshi, Haroon and others, had slaughtered 3 prohibited progenies, meat distributed amongst them and remaining meat was handed over to Haroon while the left over remnants were left at the scene. They also confessed that on the intervening of 1.12.2018 a cow was slaughtered, meat taken, remnants left at the scene. Gulfam also stated that accused Haroon is aware of the names of other accused.

(d) On 29.12.2018, co-accused Haroon came to be arrested in an open jeep with DBBL guns and cartridges. He confessed that the jeep belongs to one Mehboob Ali. He further confessed his involvement along with Nadeem @ Nadimuddin, Kala Qureshi, Raees, Azhar, Gulfam, Yunus @ Bol, Rashid Qureshi and petitioners (real brothers) of slaughtering of prohibited progenies in the jungles of Nayabans on the night of 1.12.2018 and on the intervening

night of 2/3.12.2018 in the jungles of Mahav, animals skinned, meat distributed amongst themselves, left over meat was given to Shahid Maimber (petitioner) who was running a camp for the attendees of the congregation.

(e) Petitioner- Imran Quershi surrendered before the court on 1.4.2019. He alleged that hunting is his hobby, in which he along with his brother-Shahid Qureshi (co-petitioner), Raees, Nadeem @ Nadimuddin, Rashid, Haroon, Mehboob Ali, Kala Qureshi, Azhar, Yunus @ Bol and Gulfam, often indulged in hunting for cows at night, thereafter meat sold in the market. He also confessed that on the night of 2.12.2018, he along with his brother Shahid, Rashid and Mehboob Ali remained in the tents of Sanskar Farm House for hosting the attendees of cogregation, rest accused went for hunting. At about 2-3 A.M, on 3.12.2018, other accused returned at the farm house with prohibited progenies, wherein they chopped the meat with the help of knives in order to serve as "keema" & "biryani" to the guests. Shahid (co-petitioner) also made a similar confessional statement.

(VII) The grounds finally alleged that although the petitioners had no previous criminal history, but in view of their confessional statements that they did indulge in cow slaughtering in an organized and clandestine manner, deeply hurting the religious sentiments of the majority community. The LIU also alleged in its reports dated 9.12.2018, 10.1.2019 and 25.2.2019 that the incident dated 3.12.2018 was a fall out of the alleged slaughtering on 2/3.12.2018.

2. The petitioners preferred representation against their detentions dated 4.4.2019 on 16.4.2019 before the State Government through the Jail Superintendent, which came to be rejected by the State Government on 1.5.2019. The last extension is dated 1.10.2019, i.e., for 9 months from the order of detention dated 4.4.2019.

3. Learned counsel for the petitioners assailed the detention order on the following grounds-

i)The detention suffers from the vice of non-application of mind as the only material against the petitioners is the confessional statements, which too indicates that they were not present at the time of slaughtering as they were only alleged to have served the prohibited meat to the attendees of the congregation (members of the minority community) in the camp of Shahid Member (co-petitioner) at Sanskar Farm House.

ii) Petitioners are only alleged to be involved in Case Crime no. 582 of 2018. They are neither accused nor suspects in Case Crime no.s 583 and 584, both of 2018 yet the detaining authority considered the cumulative effect of all 3 cases, while passing the detention order which also displays non-application of mind.

4. Learned A.G.A opposed the submissions on the ground that the mode and manner of the occurrence indicates that it was a well organized activity as the petitioners' often indulged in cow slaughtering which coincided with the conclusion of the conclave with a view to disturb public order so as to incite communal passion / feelings. He further submitted that once detention is based on relevant considerations, detention being a matter of subjective satisfaction, is not open to judicial review.

5. Section 3(2) of the National Security Act, 1980 enables the appropriate government to detain any person if it is satisfied that with a view to prevent such a person from acting in any manner prejudicial to or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, it is necessary to do so, make an order directing that such person be detained.

6. It is well settled that the satisfaction recorded by the detaining authority in respect of the breach of public order is subjective, but the same is to be based on relevant materials. Once relevant materials are existing, the courts are refrained from examining the legality / propriety of the same. Thus, the scope of judicial review in such matters is only confined to examining the existence of relevant materials upon which a person is detained for breaching of public order.

7. The detention order refers to three FIR's as Case Crime Nos. 582; 583 & 584 all of 2018. The petitioners are neither named accused in Case Crime No.583 & 584, both of 2018 nor the I.O's of Case Crime Nos.583 & 584 ever obtained any statement of the petitioners nor till date any charge-sheet has been submitted against them. Thus, the detention of the petitioners is based only on Case Crime No.582/2018.

8. The FIR in Case Crime No.582/2018 lodged by one Yogesh Raj against 7 named accused, namely, Sudaif Chaudhary, Ilyas, Sharaful, Anas, Sajid, Parvez & Sarfuddin, alleged that the said accused were slaughtering cows on 3.12.2018 at 9 AM in the jungles of village Mahav. During investigation, names of all the 7 accused came to be exonerated as their false implication was established in view of previous animosity of the informant with the Maulvi of a local Masjid over use of loudspeakers. On 18.12.2018, one Nadeem @ Nadeemuddin, Raees & Kala Qureshi were arrested from whom certain recoveries of DBBL gun, gandasa, knife and a wooden chopping board was made. They confessed that they along with co-accused Haroon had slaughtered a cow in the night of 1.12.2018 in the jungle of Nayabans, remains thrown in the sugarcane field as also the slaughtering of 3 cows on the intervening night of 2.12.2018 in the jungles of Mahav of which the meat was taken by them. Thus, even the 3 arrested accused, namely, Nadeem @ Nadeemuddin, Raees and Kala Qureshi were not implicating the petitioners. Co-accused Yunus @ Bol and Gulfam came to be arrested on 23.12.2018 and 26.12.2018 respectively. They also confirmed the participation of Nadeem @ Nadeemuddin and Haroon in the alleged occurrence dated 2/3.12.2018 (night). These two accused, i.e., Yunus @ Bol and Gulfam also did not disclose the involvement of the petitioners. On 29.12.2018, accused Haroon came to be arrested in an open jeep. He confessed that the jeep belongs to one Mehboob Ali and admitted his involvement along with petitioners, Nadeem, Yunus @ Bol, Rashid, Raees and others in respect of occurrence in the night of 1.12.2018 in the village of Nayabans and that of 2/3.12.2018 in the village of Mahav as they were fond of hunting; meat was distributed amongst them and the rest was given to the petitioners.

9. A perusal of the confessional statement of accused Haroon as alleged in para-11 of the grounds of detention,

nowhere alleges that the petitioners were physically present at the time of alleged slaughtering on the night of 1.12.2018 at the jungles of village Nayabans or on the night of 2.12.2018 at the jungles of village Mahav. On the contrary, it only alleges that the meat of the prohibited progeny after having been distributed between them, rest was handed over to petitioners.

10. The petitioners in their confessional statements admitted that the prohibited meat was handed over to them by Raees, Nadeem, Haroon, Kala, Azhar, Yunus @ Bol and Gulfam which after cooking were served as "keema" and "briyani" to the attendees of the conclave in the tent of co-petitioner Shahid Member installed at Sanskar Farm House.

11. There is no material to indicate that the petitioners were either physically present at the time of slaughtering on the intervening night of 2/3.12.2018 at the jungles of village Mahav. On the contrary, the only material against the petitioners is the confessional statement of accused Haroon, indicating that the left over meat was given to the petitioners which after cooking was served by them to the guests of the conclave (exclusively belonging to the members of the minority community) in a camp installed by Shahid Member (co-petitioner) at Sanskar Farm House. The material nowhere indicates that while the prohibited meat was being served, any member of the majority community was present who could claim to be a witness to the serving of the prohibited meat. The alleged disruption of public order on 3.12.2018 was only subsequent to the recovery of the remnants of the cow's progeny in the jungles of village Mahav, resulting in the loss of 2 lives one that of Inspector In-charge Subodh Kumar Singh and the other of one Sunil Kumar along with damage to public property in Case Crime No.583/2018. It is not the case set up in the grounds of detention that the disruption of public order on 3.12.2018 was on account of the prohibited meat being served to the guests of the conclave as at that point of time, no one had any inkling other than the guests that the meat which was served belonged to the prohibited category which came to be known only after the confessional statements of petitioners which recorded after more than 4 months of the alleged occurrence.

12. Slaughtering and consumption of beef per se, cannot attract the provisions of the National Security Act, 1980, it would be an offence under the provisions of the Cow Slaughter Act.

13. The resulting scenario from the above discussion is as under:

(i) There is no material on record to remotely suggest / infer that the petitioner was physically present at the jungles of Mahav at the time of slaughtering:

(ii) The only role assigned to the petitioners is that after they were handed over the left over meat, same was cooked and served as "keema" and "biryani" in an enclosed tent at Sanskar Farm House which was restricted to the members of the minority community only.

(iii) The petitioners have no concern with Case Crime Nos. 583 & 584, both of 2018.

(iv) Once the name of the petitioners surfaced in Case Crime No.582 of 2018 on the basis of extra judicial confession of accused Haroon as well as the petitioners indicting the petitioners of

serving prohibited meat to the members of the congregation (minority community alone) in a tent installed at Sanskar Farm House, yet the detaining authority cumulatively considers the impact of Case Crime Nos. 583 & 584, both of 2018 while passing the orders of detention, displays absolute non-application of mind.

(v) The alleged disturbance of public order on 3.12.2018, resulting in an unfortunate death of Inspector In-charge Subodh Kumar and one Sunil Kumar is not attributable to petitioners as the same was a sequel to the information disclosed by one Yogesh Raj, an informant of Case Crime No. 582 of 2018, who claimed to be a witness of slaughtering of 6 cows by 7 named accused, who stood exonerated.

14. We, in the light of above discussion, are of the considered view that the detaining authority and the State Government displayed absolute non-application of mind while issuing and approving the order of detention. Consequently, the order dated 4.4.2019 cannot be sustained, is liable to be set aside and the petitioners be set at liberty forthwith.

15. The Habeas Corpus Writ Petitions are **allowed.** The impugned order dated 4.4.2019 is quashed. The petitioners are set at liberty forthwith unless detained in any other case.

(2020)1ILR 359

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.12.2019

BEFORE
THE HON'BLE IRSHAD ALI, J.

Habeas Corpus No. 38173 of 2018

Master Vaibhav Shukla(Minor) **...Petitioner**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
R.B.S. Rathaur, Indra Prakash Singh

Counsel for the Respondents:
G.A., Rahul Singh 'Rana'

A. Constitution of India – Article 226 – Writ of Habeas Corpus - Custody of minor child - Paramount consideration is the welfare of the minor and not the legal right of this or that particular party - In the habeas corpus petition, the custody of the minor child is to be taken care of - Only in exceptional situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband – Held, the custody of the child is in right hands of biological mother, who is managing affairs by running a beauty parlour to provide comfort, health, education and other developments of the child required for future developments, rather in the hands of the grandmother, who is aged about 72 years (Para 16, 18, 23 and 24)

Habeas Corpus Writ Petition dismissed. (E-1)

List of cases cited :-

1. Dr. Mrs. Veena Kapoor Vs. Varinder Kumar Kapoor; AIR 1982 SC 792

2. Nithya Anand Raghavan Vs. State (NCT of Delhi) & Another; (2017) 8 SCC 454

3. Tejaswini Gaud & Others Vs. Shekhar Jagdish Prasad Tewari & Others; (2019) 7 SCC 42

(Delivered by Hon'ble Irshad Ali, J.)

(1) Heard learned counsel for the petitioner, learned A.G.A. for the State and learned counsel for the respondent No.3.

(2) Present writ petition under Article 226 of the Constitution of India has been filed for issuance of a writ in the nature of habeas corpus directing respondents to produce the petitioner Vaibhav Shukla before this Court, set him at liberty and allow him to go and live with his grandparents.

(3) For adjudication of the controversy, it is necessary to narrate some facts in brief. From the pleadings on record, it transpires that the deponent Smt. Sushma Shukla who is the grandmother of the petitioner Vaibhav Shukla had two sons - Gaurav Shukla and Gagan Shukla. Ganga Shukla was married to Nisha Shukla, respondent No.3. The petitioner was born from the wedlock on 19.9.2014. It has been pleaded that late Gagan Shukla had earlier married with Shweta Shukla in the year 2002 and a daughter Nitya Shukla was born in the year 2005. As Gagan Shukla did not have good terms with the deponent, he along with opposite party No.3 was residing separately with the deponent.

Gagan Shukla succumbed to the injuries caused in a road accident on 20.7.2018. For sometime, respondent No.3 lived with the petitioner in the house where Smt. Sushma Shukla was residing, however, it appears that due to strained relationship, the respondent No.3 shifted to another residence owned by the deponent. The child was got admitted by the deponent in a school "Kidzee", Amrishpuri Colony, Raebareli where he has been studying.

It has further been stated that due to the harassment meted out at the hands of respondent No.3, the husband of the deponent filed a writ petition No.4825(M/B) of 2015 titled "Brijesh Shukla versus The State of U.P. and others" before this Court with the prayer for issuance of a writ of mandamus directing the respondent State to provide security to him. The writ petition was finally disposed of vide order dated 2.12.2015 passed by this Court.

It has also been pleaded in the petition that one Raj Kumar Singh alias Munna had illicit relations with respondent No.3. The said Raj Kumar Singh is a life convict in Sessions Trial No.294 of 1995 under Section 326 I.P.C. Raj Kumar Singh has been enlarged on bail in a criminal appeal filed before this Court.

Supplementing the pleadings, it has been stated that due to the strained relations and the atrocities being made by the opposite party No.3, the deponent and her husband severed all the ties with Gagan Shukla (deceased). Mother of the petitioner has opened a Beauty Parlour at ground floor of the residence owned by the deponent at M-3, Amrishpuri Colony, Kanpur Road, Raebareli. The opposite party No.3 and her parents have ill motive to usurp the property of the deponent and by one way or the other has been harassing the deponent and her husband.

The deponent and her husband had already invested considerable money in favour of the petitioner. The future of the petitioner is not safe with mother.

(4) A counter affidavit has been filed by Smt. Nisha Shukla, opposite party No.3. It has been stated that the child has been residing with her and is leading a good and healthy life. The child has never met his grandparents. Relationship with Raj Kumar Singh has also been denied by the deponent of the counter affidavit. Lastly, it has been prayed that the petition be dismissed.

(5) Rejoinder affidavit filed by the petitioner almost reiterates the averments made in the writ petition.

(6) Submission of learned counsel for the petitioner is that Master Vaibhav Shukla has been detained by the mother Smt. Nisha Shukla W/o Late Gagan Shukla (respondent No.3), who was having no good relations with her husband, therefore, the custody of the minor child Master Vaibhav Shukla be handed over to the grand mother Smt. Sushma Shukla. He further submits that in the habeas corpus petition, the welfare of the minor child is the relevant factor to be considered by considering the custody of the child. The grand mother is not an outsider, therefore, for the welfare of the child, the custody should be handed over to the grand mother.

(7) In support of his submission, learned counsel for the petitioner placed reliance upon certain judgments of the Hon'ble Supreme Court, which are as under :-

(i) Dr. Mrs. Veena Kapoor Vs. Varinder Kumar Kapoor; AIR 1982 SUPREME COURT 792

(ii) Nithya Anand Raghavan Vs. State (NCT of Delhi) & Another; (2017) 8 SCC 454

(iii) Tejaswini Gaud & Others Vs. Shekhar Jagdish Prasad Tewari & Others; (2019) 7 SCC 42

(8) On the other hand, learned A.G.A. and learned counsel for respondent No.3 submitted that the respondent No.3 is the biological mother and the custody of the child is in right hands, therefore, the welfare of the child is in the hands of respondent No.3. They further submitted that the grand mother is aged about 72 years and is not able to look after the affairs of the minor child Master Vaibhav Shukla in correct prospective. It is the submission that the judgments relied upon by learned counsel for the petitioner are distinguishable on the facts and circumstances of the present case.

(9) After having heard the rival contention of learned counsel for the parties, I perused the material on record as well as the judgments relied upon by learned counsel for the petitioner.

(10) On perusal of the material on record, it is transpired that Smt. Sushma Shukla, who is the grand mother of Master Vaibhav Shukla has two sons namely, Gaurav Shukla and Gagan Shukla. Ganga Shukla was married to Nisha Shukla, respondent No.3. The petitioner was born from the wedlock on 19.9.2014. Gagan Shukla, due to road accident, died on 20.7.2018. The minor child Vaibhav Shukla is now residing along with the biological mother (respondent No.3). Master Vaibhav Shukla is pursuing his studies in a school "Kidzee", Amrishpuri Colony, Raebareli.

(11) Certain allegations have also been levelled against the respondent No.3 in regard to the illicit relationship with one Raj Kumar Singh, who is life convict and on bail in the appeal filed before this Court.

(12) The respondent No.3 has opened a beauty parlour and with the income, is managing the day to day affairs of her life including providing better education to Master Vaibhav Shukla.

(13) It appears that there are some investments in the name of Master Vaibhav Shukla, which causes dispute in filing the present petition before this Court.

(14) On perusal of the material on record, it is reflected that child has been residing with the respondent No.3 and leading a good and healthy life and the relationship with Raj Kumar Singh has also been denied by the respondent No.3.

(15) In regard to the judgment relied upon by learned counsel for the petitioner in the case of **Dr. Mrs. Veena Kapoor** (Supra), the relevant is paragraph 2, which is being quoted below :-

"2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal."

(16) On its perusal, it is reflected that the Hon'ble Supreme Court while dealing with the matter, has held that it is well settled that in matters concerning the custody of minor child, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. Here in the present case, the biological mother (respondent No.3) is running a beauty parlour and is younger than the grand mother and the child is pursuing studies under the guradianship of respondent No.3 by the income of beauty parlour, which is run and managed by the biological mother.

In view of the above, custody of the minor child is safe in the custody of respondent No.3 and not in the hands of the grand mother.

(17) In regard to the another judgment relied upon by learned counsel for the petitioner in the case of **Nithya Anand Raghavan** (Supra), the relevant is paragraph 47, which is being quoted below :-

"In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

(18) On perusal of the above referred judgment, it is reflected that in the habeas corpus petition, the custody of the minor child is to be taken care of and only in exceptional situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband. It has further been held that in exercise of writ jurisdiction, instead the other parent can be asked to resort to a substantive remedy for getting the custody of the child.

(19) Here it is undisputed fact that the child is in the custody of the biological mother (respondent No.3) and the minor

child is pursuing his studies in an institution of District Raebareli and in case, the custody of the child is claimed in the present petition from the biological mother, the welfare of the child will be highly affected.

(20) In the opinion of the Court, the respondent No.3 by running a beauty parlour is managing her affairs as well as expenditure of studies of her minor child, therefore, the welfare of the child is in the hands of respondent No.3 and not in the hands of the grand mother, who is aged about 72 years, therefore, the judgment relied upon by the learned counsel for the petitioner does not help in any manner.

(21) The last judgment, which has been relied is in the case of **Tejaswini Gaud & Others** (Supra), the relevant are paragraphs 19, 20, 26 and 27, which are being quoted below :-

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

27. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should

be given to child's ordinary comfort, contentment, health, 8 Lahari Sakhamuri v. Sobhan Kodali 2019 (5) SCALE 97 education, intellectual development and favourable surroundings, in Nil Ratan Kundu9, it was held as under:-

"49. In Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148 the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315 the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In Kamla Devi v. State of H.P. AIR 1987 HP 34 the Court observed:

"13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other." 9 Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

(22) On its perusal, it is well established that in a habeas corpus petition, for custody of the minor child, the considerable point was that whether detention by parents or others is illegal or without authority of law, wherein detention of a minor by a person, who is not entitled to his legal custody was held to be illegal detention and was in regard to the claim setup by a father of a girl child against sister of the mother, who had died due to illness. The above referred judgment is distinguishable and does not attract to the present facts and circumstances of the case.

(23) Here in the present case, the grand mother who is aged about 72 years is claiming custody of the minor child from the biological mother, who is managing affairs by running a beauty parlour to provide comfort, health, education and other developments of the child required for future developments.

(24) In the opinion of the Court, the custody of the child is in right hands and does not require any interference in the present habeas corpus petition.

(25) In view of the observation made above, there is no merit in the present habeas corpus petition and the same is hereby **dismissed.**

(26) However, it is provided that in case the grand mother of the minor child Master Vaibhav Shukla wants to meet her grand son, the respondent No.3 shall permit and provide adequate atmosphere to meet her grand son on 3rd Sunday of every month and will not create any hindrance in the meeting.

(2020)1ILR 366

ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 21.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Misc. Single No. 1540 of 2020

Vipin Kumar ...Petitioner
Versus
D.J. Gonda & Ors. ...Respondents

Counsel for the Petitioner:
Madan Gopal Tripathi, Amit Kumar Singh, Atma Ram Verma

Counsel for the Respondents:

A. Code of Civil Procedure, 1908 - Order 6 Rule 17 - Additional Statement filed by Respondent no.1 after filing of joint Written statement of Respondent no.1 and 2 -due to changed circumstances-accepted by the Civil Judge-order of Civil Judge challenged-An application u/order 6 Rule 17 can be moved at any stage of proceedings-to bring evidences which were not within the knowledge of the parties-when pleadings were filed.

Held, it is clearly borne out that application under Order 6 Rule 17 CPC can be moved at any stage of the proceedings, only such evidence can be brought on record which are not within the knowledge of the parties at the time when the pleadings were filed. (Para 14)

Writ Petition dismissed. (E-9)

Cases cited: -

1. Estralla Rubber Vs. Dass Estate (P) Ltd, (2001) 8 Supreme Court Cases 97

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

1. At the very outset learned counsel for the petitioner prays for deletion of respondents No.1 and 2. The prayer is allowed and the parties are renumbered

and respondent No.s 3 and 4 be read as respondent No.1 and 2.

2. Heard Sri M. G. Tripathi, learned counsel for the petitioner.

3. In the light of the proposed order notice to respondents is dispensed with.

4. Petitioner has approached this court challenging the order dated 23.10.2019 passed by District Judge, Gonda in Civil Revision No.20 of 2019 wherein the challenge was made by the petitioner to the order of Civil Judge (Senior Division) dated 11.3.2019 thereby rejecting the objection against the application for taking on record the written statement filed by respondent No.1.

5. The facts in brief of the present controversy are that petitioner and respondent No.2 are real brothers as father of petitioner and respondent No.2, namely, Kishori Lal son of Rameshwar Prasad was married with one namely Smt. Cheelha Devi and out of the said wedlock three sons, namely, Ram Khelawan, Shyam Lal and Chhottan Lal were born. After the demise of Smt. Cheelha Devi Sri Kishori Lal again married with Chhammi Devi and out of the said wedlock two sons namely Krishna Gopal and Harihar were born. It has further been submitted that the sons born out of the wedlock of Smt. Cheelha Devi settled themselves in the life time of Kishori Lal and further that one son, namely, Krishna Gopal passed away during life time of Kishori Lal. The father of the petitioner divided the share of not only the petitioner, opposite party No.2 and other brothers by means of a will deed executed by father of the petitioner.

6. It has further been submitted that father of the petitioner executed another will deed on 20.1.1982 jointly in favour of the petitioner, opposite party No.2 and Smt. Chhammi Devi (mother of the petitioner) providing only usefructory rights to the mother of the petitioner and, a such, she was not entitled to transfer her share. It has further been submitted that Smt. Chhammi Devi had herself executed a will deed in favour of the petitioner and opposite party No.2. The controversy in the present case has arisen out of the fact that opposite party No.2 got an agreement executed on 20.7.1988 by Smt. Chhammi Devi-his mother in his favour. All these facts was never disclosed to the petitioner. Petitioner on coming to know of the said agreement dated 20.7.1988 filed a suit bearing No.472 of 2004. On receiving summons opposite party No.s 1 and 2 jointly filed written statement on 20.12.2005 in opposition to the suit filed by the petitioner.

7. Opposite party No.1 subsequently moved an application seeking leave of the court to file additional written statement in January, 2016 against which petitioner has filed his objection along with an affidavit on 28.9.2016. The objections of the petitioner were that the only reason behind moving additional written statement was only to prolong the matter and keeping the same pending. In the meanwhile, the petitioner also approached this Court by filing a writ petition seeking direction from this Court for expeditious decision of the suit and by means of the order dated 21.1.2019 this Court directed the trial court to make an earnest endeavor to decide the suit within a period of one year if there is no other legal impediment. The application for filing of the additional written statement was considered by the Civil Judge (Senor Division), Gonda and by means of the order dated 11.3.2019 the same was allowed. The application

preferred by the respondents had stated that the earlier written statement was filed when both of them were on good terms and relationship and subsequently, the relations got sour. There was material change in the circumstances which necessitated filing of the aforesaid additional written statement. All these grounds was duly accepted by the Civil Judge (Senior Division), Gonda and the additional statement was taken on record.

8. The petitioner being aggrieved by the order dated 11.3.2019 preferred a revision before learned District Judge which was registered as Revision No.20 of 2019. Before the District Judge, the petitioner canvased all his grievance and submitted that as per the provisions of Order 6, Rule 17 of CPC at such advanced stage of proceedings application for taking additional written statement could not be allowed.

9. While rejecting the revision filed by the petitioner learned District Judge has taken notice of this fact that the relationship between respondent No.1 and 2 has changed materially. When earlier written statement was filed by respondent No.s 1 and 2 they were living jointly and subsequently their relationship became strained, therefore, to protect their interest it was necessary for respondent No.1 to file additional statement and these developments having come into existence subsequent to filing the first written statement and it was necessary to bring this affidavit on record. The petitioner being aggrieved by the acceptance of additional written submissions has preferred the instant writ petition.

10. To decide this controversy it is relevant to go through the provisions of Order 6 Rule 17 of CPC amended which reads as under:-

"17. Amendment of pleadings- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendment shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

11. A perusal of the said provision clearly indicate that the court at any stage of the proceedings can allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of of determining the real questions in controversy between the parties.

12. The proviso provides that any application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

13. It will be relevant to consider the judgment of Hon'ble Supreme Court in the case of ***Estralla Rubber Vs. Dass Estate (P) Ltd, (2001) 8 Supreme Court Cases 97*** in which in para 8 it has been held as under:-

"It is fairly settled in law that the amendment of pleadings under Order 6, Rule 17 is to be allowed if such

"It is fairly settled in law that the amendment of pleadings under Order 6,

Rule 17 is to be allowed if such an amendment is required for proper and effective adjudication of controversy between the parties and to avoid multiplicity of judicial proceedings, subject to certain conditions such as allowing amendment should not result in injustice to the other side; normally a clear admission made conferring certain right on a plaintiff is not allowed to be withdrawn by way of amendment by a defendant resulting in prejudice to such a right of plaintiff, depending on facts and circumstances of a given case. In certain situations a time barred claim cannot be allowed to be raised by proposing an amendment to take away valuable accrued right of a party. However, mere delay in making an amendment application itself is not enough to refuse amendment, as the delay can be compensated in terms of money. Amendment is to be allowed when it does not cost serious prejudice to the opposite side. This Court in recent judgment in B.K. Narayana Pillai vs. Parameswaran Pillai and another [(2000) 1 SCC 712], after referring to number of decisions, in para 3 has stated, thus: -

"3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just.

The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hyper technical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation."

In para 4 of the same judgment this Court has quoted the following passage from the judgment in A.K. Gupta and Sons Ltd. Vs. Damodar Vally Corporation [1966 (1) SCR 796]: -

"The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: Weldon v. Neal [(1887) 19 QBD 394 : 56 LJ QB 621]. But it is also well recognized that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: See Charan Das v. Amir Khan [AIR 1921 PC 50 : ILR 48 Cal 110] and L.J. Leach and Co. Ltd. V.

Jardine Skinner and Co. [AIR 1957 SC 357 :

1957 SCR 438]."

This Court in the same judgment further observed that the principles applicable to the amendment of the plaint are equally applicable to the amendment of the written statement and that the courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event. It is further stated that the defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment

the other side should not be subjected to serious injustice and that any admission made in favour of the plaintiff conferring right on him is not withdrawn."

14. In the light of the above discussions it is clearly borne out that application under Order 6 Rule 17 CPC can be moved at any stage of the proceedings, only such evidence can be brought on record which are not within the knowledge of the parties at the time when the pleadings were filed. It is needless to say that first written statement was brought on record when the said relationship between respondent No.1 and 2, who had jointly filed the same, was quite good, but subsequently the relationship having become strained which was a subsequent development and this fact not having been denied by the petitioner, it cannot be said that this fact could have been brought on record at an earlier point of time.

15. In view of the observations in the above mentioned judgment of Hon'ble Supreme Court and the discussions made hereinabove, there is no error in exercise of the discretion in accepting the written statement by the Civil Judge (Senior Division), Gonda, who has considered all the facts and circumstances necessary in allowing the application. The District Judge has also considered all these circumstances and arguments raised by the petitioner and no infirmity could be pointed out in any of the facts or points decided by him. I do not find any infirmity in the order of learned District Judge. The petition is without merits and is hereby dismissed.

16. Needles to say that after acceptance of the additional written statement, learned Civil Judge (Senior Division), Gonda shall proceed to decide the revision expeditiously and shall make earnest endeavor to decide the same within a period of one year from the date a certified copy of this order is placed before him, if there is no other legal impediment.

17. The petition is **dismissed.**

(2020)1ILR 368

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.01.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Misc. Single No. 3225 of 2008
connected with
Misc. Single No. 3271 of 2008 and Misc Single No. 3272 of 2008

M/S Ganesh Grain Store ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shafiq Mirza

Counsel for the Respondents:
C.S.C., N.C. Mehrotra

A. U.P. Krishi Utpadan Mandi Samiti Act, 1964 - Section 32 - Power of Revision delegated to Director-Revision preferred to Director-transferred to Deputy Director-Power of Revision when delegated to Director-it become a function to be performed by him-therefore, Director can authorize any officer to perform his functions including delegated powers u/s 32.

Held, The power of Revision when delegated to Director by virtue of Section 33 becomes a function to be performed by Director under Act, 1964 and, therefore, Director can authorize any other Officer to perform all or any of his functions under Act, 1964 which includes

delegated powers to be performed by Director under Section 32 of Act, 1964. In view thereof I find myself unable to accept the contention of learned counsel for petitioners that power exercised by Deputy Director in deciding Revision is bad in law as he had no jurisdiction to decide Revision and Director had no power to authorize Deputy Director to decide Revision. (Para 35)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Heinz India Private Limited and another Vs. State of U.P. and others (2012) 5 SCC 443

2. Barium Chemicals Limited and another Vs. The Co. Law Board and another AIR 1967 SC 295

3.Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. Vs. The Assistant Commissioner of Sales Tax and others (1974) 4 13 SCC 98

4. Director General, E.S.I. and another Vs. T. Abdul Razak, etc. (1996) 4 SCC 708

5.Ravinder Kumar Pal and others Vs. Nideshak, Karmchari Rajya Beema Sharam Chikitsalay and others-Writ Petition (Writ-A) No. 786 of 1995

6.Director General, E.S.I. and another Vs. T. Abdul Razak AIR 1996 SC 2292

7. Jamal Uddin Ahmad Vs. Abu Saleh Najmuddin and another (2003) 4 SCC 257

8. NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and others (2005) 8 SCC 219

9. Sidhartha Sarawgi Vs. Board of Trustees for the Port of Kolkata and others (2014) 16 SCC 248

10. Union of India Vs. B.V. Gopinath and others (2014) 1 SCC 351

(Delivered by Hon'ble Sudhir Agarwal, J)

1. Heard Sri Shafiq Mirza, Advocate, for petitioner; and, learned Standing Counsel and Sri N.C. Mehrotra, Advocate, for respondents in all these writ petitions.

2. Petitioner in Writ Petition No. 3225 of 2008 (hereinafter referred to as "WP-1"), M/s. Ganesh Grain Store, Raniganj Bazar, Ballia has filed WP-1 under Article 226 of Constitution praying for issue of a writ of certiorari and quash order dated 31.03.2008 (Annexure-6 to WP-1) passed by Sri R.K. Arya, Deputy Director (Administration), Krishi Utpadan Mandi Samiti, Varanasi dismissing petitioner's Revision No. 993 of 2007 submitted under Section 32 of U.P. Krishi Utpadan Mandi Samiti Act, 1964 (hereinafter referred to as "Act, 1964"). Petitioner has also prayed for a writ of certiorari to quash order dated 14.09.2007 (Annexure-9 to WP-1) issued by Additional Legal Adviser informing Regional Deputy Director, Mandi Samiti, Varanasi that vide order dated 13.08.1999 he has been authorized to decide Revision under Section 32 of Act, 1964. Petitioner has also prayed for a writ of mandamus commanding respondent-1 to exercise its power under Section 33B of Act, 1964 and also prayed that Section 20 of Act, 1964 be declared ultra vires and unconstitutional.

3. Facts in brief, giving rise to WP-1, are that vide Government Order dated 24.12.2001 (Annexure-1 to WP-1) two per cent exemption in Mandi Fee and half percent rebate in Development Cess was granted, besides two per cent concession in Trade Tax. Petitioner conducted business in the Financial Years (hereinafter referred to as "F.Y.") 2003-04, 2004-05, 2005-06. The exemption aforesaid was granted for the F.Y. 2001 to 2006. Therefore, with the end of scheme, petitioner's business also stood closed.

However, petitioner received a letter dated 30.04.2007 issued by Mandi Samiti, Ballia (respondent-5), raising demand of Rs. 10,22,622.90 stating that petitioner did not deposit the bill of loading/shipment H Form Second Copy and, therefore it was liable to pay the aforesaid amount. A reminder demand notice dated 22.05.2007 directing petitioner to deposit the aforesaid amount was also received. Thereafter, petitioner filed Revision against the aforesaid orders before Director, Mandi Samiti vide memo of Revision dated 31.07.2007. Before filing Revision, petitioner filed Writ Petition before this Court challenging demand notice in which an interim order was also passed but when petitioner availed statutory remedy of Revision, Writ Petition (MB) No. 6858 of 2007 was dismissed vide judgment dated 17.09.2007 with a direction to competent authority to decide Revision within a period of one month from the date of receipt of certified copy. Consequently, impugned revisional order has been passed on 31.03.2008 by Deputy Director rejecting petitioner's Revision.

4. Learned counsel for petitioner, Sri Shafiq Mirza, in WP-1 has challenged the aforesaid order of Revision on the ground that Deputy Director had no authority or jurisdiction to decide Revision inasmuch Director, Mandi Samiti himself was exercising delegated power and had no authority to further delegate or sub-delegate his power, therefore, sub-delegation by Director to Deputy Director is wholly without jurisdiction. In this regard, he placed reliance on Sections 2(h), 26-I, 27, 33 and 33-A of Act, 1964 and Rule 135 of U.P. Krishi Utpadan Mandi Rules, 1965 (hereinafter referred to as "Rules, 1965").

5. On behalf of Mandi Samiti, Counter Affidavit has been filed stating that validity of Section 20 of Act, 1964 has been upheld by this Court. Further, power to decide Revision has been conferred by Board upon Additional Director, Deputy Director as well as Regional Deputy Director.

6. On the contrary, Sri N.C. Mehrotra, learned counsel appearing for respondent-Mahdi Samiti, submitted that Board has delegated the power with authority of further sub-delegation and therefore, Deputy Director has validly exercised revisional power. He placed reliance on Supreme Court's judgment in **Heinz India Private Limited and another Vs. State of U.P. and others (2012) 5 SCC 443.**

7. Facts in both the connected Writ Petition No. 3271 of 2008 (hereinafter referred to as "WP-2") and Writ Petition No. 3272 of 2008 (hereinafter referred to as "WP-3") are also similar inasmuch therein also order passed by Deputy Director deciding petitioner's Revision vide order dated 31.03.2008 are under challenge on the same grounds, therefore, I am not repeating the facts since question of law raised in all these Writ Petitions is common and same.

8. Thus issue up for consideration in all these Writ Petitions is "whether Director was competent to delegate power of deciding Revision filed under Section 32 of Act, 1964 upon Deputy Director". In other words, "whether power conferred upon Deputy Director to decide Revision under Section 32 of Act, 1964 is validly exercised power", and "whether Revision has been decided by competent statutory authority or not".

9. In order to to examine the aforesaid issue I may have a bird eye view of Act, 1964.

10. Act, 1964 was enacted with an objective to regulate Agricultural Markets in State of U.P. with a view to achieve following objects:

"(i) to reduce the multiple trade charges, levies and exactions charged at present from the producer-sellers;

(ii) to provide for the verification of accurate weights and scales and see that the producer-seller is not denied his legitimate due;

(iii) to establish market committees in which the agricultural producer will have his due representation;

(iv) to ensure that the agricultural producer has his say in the utilisation of market funds for the improvement of the market as a whole;

(v) to provide for fair settlement of disputes relating to the sale of agricultural produce;

(vi) to provide amenities to the producer-seller in the market;

(vii) to arrange for better storage facilities;

(viii) to stop inequitable and unauthorised charges and levies from the producer-seller; and

(ix) to make adequate arrangements for market intelligence with a view to posting the agricultural producer with the latest position in respect of the markets dealing with his produce."

11. Chapter 2 deals with "Market Area And Market Yards" and contains Sections 5 to 11. Section 5 confers power upon Government whenever it is of opinion that it is necessary or expedient in the interest of public to regulate sale and purchase of any agricultural produce in any area, for that purpose it may declare that area as a Market Area by Notification in Gazette and after inviting objections such Market Area can be declared by State Government under Section 6. Once a Market Area is declared, State Government by Notification in Gazette under Section 7 may declare certain portion of Market Area as "Principal Market Yard" and other portion as "Sub-Market Yard". It can also declare that whole-sale transactions of all or any of specified agricultural produce, in respect of a Market Area, shall be carried on only at a specified place or place within Principal Market Yard by Sub-Market Yard. Once a market is declared as per Section 9 of Act, 1964, no legal body or other person shall, within the Market Area, set up, establish or continue or allow to be set up, established or continued any place for the sale-purchase, storage, weighment or processing of the specified agricultural produce except under and in accordance with the conditions of licence granted by Committee concerned. This provision has been given overriding effect over any other law, custom or usage or agreement providing otherwise.

12. Chapter-III deals with the "Market Committee". Section 12 provides that there shall be a Committee to be called "Mandi Samiti" of every Market Area which shall be a body corporate having perpetual succession and an official seal. Subject to such restrictions and/or qualifications, if any, imposed by Act, 1964 or any other enactment, 'Mandi Samiti' may sue or be sued in its corporate name and acquire, hold, and dispose of property and enter into contracts. A 'Mandi Samiti' is deemed to be a Local Authority for the purposes of Land Acquisition Act, 1894 (hereinafter referred to as "Act, 1894") and any other law for the time being in force by virtue of Section 12(2) of Act, 1964. I am not going into details of

Committee, its power etc. as the same are of no relevance to the issues raised in these Writ Petitions.

13. Chapter-V deals with external control of Market Area etc. Section 26-A empowers State Government to constitute a Board by the name of State Agricultural Produce Markets Board with its Head Office at Lucknow (hereinafter referred to as "Board"). I may notice at this stage that Definition of Board under Section 2(a-i) states that 'Board' means the State Agricultural Produce Markets Board constituted under Section 26-A. The constitution of Board is provided in Section 26-E. Director is defined in Section 2(h) and it read as under:

"(h) "Director" ***means an officer appointed by the State Government*** *as Director of Mandis and* ***includes any other Officer authorised by the Director to perform all or any of his functions under this Act;"***

14. Director is an Ex-officio of Secretary of Board and has been termed as 'Member Secretary' at various places in Act, 1964.

15. The power of employment of officers and servants for effective functioning of Board is conferred upon Board under Section 26-F. The Board can also lay down terms and conditions of Officers and Servants appointed by it but the same have to be framed with previous approval of State Government. However, subject to superintendence of Board, general control and direction over all Officers and servants of Board is vested in Director vide Section 26-G. Board may delegate its powers under Act, 1964 to any such Committee appointed by it or to Director or Member Secretary or any other Officer of Board by virtue of Section 26-I.

16. Power and functions of Board are provided in Section 26-L and it reads as under:

"26-L. Powers and functions of the Board.-*(1) The Board shall, subject to the provisions of this Act, have the following functions and shall have power to do anything which may be necessary or expedient for carrying out those functions-*

(i) superintendence and control over the working of the Market Committees and other affairs thereof including programmes undertaken by such Committees for the construction of new Market yards and development of existing Markets and Market areas;

(ii) giving such direction to Committees in general or any Committee in particular with a view to ensure efficiency thereof;

(iii) any other function entrusted to it by this Act;

(iv) such other functions as may be entrusted to the Board by the State Government by notification in the Gazette.

(2) Without prejudice to the generality of the foregoing provision, such power shall include the power-

(i) to approve proposals of the new sites selected by the Committee for the development of Markets;

(ii) to supervise and guide the Committees in the preparation of site-plans and estimates of construction programmes undertaken by the Committee;

(iii) to execute all works chargeable to the Board's fund;

(iv) to maintain accounts in such forms as may be prescribed and get the

same audited in such manner as may be laid down in regulations of the Board;

(v) to publish annually at the close of the year, its progress report, balance-sheet, and statement of assets and liabilities and send copies to each member of the Board as well as to the Chairman of all Market Committees;

(vi) to make necessary arrangements for propaganda publicity on matters related to regulated marketing of agricultural produce;

(vii) to provide facilities for the training of officers and servants of the Market Committees;

(viii) to prepare and adopt budget for the ensuring year;

(ix) to make subventions and loans to Market Committees for the purposes of this Act on such terms and conditions as the Board may determine;

(x) to do such other things as may be of general interest to Market Committees or considered necessary for the efficient functioning of the Board as may be specified from time to time by the State Government."

17. Section 27 provides power and duties of Director and reads as under:

"27. Powers and duties of the Director.- *(1) Subject to the provisions of this Act, the general superintendence, direction and control over the Committee and its Chairman, Vice-Chairman and other members, its Secretary and other officers referred to in sub-section (2) of Section 23, shall be vested in the Board.*

(2) The Board or the Director may inspect, or cause to be inspected, all documents or records relating to the affairs of the Committee and, require the Committee, its Chairman, Vice-Chairman, members, officers or servants to furnish such information or material as he may consider necessary.

(3) On receipt of a complaint in respect of an act relating to the affairs of the Committee, the State Government may require the Director to conduct enquiry or institute proceeding against the Committee, its Chairman, Vice-Chairman, member or officer, and the Director shall act accordingly.

(4) The Director shall, for the purpose of holding any enquiry under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents; and

(c) any other matters which may be prescribed."

18. Power to entertain Revision has been conferred upon Board against an order or proceedings of a Committee under Section 32 and it reads as under:

"32. Powers of the Board to call for the proceedings of a Committee and pass orders thereon.- *The* ***Board may,*** *for the purpose of satisfying itself as to the legality or propriety of any decision of, or order passed by, a Committee, at any time call and examine the proceedings of the Committee, and, where it is of the opinion that the decision or order of the Committee should be modified, annulled or reversed, pass such orders thereon as it may deem fit."*

19. Section 33 talks of development of power and reads as under:

"33. Delegation of powers.-The Board may, by regulations, delegate subject to such conditions and restrictions and in such manner, as may be specified therein, any of its powers to the Director." *(emphasis added)*

20. Power of framing Rules have been conferred upon State Government by virtue of Section 40 of Act, 1964. In exercise of power under Section 40 of Act, 1964 State Government has framed Rules, 1965.

21. Procedure for filing Revision is dealt with by Rule 133-A of Rules, 1965 and it reads as under:

"133-A. Revision under the Act (Section 32).-*(1) A fee of Rupees Ten in cash shall be deposited with the Committee for every revision to be filed under the Act and a receipt therefor shall be obtained from the Committee.*

(2) No revision under the Act shall be entertained unless it is accompanied by a receipt duly granted by the Committee for the payment of the amount of fee as referred to in sub-rule (1).

(3) Subject to the provisions of sub-rule (2), on receipt of a revision under Section 32 of the Act, the ***Board or the Officer nominated by it shall after examining the case and affording the person concerned a reasonable opportunity of being heard*** *in person, dispose of the revision within 60 days from the date of filing of the revision. The* ***Board or the officer nominated by it shall*** *during the hearing of the revision also consider the propriety of the order passed by the Committee on the basis of merit and demerit thereof and pass the suitable order. The order passed by the* ***Board or the officer nominated by it shall be final and binding."*** *(emphasis added)*

22. Rule 135 of Rules, 1965 talks of power of Director in certain cases with reference to Section 27 read with Section 40(2) (xxx) and it reads as under:

"135. Power of the Director in certain cases [Sections 27 and 40(2)(xxx)].*- Without prejudice to the provisions of the Act, and these rules, the Director, may-*

(i) cause periodical inspection of the affairs of the Committee to be carried out by any Officer Authorised by him in this behalf;

(ii) order, on receipt of a report or complaint or on his own motion, for special audit of the accounts of the Committee at the cost of the Committee;

(iii) direct the Committee, Chairman, Vice-Chairman, or any Member, Officer or Servant of the Committee to undertake such measures as he may consider necessary, for the improvement and development of the Market Area, Principal Market Yard and Sub-Market Yards;

(iv) exercise such powers and pass such orders as he may deem necessary for proper functioning of and effective superintendence and control over the Committee and the Chairman, Vice-Chairman, Members, Officers and Servants of the Committee under the Act:

Provided that such powers superintendence and control in so far as they relate to the Officers and Servants appointed by the Committee under sub-section (1) of Section 23 of the Act, shall be exercised through, the Chairman of the Committee.

(v) inspect or cause to be inspected any premises, vehicles or stocks

for the purpose of holding any inquiry under sub-section (4) of Section 27 of the Act."

23. It is no doubt true that a well settled principle in law is, *'delegatus non potest delegare'*. A delegate has no power to delegate. The principle, however, has a different field of operation in the context of legislative powers vis-a-vis non-legislative/administrative powers. It is well settled that delegation of power to legislate cannot be sub-delegated. In other words, Legislature cannot delegate essential legislative functions which consists of determination or choosing of the legislative policy and formally enacting that policy into a binding rule of conduct. Subordinate legislation, however, is in the realm of Rules and Regulations dealing with the procedure on implementation of plenary legislation and generally a task entrusted to a specified authority. Principal Legislature is not supposed to spend its time for working out details on implementation of law. It can entrust such task to an agency and to this extent sub-delegation is permissible but such agency cannot further entrust such task to its subordinates. It would be a breach of confidence reposed on delegate. With regard to delegation of non-legislative/administrative powers on a person or a body to do certain things, whether delegatee himself is to perform such functions or whether after taking decision as per the terms of the delegation, the said agency can authorize the implementation of the same on somebody else, depends upon the Statute concerned. Once power is conferred, after exercising power of taking decision as per the Policy etc., the question how to implement the decision taken in the process, is a matter of procedure. The Legislature may, after laying down legislative policy, confer discretion on an administrative agency with regard to execution of policy. It can leave this task to agency to work out the details within the framework of that policy. So long as essential functions of decision making is performed by the delegate, the burden of performing the ancillary and clerical task need not be shouldered by the primary delegate. It is not necessary that primary delegate himself should perform ministerial acts as well. Implementation of decision already taken by primary delegate as per the delegation, ministerial or clerical tasks can be performed by authorized officers. Practical necessities or exigencies of administration require that the decision making authority who has been conferred with statutory power, be able to delegate tasks when the situation so requires. Thus, the maxim "delegatus non potest delegare", gives way in the performance of administrative or ministerial tasks by subordinate authorities in furtherance of the exercise of delegated power by an authority.

24. In **Barium Chemicals Limited and another Vs. The Co. Law Board and another AIR 1967 SC 295** Court said:

*"... the **maxim delegatus non potest delegare must not be pushed too** far. The **maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument conferring an authority.** Prima facie, a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other. But the **intention may be negatived by any contrary indications in the language, scope or object of the statute.** The construction that would best*

achieve the purpose and object of the statute should be adopted." (emphasis added)

25. In **Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. Vs. The Assistant Commissioner of Sales Tax and others (1974) 4 SCC 98,** a Constitution Bench held that essential legislative functions consist in the determination or choosing of the legislative policy and it is formally has a binding rule of conduct, cannot be delegated by Legislature, nor is there any unlimited right of delegation inherent in the legislative power itself. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the law passed by Legislature declares legislative policy and lays down the standard which is enacted into a rule of law, it can leave the task of subordinate legislation like making of rules, regulations or bye-laws which by its very nature is ancillary to the statute, to subordinate bodies.

26. In **Director General, E.S.I. and another Vs. T. Abdul Razak, etc. (1996) 4 SCC 708,** Court held that statutory power must be exercised only by body or officer in whom it has been confided unless sub-delegation of power is authorised by express words or necessary implication.

27. This Court has also followed authorities in **Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. Vs. The Assistant Commissioner of Sales Tax and others (supra) and Director General, E.S.I. and another Vs. T. Abdul Razak, etc. (supra) in its judgment in Writ Petition (Writ-A) No. 786 of 1995 (Ravinder Kumar Pal and others Vs. Nideshak, Karmchari Rajya Beema Sharam Chikitsalay and others)** decided on 18.12.2013, para 5 and 6 whereof read as under:

*"5. However, I find no force in the submission. It is well settled legal principle in constitutional and administrative law that 'delegatus non potest delegare, "one to whom power is delegated cannot himself further delegate that power' (See: **Gwalior Rayon Silk Mfg. (Wvg.) Co. Vs. The Asstt. Commissioner of Sales 1974 AIR 1660).***

*6. Following the above principle, Apex Court in **Director General, E.S.I. and another Vs. T . Abdul Razak AIR 1996 SC 2292** has held as under:*

"The law is well settled that in accordance with the maxim delegatus non potest delegare, a statutory power must be exercised only by the body or officer in whom it has been confided..."

28. In **Jamal Uddin Ahmad Vs. Abu Saleh Najmuddin and another (2003) 4 SCC 257,** scope of delegation in the matter of judicial functions of Court was examined. Court held:

"13. The functions discharged by a High Court can be divided broadly into judicial and administrative functions. The judicial functions are to be discharged essentially by the Judges as per the Rules of the Court and cannot be delegated. However, administrative functions need not necessarily be discharged by the Judges by themselves, whether individually or collectively or in a group of two or more, and may be delegated or entrusted by authorization to subordinates

unless there be some rule of law restraining such delegation or authorisation. Every High Court consists of some administrative and ministerial staff which is as much a part of the High Court as an institution and is meant to be entrusted with the responsibility of discharging administrative and ministerial functions. There can be "delegation" as also there can be "authorization" in favour of the Registry and the officials therein by empowering or entrusting them with authority or by permitting a few things to be done by them for and on behalf of the Court so as to aid the Judges in discharge of their judicial functioning. Authorization may take the form of formal conferral or sanction or may be by way of approval or countenance. Such delegation or authorization is not a matter of mere convenience but a necessity at times. The Judges are already overburdened with the task of performing judicial functions and the constraints on their time and energy are so demanding that it is in public interest to allow them to devote time and energy as much as possible in discharging their judicial functions, relieving them of the need for diverting their limited resources of time and energy to such administrative or ministerial functions, which, on any principle of propriety, logic, or necessity are not required necessarily to be performed by the Judges. Receiving a cause or a document and making it presentable to a Judge for the purpose of hearing or trial and many a functions post-decision, which functions are administrative and ministerial in nature, can be and are generally entrusted or made over to be discharged by the staff of the High Court, often by making a provision in the Rules or under the orders of the Chief Justice or by issuing practice directions, and at times, in the absence of rules, by sheer practice. The practice gathers the strength of law and the older the practice the greater is the strength. ..."

29. In **NGEF Ltd . Vs . Chandra Developers Pvt . Ltd . and others (2005) 8 SCC 219,** Court has observed that BIFR being a statutory authority, in absence of any provision empowering it to delegate its power in favour of any other authority, had no jurisdiction to do so. *'Delegatus non potest delegare'* is a well-known maxim which means unless expressly authorized a delegate cannot sub-delegate its power.

30. Referring to some of the above authorities, same proposition of law has been followed in **Sidhartha Sarawgi Vs. Board of Trustees for the Port of Kolkata and others (2014) 16 SCC 248 and Union of India Vs. B.V. Gopinath and others (2014) 1 SCC 351.**

31. Now we will examine the issues raised before this Court in the present case in the light of above exposition of law.

32. The definition of 'Director' includes any other Officer authorized by Director to perform all or any of his functions under Act, 1964.

33. Section 32 of Act, 1964 confers power of Revision upon Board. Section 33 which was substituted by U.P. Act No. 10 of 1991 with effect from 01.09.1990 provides that the Board may, by Regulations, delegate, subject to such conditions and restrictions and in such manner, as may be specified therein, any of its power to 'Director'. Petitioners in these Writ Petitions have not disputed that power of Revision is delegated to Director and Revisions were preferred by

petitioners to Director. Revisions preferred to 'Director' were transferred to Deputy Director with reference to Board's resolution dated 12.12.1994 and 19.01.1998 and order dated 13.08.1999 and delegation of power by Director to Deputy Director, Varanasi communicated to him vide letter dated 14.09.2007.

34. The submission is that 'Director' exercised power delegated to it by Board under Section 33 and it is not Director's any of his functions under Act, 1964 and, therefore, Section 2(h) which defines "Director" will not include within its ambit Deputy Director, Varanasi who has decided the Revision in question. I find that almost similar question has been considered by Supreme Court in **Heinz India Pvt. Ltd. and others Vs. State of U.P. and others (2012) 5 SCC 443** wherein also Revision was decided by an Officer authorized by Director and Court said as under:

"33. .... It is ***manifest from a plain reading of the above that the expression 'Director' wherever used in the Act including Section 33 thereof includes an officer authorised by the Director to perform all or any of his functions under the Act.*** *Significantly enough neither before the High Court nor before us was it contended that the officer who had handled and disposed of the revision petitions filed by the dealers, was not duly authorised in terms of Section 2(h) or that the power of the Board under Section 32 of the Act was not duly delegated to the Director. It is not, therefore, a case of inherent lack of jurisdiction. All that the Appellants propose is that the revisions could either be heard by the Board itself or made over for disposal to a Committee of officers senior enough to decide issues of fact and law involving substantial financial stakes of the parties.*

34. Now it is true that the stakes involved in the present batch of cases are substantial and those called upon to satisfy the demands raised against them would like their cases to be heard by a senior officer or a Committee of officers to be nominated by the Board. But in the absence of any data as to the number of cases that arise for consideration involving a challenge to the demands raised by the Market Committee and the nature of the disputes that generally fall for determination in such cases, it will not be possible for this Court to step in and direct an alteration in the mechanism that is currently in place. ***The power to decide the revisions vests with the Board who also enjoys the power to delegate that function to the Director. So long as there is statutory sanction for the Director to exercise the revisional power vested in the Board, any argument that such a delegation is either impermissible or does not serve the purpose of providing a suitable machinery for adjudication of the disputes shall have to be rejected.***

35. It is noteworthy that Rule 133-A of the Rules framed under the Act regulates the filing and disposal of the revision petitions under Section 32 thereof. ***This provision was inserted with effect from 11th May, 2008 and empowers the Board either to decide the revision petition itself or to nominate an officer for doing so.*** *It also provides for grant of an opportunity of being heard to the person concerned and a time bound disposal of the revision.* ***Rule 133-A is, therefore, a step in the direction of providing a machinery under the Act for adjudication of disputes that may arise between dealers on the one hand and the***

market committee on the other. *That being so, the Act is not completely bereft of a machinery nor can it be said that the observations made by this Court in Ram Chandra Kailash Kumar's case (supra) have gone unheeded. All that we need to add is that in order to make the Board's revisional power more effective and its exercise more transparent and credible, the Board would do well to delegate the power of hearing and disposal of the revision petitions to a senior and experienced officer who is well-versed in dealing with legal issues concerning assessment and/or determination of the liability under the Act. Beyond that it is neither necessary nor proper for us to say anything. Question No. 1 is answered accordingly." (emphasis added)*

35. The power of Revision when delegated to Director by virtue of Section 33 becomes a function to be performed by Director under Act, 1964 and, therefore, Director can authorize any other Officer to perform all or any of his functions under Act, 1964 which includes delegated powers to be performed by Director under Section 32 of Act, 1964. In view thereof I find myself unable to accept the contention of learned counsel for petitioners that power exercised by Deputy Director in deciding Revision is bad in law as he had no jurisdiction to decide Revision and Director had no power to authorize Deputy Director to decide Revision.

36. The issues, formulated above, are answered against petitioners.

37. Since this Court has not been addressed on merits of issue as to whether demand raised from petitioners was valid or not, hence, I have not gone into that issue at all.

38. No other point has been argued.

39. The writ petitions lack merit. Dismissed.

40. Interim order, if any, stands vacated.

(2020)1ILR 380

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2020

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 34797 of 2019

Lalita Devi & Ors. ...Petitioners
Versus
Board of Revenue U.P., Lucknow & Ors. ...Respondents

Counsel for the Petitioners:
Indrajeet Shukla, P.K. Shukla

Counsel for the Respondents:
C.S.C., Mohd. Waris Farooqui

A. Challenging-impugned order-passed illegally-without notice on prescribed date-without informing petitioner-normally writ jurisdiction not exercised in matters arising out of mutation proceedings- in the case-if not-would amount to restoring illegal order.

B. When two remedies available no prohibition is pursuing both simultaneously-aggrieved person can choose either one or both remedies.

C. Held, This Court is aware that normally extra ordinary writ jurisdiction is not exercised in matters arising out of mutation proceedings. In this case, however, the order passed by the Board of Revenue, if not, interfered with by this Court in equity jurisdiction would amount

to restoring an illegal and fraudulent order dated 08.08.2012 passed by the Naib Tehsildar.

D. This Court also feels that it is its duty to correct an error of law occurring in the lower court record. The Board of Revenue under some misconception of law, had come to the conclusion that the Recall application having been filed, no Revision was maintainable simultaneously. The Supreme Court has settled the position in law that when two remedies are available to a person aggrieved and there is no prohibition in law in pursuing of both the remedies simultaneously, then the person aggrieved can choose either to avail only one remedy or to avail both remedies to establish his rights.

E. The order passed by the Board of Revenue dated 30.10.2019 is set aside. The order passed by the Additional Commissioner (Judicial), Devi Patan Mandal, Gonda, on 07.04.2016 is affirmed. The parties are directed to approach the Naib Tehsildar who shall consider the matter on merits and decide the same strictly in accordance with law within a period of three months from today.

Writ Petition allowed. (E-8)

List of cases cited: -

1. Vijay Shanker V. Additional Commissioner (Administration), Lucknow Division & Ors. W.P No.7719 (M/S) of 2014

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

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

(2) This petition has been filed by the petitioners challenging the order dated 30.10.2019 passed by the opposite party no.1-Board of Revenue, U.P., Lucknow and also praying for a direction to be issued to the opposite parties to maintain status-quo and not alienate the property in question i.e. Khata Nos.1484 and 1645 situated at Village Keshav Nagar (Paschim), Pargana, Budhapayar, Tehsil Mankapur, District Gonda.

(3) Learned counsel for the petitioners Shri Indrajeet Shukla, has placed the brief facts related to the controversy for its better appreciation. It has been submitted that a dispute relating to Khata Nos.1484 and 1645 situated Village Keshav Nagar (Paschim), Pargana Budhapayar, Tehsil Mankapur, District Gonda arose. Smt. Lakpati widow of Ram Keval, was the undisputed recorded tenure holder of the land in question and after her death on 14.06.1992 by virtue of PA-11 entry the names of Ram Ratan and Ram Milan were recorded as legal heirs in the Revenue records. A Mutation proceedings by way of application was initiated by the opposite party no.3 Adhari wife of Ram Sughar as a result whereof an order dated 24.08.1994 was passed by the Naib Tehsildar without providing any opportunity of hearing to the recorded tenure holders Ram Ratan and Ram Milan. Since the recorded tenure holders Ram Ratan and Ram Milan were not provided any opportunity of hearing, they moved a restoration application seeking Recall of the order dated 24.08.1994. During the pendency of the restoration application, they died and the legal heirs were substituted by an order dated 02.12.2011. The restoration application was allowed setting aside the order dated 24.08.1994 and the next date fixed was 23.12.2011. On 23.12.2011, a general date was fixed for 20.07.2012 and on 20.07.2012, again a general date was fixed for 24.08.2012. On 08.08.2012 an order deciding the mutation

proceedings was passed by the Naib Tehsildar, Babhanipayar, Tehsil Mankapur, District Gonda, on the basis of some spot inspection carried out on an application made by the opposite party no.3 on 26.06.2012. Neither the spot inspection was carried out in presence of the petitioners nor the date earlier fixed as 24.08.2012 was pre-poned and notice issued for the date to be fixed as 08.08.2012. A copy of the Spot Inspection and Enquiry report was never provided to the predecessor in the interest of the petitioners. In fact, the order dated 08.08.2012 was passed by the opposite party no.2 in favour of the opposite party no.3 in a fraudulent manner.

(4) It has been submitted in Paragraph 12 of the petition that the Naib Tehsildar, Mankapur, had been transferred to Tehsil Nanpara District Bahraich, prior to 24.08.2012 and as such, before assuming charge at Tehsil Nanpara, District Bahraich, the order dated 08.08.2012 was passed to benefit the opposite party no.3 for extraneous consideration, although the date already fixed in the matter was 24.08.2012.

(5) Since the order dated 08.08.2012 was ex-parte, a Recall application was filed. At the same time, the petitioner was advised that since the order dated 08.08.2012 was on the merits of the matter, directing recording of the opposite party no.3 as co-tenure holder of the property in question and had been passed fraudulently, the petitioner may also file Revision against such proceedings. A Revision was preferred by the predecessor in the interest of the petitioner and it was allowed by the order dated 07.04.2016 passed by the Additional Commissioner (Judicial), Devi Patan Mandal, Gonda.

(6) Learned Additional Commissioner (Judicial), Devi Patan Mandal, Gonda while allowing the Revision had summoned the lower court record and recorded a categorical finding that the order dated 08.08.2012 was passed by the Naib Tehsildar, Mankapur, Gonda while he was under transfer and also when no date was fixed on 08.08.2012. In the order-sheet there was a clear indication that on 20.07.2012 only a general date has been given and the matter had been fixed for 24.08.2012. The Additional Commissioner (J), Devi Patan Mandal, Gonda, had recorded a finding that the parties were not informed that the matter would be taken up on 08.08.2012. The Additional Commissioner (J), Gonda, also found that after 23.12.2011 only general dates had been fixed in all contested matters including the matter under his consideration by the Naib Tehsildar Court and no hearing on merits had taken place. Learned Additional Commissioner (Judicial), Devi Patan Mandal, Gonda set aside the order dated 08.08.2012 and remanded the matter to the Trial Court for adjudication on merits.

(7) Against the order dated 07.04.2016, the opposite party no.3 filed a Revision No.933 of 2016 on 25.04.2016. The said Revision has been allowed by the impugned order dated 30.10.2019 by the Board of Revenue only on the ground that the Recall application was pending against the order dated 08.08.2012 before the Naib Tehsildar and simultaneously a Revision had been filed by the predecessor in the interest of the petitioners before the Additional Commissioner (Judicial), Devi Patan Mandal, Gonda. It was observed by the Member (Judicial) of Board of Revenue that two remedies against one order were not permissible to be

prosecuted simultaneously. The order of the Additional Commissioner (Judicial), Devi Patan Mandal, Gonda on its merits with regard to the finding of fraudulently getting the matter pre-poned and the order being passed on 08.08.2012 behind the back of the petitioners was not set aside or interfered with.

(8) It has been submitted by the learned counsel for the petitioners that without setting aside the finding recorded by the First Revisional Court, the Second Revisional Court i.e. Board of Revenue only interfered with the order because under some misapprehension of law it was of the opinion that a Recall application before the Trial Court and a Revision before the Higher Court was not permissible simultaneously. The observation of the Board of Revenue is against the law settled by the Supreme Court in ***Bhanu Kumar Jain Vs. Archana Kumar and Others reported in 2005 (All.) C.J. 715***. The Supreme Court has observed that a person aggrieved by an order passed ex-parte may file application under Order 9 Rule 13 for Recall, and at the same time file an Appeal and pursue both the remedies simultaneously. The statutory right on filing an Appeal cannot be curtailed and the circumstances mentioned by the Court in Paragraphs 24 to 28 of the judgment, although relate to an Appeal, also apply in case of Revision before a Superior Court, challenging the illegal and fraudulent proceedings of lower court. Paragraphs 24 to 25 of the judgment rendered by the Hon'ble Supreme Court say that an Appeal against an ex-parte decree in terms of Section 96 (2) of the CPC could be filed on such grounds as the material on record in the ex-parte proceedings in the suit by the plaintiff cannot entail a decree in his favour, and also that the Suit could not have been posted for ex-parte hearing. In an application under Order 9 Rule 13 of the Code, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

(9) This Court perused the judgment in ***Bhanu Kumar Jain (Supra)*** Paragraph 26 of the judgment rendered in ***Bhanu Kumar Jain (Supra)***, the Supreme Court had observed that a party aggrieved against the ex-parte decree has two clear options, one, to file an Appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the CPC. He can take recourse to both the proceedings simultaneously but in the event the Appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed with the order passed by the Appellate Court, having regard to Explanation appended to Order 9 Rule 13 of the Code, a petition under Order 9 Rule 13 would not be maintainable.

(10) To summarize the law as settled by the Hon'ble Supreme Court, it may be observed that the right of Appeal is not taken away by filing an application under Order 9 Rule 13 of the CPC. If an Appeal is dismissed as a result of which the ex-parte decree merges with the order of the Appellate Court a Recall application against the order passed by the inferior Court would not be maintainable.

(11) It has moreover been submitted by Shri Indrajeet Shukla, that the Additional Commissioner (Judicial), Devi

Patan Mandal, Gonda, noted the illegality and procedural impropriety in the order dated 08.08.2012 being passed by the Naib Tehsildar and having set it aside, had only remanded the matter to Naib Tehsildar to consider afresh on merits and thus substantial justice had been done and it was open to both the parties to participate before the Trial Court of Naib Tehsildar with regard to the mutation proceedings pending before him. Such order should not have been interfered with by the Board of Revenue in such a cursory manner and on a misconception of law.

(12) Shri Mohd. Arif Khan, learned Senior Advocate assisted by Shri Mohd. Waris Farooqui has appeared on behalf of the respondent no.3. He has raised a preliminary objection regarding maintainability of the writ petition saying that the said writ petition arises out of orders passed in mutation proceedings. Ordinarily, this Court does not entertain the writ petition against such orders as mutation proceedings are the summary proceedings and it is open for the parties to get their rights adjudicated by filing a regular proceeding either in Revenue Courts or in Civil Court for declaration of their rights. He has pointed out Paragraph 12 of the counter affidavit to say that Ram Ratan and Ram Milan, the predecessor in interest had filed a Regular Suit No.38 of 2010 ***(Ram Kishore and Another Vs. Smt. Adhari and others)*** which was subjudice before the Civil Judge (Senior Division), Gonda, and therefore, this writ petition should not be entertained.

(13) Learned counsel for the respondent no.3 has also pointed out that the petitioner no.1 has sold out the property to one Balram, her brother on 25.05.2016 and mutation of the name of Balram has already been ordered by the Naib Tehsildar in the Revenue Record on 16.09.2016. Against the order dated 16.09.2016 an Appeal was filed by the respondent no.3 which has been entertained and the order dated 16.09.2016 has been stayed by the Appellate Court on 13.12.2016. Against the order passed by the Appellate Court dated 13.12.2016 the petitioners have filed a Revision which is pending before the Court of Additional Commissioner where the order passed by the Appellate Court has been stayed.

(14) It has been submitted that the petitioners have no locus to challenge the order dated 30.10.2019 as they have already sold out the property to one Balram.

(15) The learned counsel for the respondent no.3 has also submitted that by the order passed by the Board of Revenue impugned in this petition, only the order passed by the Additional Commissioner has been set aside and the petitioners have been asked to go to the Trial Court to pursue their restoration application pending against the order dated 08.08.2012. There would be ample opportunity to the petitioners to get their case thrashed out on merits before the Naib Tehsildar in the restoration application.

(16) Learned counsel for the respondent has also referred to Section 210 of the U.P. Land Revenue Act to say that the Revision before the Additional Commissioner filed under Section 219 by the petitioners was not maintainable. It has been submitted that against an order passed by the Assistant Collector, First Class or Second Class i.e. against an order passed by the SDM or the Tehsildar, an

Appeal would lie and not a revision. The exception carved out under Sub-Section 6 of Section 210 would also not be available as the order impugned before the Additional Commissioner was passed under Section 34 of the Land Revenue Act and not under Section 33.

(17) It has also been submitted that the petitioners assignee Balram has not been arrayed as a party and the facts regarding the petitioners having sold off the property to Balram has been concealed before this Court. The transferee is the real brother of the petitioner no.1 Smt. Lalita.

(18) On merits it has also been submitted that initially Gayadeen was the recorded tenure holder. He had two sons Ramai and Ram Keval. Ram Keval married Lakpati while Ramai had tow sons, Ram Ratan and Ram Milan. Lakpati and Ram Keval had one daughter Smt. Adhari who has been arrayed as respondent no3. On the other hand, Smt. Lalita is claiming through Babu Lal and Annu Lal, the sons of Ram Kishore who is claiming through Ram Ratan the son of Ramai. It is a dispute between two branches of the same family one represented by the predecessor in interest of Smt. Lalita i.e. Ram Ratan and Ram Milan and the other represented by the opposite party no.3 Smt. Adhari. Smt. Adhari being the daughter of Ram Keval was deprived of her ancestral property by getting the name of Ram Ratan and Ram Milan alone recorded in the Record of Rights through the proceedings under PA-11, therefore, the mutation application was rightly filed by Smt. Adhari and the order passed by the Naib Tehsildar on 08.08.2012 directs recording of the name of Smt. Adhari also as co-tenure holder, and such order should not be interfered with in writ jurisdiction.

(19) Learned counsel for the petitioners Shri Indrajeet Shukla, on the other hand, in his reply has submitted that this Court in ***Awadhesh Singh Vs. Additional Commissioner and Others*** Writ-C 13751 of 2005 decided on 04.08.2017 has mentioned. The exceptions where this Court can interfere even in orders passed in mutation proceedings. It has been observed by this Court that where an order has been passed without jurisdiction or that it confers rights against the settled position in law, an order passed in mutation proceedings can be interfered with in writ jurisdiction. This Court has relied upon a judgment in ***Vijay Shanker V. Additional Commissioner (Administration), Lucknow Division & Ors.*** passed in Writ Petition No.7719 (M/S) of 2014. This Court had carved out the exceptions in Paragraph 15 of the judgment in ***Vijay Shanker (Supra)*** where it was held that remedy of writ jurisdiction under Article 226 of the Constitution of India can be available where the order passed is absolutely without jurisdiction, where the order passed is against an entry made in pursuance of the order passed by the Regular Court, where the Courts have not considered the matter on merits like where the Courts have passed the orders on restoration application etc., where the order has been obtained by fraud or by fabricating the documents.

(20) Learned counsel for the petitioners has emphasized the third and fourth grounds mentioned in ***Vijay Shanker (Supra)*** available for the writ petitioners to approach this Court in writ jurisdiction against the order passed in mutation proceedings.

(21) With regard to the second preliminary objection raised by the learned counsel for the respondent no.3, learned counsel for the petitioners has relied upon on ***Shardamma Vs. Mohammed Pyrejan***

(D) through L.R.s & Another reported in AIR 2015 (SC) 3747; 2016 (1) SCC 730, where the Supreme Court has observed that an assignee can approach the court independently to protect the right of the assignee. The High Court had held that Shardamma, the plaintiff had transferred her interest in favour of her daughter during the pendency of the First Appeal and therefore, she had lost her right to continue the Appeal for the benefit of her daughter, who in turn had transferred the property in favour of a third person. The High Court had held that the appellant had lost her right to continue the Appeal. The Supreme Court over ruled the High Court and held that merely by assignment or release of the rights during the pendency of the Appeal, one does not lose the right to continue the Appeal, the Assignee may move an application for impleadment, but his failure to do so will not entail the dismissal of the Suit or the Appeal. The Assignee can continue the proceedings for the benefit of the Assignee. The Supreme Court observed on the basis of the judgment rendered by ***Jaskirat Datwani Vs. Vidyavati & Ors. reported in [2002 (5) SCC 647],*** that even if no step is taken by assignee, suit may be continued by the original party and the person upon whom the interest has devolved will be bound by the decree, particularly when such party had the knowledge of the proceedings and still failed to file any application for being heard.

(22) It has been submitted by the learned counsel for the petitioners that the petitioner no.1 Smt. Lalita Devi may have sold off her property to her brother Balram but her rights to selling off the property are still to be determined and she can only transfer a right that she herself possesses to her Assignee, as a vendor cannot transfer a better right to her transferee.

(23) It has also been submitted that the Regular Suit filed by the Ram Milan is for a Permanent Injunction restraining the respondents from interfering in the peaceful possession of the petitioners' predecessors Ram Milan and Ram Ratan. There is no suit filed for declaration of rights of the parties, and said suit for permanent injunction shall take its own course whereas the mutation proceedings in this case have been initiated for recording of name in the Revenue records.

(24) It has also been submitted that the Additional Commissioner's orders had directed the parties to appear before the Trial Court i.e. the Court of Naib Tehsildar to thrash out the matter on merits in the mutation proceedings. Such order need not have been interfering with by the Board of Revenue on misconceived grounds as it directs for participation of both the parties before the Trial Court.

(25) Learned counsel for the petitioners has also stated that under Section 219 of the U.P. Land Revenue Act, a Revision can be filed not only against the "order" but also against the "proceedings" and in a case where no Appeal lies or even where Appeal lies but has not been preferred. In this case, a Revision was filed against the illegality and impropriety of the procedure followed by the Naib Tehsildar in his making a spot inspection on the application made by the respondent no.3 behind the back of the petitioners, not giving copy of the spot inspection report to the petitioners and preponing date without notice to the petitioners from 24.08.2012 to 08.08.2012 and passing orders on merits of the case.

(26) This Court has considered the arguments raised by the learned counsel for the parties. This Court finds from the record that the Additional Commissioner (Judicial), Devi Patan Mandal, Gonda, had

summoned the lower court record and had found therefrom that on 20.07.2012 a general date had been given in all the cases of 24.08.2012. No application was moved for preponing the a date by either of the parties. The Naib Tehsildar Mankapur, had been transferred from Mankapur, Gonda to Tehsil Nanpara, District Bahraich before the date fixed on 24.08.2012. Without their being any date fixed on 08.08.2012, the Naib Tehsildar had passed the order impugned in favour of the respondents to the Revision for their names be recorded as co-tenure holders in the records of rights. The order-sheet had been produced before him and having perused the order-sheet, he had found that only general dates had been given in all the cases and the last date fixed on the order-sheet was 24.08.2012. Only a general date having been fixed, the matter was not heard on merits from 23.12.2011 onwards. Since March, 2012 to 24.08.2012 the Court of Naib Tehsildar had in fact not heard a single matter on contested mutation applications, filed before him. The Additional Commissioner had found that the order was passed behind the back of the Revisionists and without following the procedure in a fraudulent manner. The order passed by the Naib Tehsildar was set aside and the matter had only been remanded before the Trial Court to consider afresh on merits after giving opportunity to both the parties to be heard.

(27) This Court is aware that normally extra ordinary writ jurisdiction is not exercised in matters arising out of mutation proceedings. In this case, however, the order passed by the Board of Revenue, if not, interfered with by this Court in equity jurisdiction would amount to restoring an illegal and fraudulent order dated 08.08.2012 passed by the Naib Tehsildar.

(28) This Court also feels that it is its duty to correct an error of law occurring in the lower court record. The Board of Revenue under some misconception of law, had come to the conclusion that the Recall application having been filed, no Revision was maintainable simultaneously. The Supreme Court has settled the position in law that when two remedies are available to a person aggrieved and there is no prohibition in law in pursuing of both the remedies simultaneously, then the person aggrieved can choose either to avail only one remedy or to avail both remedies to establish his rights.

(29) The order passed by the Board of Revenue **dated 30.10.2019 is set aside.** The order passed by the Additional Commissioner (Judicial), Devi Patan Mandal, Gonda, on 07.04.2016 is **affirmed.** The parties are directed to approach the Naib Tehsildar who shall consider the matter on merits and decide the same strictly in accordance with law within a period of three months from today.

(30) It is made clear that no unnecessary adjournments shall be given to either of the parties.

(31) Let a copy of this order be sent to the Additional Chief Secretary, Department of Revenue, Government of Uttar Pradesh by the office of the Chief Standing Counsel and also by the Registry to take appropriate action against the then Naib Tehsildar Babhanipayar, Tehsil Mankapur, District Gonda, who had passed the order dated 08.08.2012 for extraneous considerations and behind the back of the parties and, to initiate the disciplinary proceedings against the said Officer.

(32) Till the decision of the matter by the Naib Tehsildar concerned, the parties shall maintain the status-quo as on date with regard to the property in dispute.

(33) Writ petition ***stands allowed.***

(2020)1ILR 388

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.01.2020

BEFORE
THE HON'BLE RAJAN ROY, J.

Misc. Single No. 35143 of 2019

Poonam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Surendra Pratap Singh, Amit Kumar Singh

Counsel for the Respondents:
C.S.C.

A. U.P. Panchayat Raj Act, 1947-section 95 (1) (g)-U.P. Panchayat Raj (Removal of pradhan, Up-Pradhan and Members) Enquiry Rules-section 2 (c) -District magistrate has power to seize the financial and administrative power of Petitioner-Gram Pradhan-upon receiving a report from District Panchayat Officer-during pendency of proceedings u/s 95 (1) (g).

Held, On a bare perusal of the aforesaid Full Bench decision the Court finds that while a report submitted by any other public servant who does not fall within the definition of 'enquiry officer' under Rule 2(c) of the Rules 1997 cannot be made the basis for any action involving cessation of financial and administrative powers of the Gram Pradhan and constitution of a Three Member Committee for discharging his duties and such a report can only be made basis for ordering a preliminary inquiry in terms of Rules 1997 by an inquiry officer defined in Rule 2(c) thereof, a report submitted by an officer who is either the District Panchayat Raj Officer or any other district level officer and falls within the meaning of 'inquiry officer' as defined in Rule 2(c) of the Rules 1997 can be acted upon by the District Magistrate ipso facto for the aforesaid purpose, meaning thereby, even if any preliminary inquiry had already been ordered by him earlier by any other officer or it had not been ordered, on receipt of any such report by a District Panchayat Raj Officer or any other District level officer who falls in the definition of 'inquiry officer' under Rule 2(c), whether or not he had been appointed to function as inquiry officer, can be made the basis by the District Magistrate to seize financial and administrative powers of the Gram Pradhan and to form a three member Committee for discharging his functions. (Para 8)

Writ Petition dismissed. (E-9)

List of cases Cited: -

1. Vivekanand Yadav Vs. State of U.P. & others, 2010 (10) ADJ 1

2. Ambesh Kumar v. State of U.P., Writ Petition No.20971 (MS) of 2018

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. By means of this writ petition the petitioner- Gram Pradhan has challenged an order passed by the District Magistrate, Sultanpur on 26.11.2019 seizing the financial and administrative powers of the petitioner and constituting a three Member Committee under the proviso to section 95(1)(g) of the U.P. Panchayat Raj Act 1947 for performing the duties of the office of Gram Pradhan during the pendency of the proceedings under section 95(1)(g).

3. Contention of the learned counsel for the petitioner Sri Surendra Pratap Singh, Advocate was that on receipt of a complaint the District Magistrate had ordered a preliminary enquiry to be conducted by District Development Officer on 6.4.2019. The said preliminary inquiry is still pending. In the interregnum, on a report submitted by the District Panchayat Raj Officer on 31.8.2019 based on a inspection conducted by him on 17.8.2019 the impugned order has been passed which is violative of the U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules, 1997 (hereinafter referred as 'Rules 1997').

4. Sri Hemant Pandey, learned Standing Counsel appearing for the State relied upon Full Bench decision of this Court in the case of Vivekanand Yadav Vs. State of U.P. & others, 2010 (10) ADJ 1, to contend that the inspection report submitted in this case being one by a District Level Officer who qualifies as an Enquiry Officer under Rule 2(c) of the Rules 1997, the District Magistrate was competent to pass the impugned order based on such report without waiting for the result of the preliminary inquiry earlier ordered.

5. This Court has perused the decision of the Full Bench in the case of Vivekanand Yadav. It is worthwhile to quote point No. (x) and (xi) in paragraph 33 which were considered by the Full Bench and are as under :

"(x) What is the meaning of word 'otherwise' in sub-rule 1 of rule 5 {rule 5(1) of the Enquiry Rules};

(xi) Whether a preliminary report submitted by the DPRO or an officer defined as enquiry officer under sub-rule (c) of Rule 2 {rule (2)(c) of the Enquiry Rules}- without being formally asked to conduct the preliminary enquiry- can be accepted under Rule 5 to constitute a three member committee to exercise financial and administrative powers; and appoint an enquiry officer to conduct the final enquiry under rule 6."

6. The said points/questions have been answered by the Full Bench and the relevant paragraphs in this regard i.e. paragraphs 90 to 104 are quoted hereinbelow :

"90. Rule 2(c) defines 'Enquiry Officer'. It means the DPRO or any other district level officer to be nominated by the DM. The following contingencies may be there:

(i) A complaint can be made directly to the DM who may ask the enquiry officer as defnined under rule 2(c) to conduct a preliminary inquiry under rule 4; or

(ii) A complaint can be made directly to the enquiry officer defined under section 2(c), who may submit a report without the DM asking for it; or

(iii) A complaint can be made to the DM with copy to the enquiry officer, who may submit a report without the DM asking for it; or

(iv) A DM can himself conduct a preliminary enquiry; or

(v) A report can be submitted by any other public servant.

91. In all the aforesaid alternatives, a preliminary enquiry is conducted and a preliminary report is there. The question is, which one of these can be acted upon under rule 5 to cease the power under proviso to section 95(1)(g) of the Panchayat Raj Act. According to,

The petitioners only first of the aforesaid report can be relied upon;

The respondents all five reports can be relied upon.

In our opinion, answer lies somewhere in between and only the first four reports can be so relied.

92. There is no dispute so far as first contingency is concerned. The fifth one has to be rejected. In case it is accepted, then this would make rule 3(6) otiose. In our opinion this cannot be the case. However this cannot be said about contingencies number two to four.

93. Rule 6 provides a detailed procedure for the final enquiry. However, there is no detailed procedure provided for the preliminary enquiry under rule 4. A pradhan is not required to be associated in the preliminary enquiry.

94. The procedure provided in rules 6 to 8 is for the final enquiry and not for the preliminary enquiry. A report by an enquiry officer defined under rule 2(c) is also a report by a person prescribed. It is not necessary for the enquiry officer to conduct the preliminary inquiry only on the direction given by the DM. His job is to submit a report, so that the DM may take a decision,

Whether there is prima facie case against the pradhan or not; and

Whether the final enquiry should be held after ceasing his powers.

95. It is not necessary for the DM to specifically ask the enquiry officer to conduct a preliminary enquiry. There seems to be no point in asking the enquiry officer to conduct a preliminary enquiry again even if he submitted a report after the enquiry. It would be futile exercise unless the DM disagrees with the report of the enquiry officer.

96. A report by an enquiry officer defined under rule 2(c) is also a report by a person and the manner is prescribed under the Rules--irrespective of the fact that he was so asked by the DM or not. In our opinion, it is also a preliminary report within the meaning of the proviso to section 95(1) (g) of the Panchayat Raj Act.

97. The DM exercises the powers of the State Government under section 95(1)(g) as well as under the Enquiry Rules as the powers are delegated to him. He also appoints the enquiry officer. He is higher than all enquiry officers. He can himself conduct a preliminary enquiry. It would be anomalous that on a preliminary report of a subordinate officer, a final enquiry and cessation of power can be ordered but the DM, who appoints him, cannot conduct a preliminary enquiry.

98. In our opinion, action under proviso to section 95(1)(g) can also be taken on the preliminary report of the DM as well as on a report of a person defined as enquiry officer under rule 2(c) of the Enquiry Rules. Only these reports would be covered in the word 'otherwise' of rule 5. Any other report would be a report under rule 3(6) of the Enquiry Rules or can be considered by the DM under his suo motu power to order a preliminary enquiry but final enquiry with cessation of power can not be ordered on its basis.

99. We would like to explain our point of view as well.

100. In the third WP, the report is by the DPRO. He is defined as an enquiry officer under rule 2(c) of the Enquiry Rules. On his report, the power of pradhan can be ceased and the final enquiry can be ordered. The order in the third WP cannot be invalidated on this account.

The Chunmun Case--Observations Should be Limited.

101. The observations of the single judge in the Chunmun case,

mentioned in the fourth question under the heading 'QUESTIONS REFERRED', should be seen in the light of the facts of that case.

102. In the Chunmun case, a report was sent by a junior engineer. It is not clear from the judgement whether the junior engineer was nominated by the DM as the enquiry officer or not but the single judge had held that a junior engineer was not competent to hold enquiry under the Enquiry Rules. In view of our decision, this report could be treated under rule 3(6) and could be referred for a preliminary enquiry but on its basis alone neither the three members committee could be appointed nor powers of the pradhan could be ceased.

103. The judgement on the facts of the Chunmun case is correct but the broad proposition that are extracted by the single judge, referring the third and fourth WPs to the larger bench--are not correct and they require modifications and have to be limited to facts of that case only.

104. In our opinion, the word 'otherwise' in rule 5 includes, and the DM can rely upon, the following reports only to cease financial and administrative powers and direct for the final enquiry.

A report of a person, who is also defined as an enquiry officer under rule 2(c) of the Enquiry Rules--irrespective whether he was directed by the DM to conduct the preliminary inquiry or not;

A preliminary enquiry report conducted by the DM himself.

However, a report by any other officer or any other information cannot be relied upon by the DM to constitute a three member committee ceasing financial and administrative powers. In such a situation, it should be treated as a report under rule 3(6) or would come under word 'otherwise' in rule 4(1) and at the most only a preliminary enquiry can be ordered."

7. Paragraph 107 of the decision of the Full Bench, especially clause (e) thereof, is also relevant. The same is quoted hereinbelow:

"107. Our conclusions are as follows:

(a) The DM may ask the preliminary enquiry to be conducted by any officer defined under rule 2(c) of the Enquiry Rules on a complaint or a report under rule 3 or any other material or information. He has suo motu powers as well to order a preliminary enquiry;

(b) A pradhan has no right to object that complaint or report is not in accordance with rule 3 of the Enquiry Rules;

(c) A pradhan is neither entitled to be associated in the preliminary enquiry nor is entitled to the copy of the preliminary report. However, before an order ceasing the financial and administrative power is passed, his explanation or point of view or the version to the charges should be obtained and considered;

(d) In the first and the third WPs, the impugned orders have been passed on the basis of preliminary report after obtaining and considering the explanation of the pradhan. The impugned orders in these WPs cannot be faulted on this ground;

(e) In our opinion the word 'otherwise' in rule 5 includes and the DM can rely upon the following reports only to cease financial and administrative power and direct the final enquiry:

A report of a person who is also defined as an enquiry officer under rule 2(c) of the Enquiry Rules--irrespective of

whether he was directed by the DM to conduct the preliminary inquiry or not;

A preliminary enquiry report conducted by the DM himself.

(f) In the third writ petition, the report was submitted by the DPRO, who is defined as an enquiry officer under rule 2(c) of the Enquiry Rules. The impugned order cannot be faulted on the ground that the DPRO was not asked by the DM to conduct the preliminary enquiry;

However, it is open to the petitioners in the first and third WPs to raise other points before the appropriate bench."

8. On a bare perusal of the aforesaid Full Bench decision the Court finds that while a report submitted by any other public servant who does not fall within the definition of 'enquiry officer' under Rule 2(c) of the Rules 1997 cannot be made the basis for any action involving cessation of financial and administrative powers of the Gram Pradhan and constitution of a Three Member Committee for discharging his duties and such a report can only be made basis for ordering a preliminary inquiry in terms of Rules 1997 by an inquiry officer defined in Rule 2(c) thereof, a report submitted by an officer who is either the District Panchayat Raj Officer or any other district level officer and falls within the meaning of 'inquiry officer' as defined in Rule 2(c) of the Rules 1997 can be acted upon by the District Magistrate *ipso facto* for the aforesaid purpose, meaning thereby, even if any preliminary inquiry had already been ordered by him earlier by any other officer or it had not been ordered, on receipt of any such report by a District Panchayat Raj Officer or any other District level officer who falls in the definition of 'inquiry officer' under Rule 2(c), whether or not he had been appointed to function as inquiry officer, can be made the basis by the District Magistrate to seize financial and administrative powers of the Gram Pradhan and to form a three member Committee for discharging his functions. Reasons in this regard have already been given by the Full Bench. This is its ratio.

9. In view of the above discussion only point raised by the learned counsel for the petitioner for challenging the impugned order is not sustainable. The petitioner in spite of being served a show-cause notice did not submit a reply. The explanation furnished in this regard in the petition is not acceptable, especially after going through the alleged certificate issued by a Private Nursing Home, copy of which is appended as Annexure-5 to the writ petition.

10. In view of the above, no interference is called for. The writ petition is **dismissed.**

11. The inquiry officer appointed for conducting the final inquiry shall conduct the inquiry within six months with the cooperation of the petitioner after following the relevant Rules in this regard, especially Rule 6 of the Rules 1997. After submission of the final inquiry report, a copy of which shall be given to the petitioner, final decision shall be taken keeping in mind the decision rendered in the case of Ambesh Kumar v. State of U.P., Writ Petition No.20971 (MS) of 2018, copy of which shall be furnished by the petitioner's counsel to the District Magistrate in this regard.

(2020)1ILR 393

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ Tax No. 147 of 2018

M/S Honda Siel Power Products ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Tarun Gulati, Sri Vinayak Mathur, Sri Vipin Upadhyay

Counsel for the Respondents:
A.S.G.I., Sri Anant Kumar Tiwari, Sri B.K. Singh Raghuvanshi

A. Tax – Repayment of refund – Principle of Unjust Enrichment – Central Excise Act, 1944: Sections 11A, 11B, 12B, 35, 35E; Central Excise Tariff Act, 1985; Central Excise Rules, 2002: Rule 7 - Question for consideration before the Court is, as to whether the revenue can initiate proceedings u/s 11A for recovery of excise duty, once adjudication had been made by department making final provisional assessment and, thereafter, adjudicating application for refund u/s 11B, and no appeal being filed challenging the said adjudication which having attained finality, is barred on the ground of change of opinion or would amount to reassessment when once the revenue did not take recourse to appeal in higher forum. (Para 31)

There is no remedy available to department at all u/s 11A to proceed, after having allowed adjudication u/s 11B to attain finality - Once the adjudication has taken place u/s 11B, department cannot proceed to recover u/s 11A, on the basis of "erroneous refund", so as to enable the refund order to be revoked, as the remedy lies u/s 35E for applying to the Appellate Tribunal for determination - In the present case, petitioner-company had made an application for refund which was adjudicated on 05.11.2015 and it was directed to refund excise duty amounting to Rs.1,02,75,633/- which was in excess. This order was never challenged by revenue in appeal and it attained finality. (Para 33 to 35, 39, 43 to 45)

B. Alternative Remedy u/s 35 – Where there is change of opinion by issuance of show-cause notice, writ petition is maintainable. (Para 42)

Writ Petition allowed. (E-4)

Precedent followed: -

1. Shahnaaz Ayurvedics Vs. CCE, Noida, 2004 (173) ELT 377 (All. HC) (Para 14 & 42)

2. CIT Vs. Simplex Concrete Piles, (2013) 11 SCC 373 (Para 15 & 42)

3. Samsung India Electronics Pvt. Ltd. Vs. State of U.P. and others, (2016) SCC Online All. 1539 (Para 15, 20 & 42)

4. Eveready Industries Ltd. Vs. Cestat, Chennai, 2016 337 ELT 189 (Mad. HC) (Para 10 & 44)

5. Civil Appeal No. 8488 of 2009 decided along with case of Addison and Company (Para 18 & 41)

6. CCE and C, Tirupati Vs. Panyam Cements and Minerals Industries Ltd. 2016 (331) ELT 2006 (SC) (Para 11)

7. Mafatlal Industries Ltd. Vs. Union of India, 1979 (89) ELT 247 (SC) (Para 12)

8. CTO Vs. Binani Cements, (2014) 8 SCC 319 (Para 13)

9. CIT Vs. Bhanji Lavji (1972) 4 SCC 88 (Para 16)

10. Arun Gupta Vs. Union of India, (2015) 371 ITR394 (All. HC) (Para 16)

11 Calcutta discount Company Ltd. Vs. ITO, AIR 1961 SC 372 (Para 16)

12. Jeans Knit Pvt. Ltd. Vs. DCIT Bangalore, 2016 SCC Online 1536 (Para 16)

13. State of Punjab Vs. Bhatinda district Cooperative Milk Producers Union, (2007) 11 SCC 363 (Para 20)

Precedent distinguished: -

1. CCE, Madras Vs. Addison and Company, (2016) 10 SCC 56 (Para 7, 18, 24, 32 & 41)

2. Union of India Vs. Jain Shudh Vanaspati, 1996 (86) ELT 460 (SC) (Para 9, 25 & 40)

Precedent cited: -

1. Union of India Vs. Rubber Products Ltd., 2015 (326) ELT 232 (SC) (Para 22)

2. CCE Bhuvenshwar Vs. Re-Rolling Mills, (1997) 94 ELT 8 (SC) (Para 25)

Petition challenges show-cause notice dated 17.08.2017 and order dated 30.11.2017, passed by Additional Commissioner of Central Tax, GST and Central Excise, Greater Noida.

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Tarun Gulati, learned Senior Counsel assisted by Sri Vipin Upadhyay and Sri Nishant Mishra, learned counsel for the petitioner, Sri B.K.S. Raghuvanshi and Sri Anant Kumar Tiwari, learned counsel for the respondents-department.

2. Present petition has been filed seeking a writ of certiorari for quashing show-cause notice dated 17.08.2017 and order dated 30.11.2017, and also for writ of mandamus restraining respondents from enforcing demands in respect of repayment of refund received by petitioner.

3. Facts in brief are that petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in manufacture of portable gensets and IC engine falling under Chapter Heading No. 85 and 84 of First Schedule to Central Excise Tariff Act, 1985.

4. Dispute relates to period 2014-15. According to petitioner, it applied for provisional assessment of excise duty under Rule 7 of Central Excise Rules, 2002 (hereinafter called as "Rules") on 01.04.2014. The Excise Commissioner, Central Excise, Division II accepted the request of petitioner for provisional assessment and intimated the same on 31.07.2014. The said correspondence is on record as Annexure-5. Petitioner-Company, thereafter, filed an application for finalisation of provisional assessment on 19.06.2015.

5. Provisional assessment was finalised for period 2014-15 by Assistant Commissioner on 24.07.2015, copy of said order is on record as Annexure-8. According to provisional assessment order, an amount of Rs.17,89,42,303/- was passed on to customer and excise duty deposited to the tune of Rs.1,02,75,633/- was in excess. Assistant Commissioner further held after examining certificate submitted by CA of petitioner-Company that principle of unjust enrichment was not applicable to facts of the case. Order of provisional assessment became final as the department did not prefer any appeal as contemplated under Section 35E read with Section 35 of Central Excise Act, 1944 (for short "Excise Act").

6. After finalisation of provisional assessment, petitioner-Company applied

for refund. Again after adjudication of refund, on 05.11.2015 refund claim was sanctioned under Section 11B of Excise Act. The adjudication of refund order also took note of the fact that unjust enrichment did not apply to facts of the case. This order was also appealable under Section 35E read with Section 35 of Excise Act but no appeal was preferred by department and it attained finality.

7. In one of the matters ***CCE, Madras vs. Addison and Company, (2016) 10 SCC 56,*** the Apex Court held that principle of unjust enrichment applied in a case where manufacturer had failed to establish that burden of duties had not been passed on to the ultimate buyer. On the basis of said judgment, respondent no. 2 issued show-cause notice to petitioner-Company on 17.08.2017, that is after more than two years, asking why amount of Rs.1,02,75,633/- which was erroneously refunded, should not be recovered and credited to the Consumer Welfare Fund. Reply was filed by petitioner-Company on 09.10.2017 and written submission were submitted on 30.10.2017, taking specific objection that proceedings seeking to reopen concluded proceedings on the basis of unconnected and subsequent Supreme Court judgment was without jurisdiction and ought to be dropped.

8. Respondent no. 2 on 30.11.2017 held the petitioner liable for refund of the amount being unjust enrichment, since petitioner was not able to prove that burden of duty was not passed on by dealers/ distributors to their customers.

9. Counsel for the petitioner submitted that revenue did not file any appeal against finalisation of provisional assessment order dated 24.07.2015 wherein it was held that unjust enrichment is inapplicable. Further, no appeal was preferred against order dated 05.11.2015, whereby refund of excess excise duty was paid to petitioner, and thus, it attained finality. It is contended that by issuing show-cause notice dated 17.08.2017 seeking to reopen the proceedings and, thereafter, by passing order impugned dated 30.11.2017, the respondent authorities had committed gross illegality to question the correctness of earlier orders which had become final. Reliance placed by department on the decision of the Apex Court in case of ***Union of India vs. Jain Shudh Vanaspati, 1996 (86) ELT 460 (SC)*** cannot be applied in the present case, as said case relates to fraud which is not alleged in the present case. It is further contended that Section 35E of Excise Act provides that power of review is available with the Commissioner under which it can be directed that an appeal against any order be filed by department. As orders dated 24.07.2015 and 05.11.2015 whereby provisional orders were finalised and refund was granted, also qualifies as order passed under the Act, and respondents were entitled to file an appeal against such orders. In absence of any appeal, these orders attained finality and cannot be reopened by starting collateral proceedings by issuance of show-cause notice under Section 11A of Excise Act, as provisions of Section 11A applies *inter alia* in case when there is a grant of "erroneous refund", while in the present case refund was granted in accordance with orders passed which attained finality and cannot be termed as erroneous to invoke Section 11A.

10. Reliance has been placed upon a judgment of Madras High Court in case of ***Eveready Industries Ltd. vs. Cestat,***

Chennai 2016 337 ELT 189 (Mad. HC), wherein it has been held that once refund is allowed, then parallel proceedings by way of issuance of show-cause notice under Section 11A of the Act can not be initiated. Relevant Paras 48 and 49 are extracted hereasunder:-

"48. In other words, two valuable rights, one in the form of right of appeal and another in the form of order of refund, are now sought to be taken away indirectly by taking recourse to Section 11A. What cannot be done directly cannot be done indirectly also.

49. In so far as the decision of the Andhra Pradesh High Court is concerned, one observation made in paragraph 16 of the said decision is of prime importance. In paragraph 16, the Andhra Pradesh High Court has made it clear, after analysing Sections 11A and 11B that there is an adjudication process involved in the processing of applications made under Sections 11A and 11B. The Andhra Pradesh High Court held that orders passed under Sections 11A and 11B are appealable. Therefore, the decision of the Andhra Pradesh High Court, especially the observation in paragraph 16, should be made use of by the assessee to contend that since there was no appeal against the order under Section 11B, the Department cannot take recourse to Section 11A."

11. In case of ***CCE and C, Tirupati vs. Panyam Cements and Minerals Industries Ltd. 2016 (331) ELT 206 (AP),*** the Andhra Pradesh High Court took a view that once the department failed to file an appeal, it would be incorrect to start collateral proceedings by issuance of show-cause notice under Section 11A of the Excise Act.

12. Apex Court in case of ***Mafatlal Industries Ltd. Vs. Union of India 1979 (89) ELT 247 (SC),*** while dealing with a situation where a manufacturer pays a duty unquestioningly and his remedy of appeal fails, then after the order becoming final after a lapse of sufficient period, on basis of decision rendered by a High Court or Supreme Court challenges the same on the ground that duty was not payable or was payable at a lesser rate, it was held that manufacturer was not entitled to claim any refund as the adjudication order had become final. In case in hand assessment order as well as refund order having become final, revenue cannot restart the matter by issuing show-cause notice exercising power under Section 11A of the Act.

13. The second point canvassed by counsel for petitioner is that show-cause notice dated 17.08.2017 was issued after more than two years from finalisation of assessment order dated 24.07.2015 and is barred by limitation. Show-cause notice has been treated from the date of refund order dated 05.11.2015, which is a consequential order after finalisation of assessment, thus, show-cause notice is beyond two years and is barred by limitation. Reliance has been placed upon a decision of the Apex Court in case of ***CTO v. Binani Cements (2014) 8 SCC 319,*** wherein it has been held that a specific provision relating to a specific and defined subject would prevail over a general provision relating to a broad subject.

14. Sri Gulati further submitted that issuance of show-cause notice by respondent was based on mere change of opinion on the very same facts, only on account of a subsequent decision of Apex

Court, which is not applicable in the present case. Issuance of notice under Section 11A amounted to reassessment as held in case of ***Shahnaaz Ayurvedics vs. CCE, Noida 2004 (173) ELT 337 (All. HC).***

15. On question of reassessment, on basis of subsequent decision, reliance has been placed on a decision of Apex Court in case of ***CIT vs. Simplex Concrete Piles (2013) 11 SCC 373,*** and also on a Division Bench of this Court in case of ***Samsung India Electronics Pvt. Ltd. vs. State of U.P. and others, (2016) SCC Online All. 1539*** wherein it was held that subsequent judgment cannot be used to reopen assessment or disturb past assessments. Relevant Para 11 is extracted hereasunder:-

"11. Further, a subsequent judgment cannot be used to reopen assessments or disturb past assessments which have been concluded. [See Para 7, Austin Engineering v. JCIT (2009) 312 ITR 70 (Guj.) Para 4 and 5, Bear Shoes 2011 (331) ITR 435 (Mad.), B.J. Services Co. Middle East Ltd. v. Deputy Director (2011) 339 ITR 169 (Uttarakhand), Sesa Goa v. JCIT 2007 (294) ITR 101 (Bom.), Geo Miller and Co. 2004 (134) Taxman 552 (Cal)]. Reliance is also placed on the decision of the Hon'ble Supreme Court in MEPCO Industries v. CIT, (2010) 1 SCC 434, where the CIT on the basis of a subsequent decision of the Supreme Court sought to rectify his earlier order. The Hon'ble Court held that this would amount to a change of opinion."

16. Reliance has also been placed on the decision in case of ***CIT vs. Bhanji Lavji (1972) 4 SCC 88, Arun Gupta vs. Union of India (2015) 371 ITR 394 (All. HC)*** (Para 14, 20), ***Calcutta Discount Company Ltd. vs. ITO AIR 1961 SC 372*** *and* ***Jeans Knit Pvt. Ltd. vs. DCIT Bangalore 2016 SCC Online 1536*** wherein the Courts have held that no reassessment can be made once the proceedings are concluded, merely on the basis of change of opinion.

17. Counsel for the petitioner distinguishing the case of ***Addison and Company*** (supra) relied upon the department while issuing show-cause notice, submitted that the said case is distinguishable on facts. As Hon'ble Apex Court interpreted clause (e) of Proviso to Section 11B and not Clause (d). As in that case no CA certificate was presented by assessee evidencing that incidence of duty lied with assessee, no commercial invoices were issued by applicant to its customers on which no excise duty was mentioned. While reading Section 11B(2), it is clear that where manufacturer has applied for refund of excise duty, clause (d) of Proviso to Section 11B(2) states that (i) the duty of excise should have been paid by the manufacturer and (ii) such incidence of duty must not have been passed on to any other person. In the present case, it is not in dispute that incidence of excise duty which was initially passed on to dealer was borne by petitioner on issuance of credit notes and discounts on invoices. The Commissioner on the basis of such credit notes and invoices had held petitioner to have paid excess excise duty, thus, the law laid down by Apex Court in case of ***Addison and Company*** (supra) was not applicable in the present case.

18. Stress was also laid upon the fact that ***Civil Appeal No. 8488 of 2009*** decided along with case of ***Addison and Company*** (supra) where credit notes were

issued regarding return of excise duty paid and CA certificate was produced, the Apex Court dismissed the appeal of the revenue and allowed refund to assessee. Relevant Paras 38 and 39 are quoted hereasunder:-

"38. The respondent-Assessee is a 100 per cent export-oriented unit (EOU) manufacturing cotton yarn. The respondent filed an application for refund of an amount of Rs. 2,00,827/- on 14.08.2002 on the ground that it had paid excess excise duty @ 18.11 % instead of 9.20 %. The Assessee initially passed on the duty incidence to its customers. Later the Assessee returned the excess duty amount to its buyers which was evidenced by a certificate issued by the Chartered Accountant on 02.08.2002. The refund claim was rejected by the Deputy Commissioner of Central Excise, Kolhapur Division vide an order dated 24.09.2002 on the ground that the Assessee did not submit either the credit notes or the Chartered Accountant's certificate at the time of filing the refund application. Not satisfied with the genuineness of the documents, the Deputy Commissioner rejected the refund claim. The Commissioner (Appeals) Central Excise, Pune allowed the appeal filed by the Assessee by taking note of the certificate issued by the Chartered Accountant and the credit notes dated 29.07.2002. The Appellate Authority accepted the Assessee's contentions and held that there was no reason to doubt the genuineness of the documents produced. The Appellate Authority allowed the appeal of the Assessee and the said order was confirmed by the Central Excise and Service Tax Appellate Tribunal vide judgment and order dated 06.10.2005. The said order of Central Excise and Service Tax Appellate Tribunal was further confirmed by the High Court of Judicature at Bombay in Central Excise Appeal No. 100 of 2008 filed by the Revenue. The Revenue has filed the above Civil Appeal challenging the validity of the judgment of the High Court in CCE v. Eurotex Industries and Exports Ltd, reported in 2008 SCC OnLine Bom 1578.

39. Except for a factual dispute about the genuineness of the certificate issued by the Chartered Accountant and the credit notes raised by the Assessee regarding the return of the excess duty paid by the Assessee, there is no dispute in this case of the duty being passed on to any other person by the buyer. As it is clear that the Assessee has borne the burden of duty, it cannot be said that it is not entitled for the refund of the excess duty paid. In view of the facts of this case being different from Civil Appeal No. 7906 of 2002, the appeal preferred by the Revenue is dismissed."

19. In the present case, CA certificate dated 15.06.2015 was submitted to substantiate that burden of duty initially passed on to dealers/ distributors was assumed back by petitioner after credit notes were issued.

20. As to the maintainability of writ petition, Sri Gulati submitted that the Apex Court in ***State of Punjab vs. Bhatinda District Cooperative Milk Producers Union (2007) 11 SCC 363*** had held that question of limitation being a question of jurisdiction, a writ petition under Article 226 of the Constitution is maintainable. He also relied upon decision of this Court in case of **Samsung India Electronics Pvt. Ltd.** (supra) wherein it has been held that writ petition is maintainable when reassessment

proceedings are initiated on the basis of mere change of opinion.

21. It was lastly contended that no burden of excise duty was passed in respect of cash discount and mega discount is concerned to the dealers/ distributors. Perusal of invoices issued by petitioner reveals that in case of cash discount and mega discount, the discounts are passed on to dealers through invoices issued at the time of sale of products, thus, amount paid by dealers to petitioner is the discounted prices and incidence of excise duty on such discount remained with petitioner alone and is never shifted to dealer.

22. Per contra, Sri B.K.Singh Raghuvanshi, learned counsel appearing for the department submitted that order impugned dated 30.11.2017 is appealable before Commissioner (Appeals) in terms of Section 35 of the Act, as there is an alternative remedy available to the petitioner. He has relied upon a decision of the Apex Court in case of ***Union of India vs. Rubber Products Ltd. 2015 (326) ELT 232 (SC).***

23. He further submitted that excise duty is subsumed in the prices and not charged separately from customer, when price charged from customer includes excise duty and discounts are provided to the dealers by way of credit notes, then it is not clear how the duty element included in the discount granted by way of credit note is passed on to customers after sale.

24. It was also contended that Section 11A of the Act provides for recovery of excise duty refunded erroneously. The show-cause notice was issued in the background of judgment of Apex Court in the case of ***Addison and Company*** (supra). According to him, there is no pre-condition under Act to review of the refund order before initiating recovery proceedings, as Act nowhere bars such recovery proceedings without review of refund order.

25. Sri Raghuvanshi also relied upon judgment of Apex Court in case of ***Jain Shudh Vanaspati*** (supra) wherein it has been held that show-cause notice issued under Section 28 of Customs Act, could be issued for demand of duty without revising order passed under Section 47 in terms of Section 130 of Customs Act. Reliance has also been placed upon a decision of Apex Court in case of ***CCE Bhuvenshwar vs. Re-Rolling Mills (1997) 94 ELT 8 (SC)*** wherein it has been held that Section 11A was parimateria with Section 28 of Customs Act.

26. Learned counsel for department laid stress that show-cause notice as well as the order dated 30.11.2017 are not in nature of reassessment as they do not affect or change the quantum of excise duty assessed and refunded to petitioner, but has been issued only for transfer/ credit to the Consumer Welfare Fund after recovering the same from petitioner to whom it has been erroneously refunded.

27. We have heard counsel for the parties and perused the material on record. Before proceeding to decide the issue in hand, it would be necessary to have a cursory glance at relevant provisions of Central Excise Act, 1944. Relevant portion of Sections 11A and Sections 11B, 12B, 35E and 35 are extracted hereasunder:-

"Section 11A. Recovery of duties not levied or not paid or short-

levied or short-paid or erroneously refunded.-

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

(a) the Central Excise Officer shall, within [two years] from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

.....

Explanation 1. *-- For the purposes of this section and section 11AC,--*

(a) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) "relevant date" means,-

(i) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid, and no periodical return as required by the provisions of this Act has been filed, the last date on which such return is required to be filed under this Act and the rules made thereunder;

(ii) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid and the return has been filed, the date on which such return has been filed;

(iii) in any other case, the date on which duty of excise is required to be paid under this Act or the rules made thereunder;

(iv) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(v)in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund;

(vi) in the case where only interest is to be recovered, the date of payment of duty to which such interest relates.

Section 11B. Claim for refund of [duty and interest, if any, paid on such duty.-

(1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or DeputyCommissioner of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in

relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:

Provided *that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :*

Provided *further* ***t****hat the limitation of [one year] shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest.*

(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the [duty of excise and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided *that the amount of [duty of excise and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -*

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the [duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

(e) the [duty of excise and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

(f) the [duty of excise and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Section 12B. Presumption that the incidence of duty has been passed on to the buyer. -

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

Section 35. Appeals to [Commissioner (Appeals)]. *-- (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a [Principal Commissioner of Central Excise or Commissioner of Central Excise], may appeal to the [Commissioner of Central Excise (Appeals)] [hereafter in this Chapter referred to as the [Commissioner*

(Appeals)]] [within sixty days] from the date of the communication to him of such decision or order :

*[**Provided** that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]*

[(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

***Provided** that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]*

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.

Section 35E. Powers of [Committee of Chief Commissioners of Central Excise] or [Principal Commissioner of Central Excise or Commissioner of Central Excise] to pass certain orders-

(1) The Committee of Chief Commissioners of Central Excise may, of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner of Central Excise or Commissioner of Central Excise as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Central Excise in its order."

28. Thus, from the reading of provisions of Section 11A(1) of the Act, which provides for recovery of any duty of excise which has not been levied or paid or has been short levied or short paid or erroneously refunded. The recovery of such amount of excise duty can be made under Section 11A(1) irrespective of whether such non-levy or non payment or short levy or short payment or erroneously refund was on the basis of any approval, acceptance or assessment relating to rate of duty or on valuation of excisable goods under any other provisions of this Act or Rules made thereunder.

29. Section 35 of the Act provides for appeals to Commissioner (Appeals), wherein any person aggrieved by any decision or order passed under this Act may appeal within 60 days from the date of communication. Further, Section 35E which confers power on Committee of Chief Commissioner of Central Excise to either call for and examine the records of any proceedings in which a Principal Chief Commissioner of Central Excise or Commissioner of Central Excise as an Adjudicating authority has passed a decision or order under the Act and may direct such Commissioner or any other Commissioner to apply before Appellate Tribunal for decision. While Section 11B of the Act provides for claim for refund of excise duty.

30. As in the present case, provisional assessment was finalised on 24.07.2015, the assessing authority recorded a finding that CA certificate dated 15.06.2015 certifies that no part of duty is recovered from the dealers/

distributors involved in the discount passed on to the dealers/ distributors, which indicates that assessee had not passed on the incidence of duty paid in proportion to the discount given to dealers/ distributors and, therefore, issue of unjust enrichment is a remote possibility and further, the order observed that duty to the tune of Rs.17,89,42,303/- was passed on to the customers and duty deposited to the tune of Rs.1,03,75,633/- was in excess. Further, an application being made by petitioner was adjudicated by Assistant Commissioner on 05.11.2015 wherein it was held that it was not a case of unjust enrichment and petitioner was entitled for refund. This order was also not challenged by revenue and the same attained finality.

31. Thus, question for consideration before us is, as to whether the revenue can initiate proceedings under Section 11A for recovery of excise duty, once adjudication had been made by department making final provisional assessment and, thereafter, adjudicating application for refund under Section 11B, and no appeal being filed challenging the said adjudication which having attained finality, is barred on the ground of change of opinion or would amount to reassessment when once the revenue did not take recourse to appeal in higher forum.

32. As it is not in dispute that after provisional assessment order, the adjudicating authority passed an order for refund under Section 11B of the Act. Both the orders which were appealable and revisable under Section 35 and 35E were never taken to the higher forum by revenue and they attained finality. It was only after decision of the Apex Court in case of ***Addison and Company*** (supra) that show-cause notice was issued on 17.08.2017, and order was passed on 30.11.2017 directing the petitioner for refund of excise duty to be deposited in Consumer Welfare Fund.

33. A careful reading of Sections 11A, 11B, 35 and 35E would reveal that an application for refund as envisaged under Section 11B is not to be dealt as a ministerial Act or an administrative Act, rather an application has to be made by person claiming refund within a prescribed time and the application is to be accompanied by documents referred to in Sub-section (1) of Section 11B to establish that amount of duty of excise and interest, if any paid on such duty in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty and interest, if any, paid on such duty has not been passed on by him to any other person. It is on the receipt of this application, Assistant Commissioner or Deputy Commissioner of Central Excise, if satisfied may make an order for refund. Thus, it is only after the adjudication of the application that an order of refund of duty and interest is passed.

34. Sub-section (3) of Section 11B which is a non-obstante clause makes it clear that dehors any judgment, decree, order or direction of appellate tribunal or court or any other provision of the Act, no refund shall be made except as provided in Sub-section (2). Thus, the procedure prescribed under Section 11B not only regulates the manner and form in which an application for refund is to be made but also prescribes period of limitation as well as method of adjudication in which refund has to be made.

35. Thus, Section 11B assumes great significance, as any order of refund of

excise duty and interest is made only after the adjudication as envisaged under scheme of Section 11B. In the present case, petitioner-company had made an application for refund which was adjudicated on 05.11.2015 and it was directed to refund excise duty to tune of Rs.1,02,75,633/- which was in excess. This order was never challenged by revenue in appeal and it attained finality.

36. Thus, once the order of adjudication has been validly passed under Section 11B and a refund has been made on 05.11.2015, the next question which crops up for consideration is as to whether Section 11A can be invoked thereafter.

37. As Section 11A(1)(a) uses the word "Central Excise Officer" who is empowered for recovery of any refund, Central Excise Officer is defined in Section 2(b) of the Act to mean Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of Central Excise Department invested by Central Board of Excise and Customs constituted under Central Board of Revenue Act, 1963 with any of powers of a Central Excise Officer under the act. Thus, an order of recovery can be passed under Section 11A by an Assistant Commissioner, as he happens to be a Central Excise Officer in terms of Clause (a) of sub-section (1) of Section 11A, though an application under sub-section (2) of Section 11B can be made and an order for refund can either be passed by Assistant Commissioner or by Deputy Commissioner. Meaning thereby that a Deputy Commissioner can pass an order for refund under Section 11B (2) and an Assistant Commissioner can invoke proceedings for recovery under Section 11A (1).

38. This could lead to a situation where power of recovery under Section 11A is invoked by a subordinate authority despite the fact that refund application has been adjudicated upon by a superior authority under Section 11B.

39. Through plain reading of Section 35E, it is clear that limited revisional jurisdiction is conferred upon Principal Commissioner and Commissioner of Excise in sub-section (2) of Section 35E, this power is not actually to correct any error directly, but only available for directing the competent authority to take matter to the Commissioner (Appeals). Meaning thereby that it is always open to Principal Commissioner or Commissioner or Central Excise to examine the order passed by adjudicating authority under Section 11B and direct the competent authority to file appeal against order of refund. In the present case, order of refund was never taken to higher forum and it became final.

40. Decisions relied upon by the counsel for the revenue in case of ***Jain Shudh Vanaspati*** (supra) relates to proceedings which were vitiated by fraud. Further, the Apex Court recorded a clear finding that goods were cleared for home consumption under Section 47 of the Act by playing fraud upon the Department. Therefore, the Court held that fraud vitiates all solemn Acts, while in present case department has not alleged any fraud upon the petitioner-assessee.

41. Further reliance placed by counsel for revenue on the decision of ***Addison and Company*** (supra), wherein it was held that recovery under Section 11A can be made where excise duty was refunded erroneously, but the Apex Court had also held that where the incidence of duty was not passed on and the assessee had borne burden of duty, thus he was entitled for the refund. Thus, both the cases relied upon by the department are not applicable in the present case, as it is neither a case of fraud, nor where incidence of duty was passed on.

42. Secondly, the argument of alternative remedy under Section 35 is concerned, the said fact is of no rescue to the department as specific case of petitioner is that show-cause notice dated 17.08.2017 was issued after more than two years from finalisation of assessment order dated 24.07.2015, and where there is change of opinion by issuance of show-cause notice, writ petition is maintainable as held in ***Shahnaaz Ayurvedics*** (supra), ***Simplex Concrete Piles*** (supra) and ***Samsung India Electronics Pvt. Ltd.*** (supra).

43. As seen above that Section 35E and 11A operate in different fields and are invoked for different purposes, we are merely concerned in this case with the interplay between Sections 11A and 35E. We are also concerned with what happened in the form of an adjudication under Section 11B. What happens in a case wherein adjudication takes place under Section 11B and authorities do not take recourse available to them, whether after having allowed adjudication under Section 11B to attain finality, was there any remedy available to department at all under Section 11A to proceed.

44. This question was considered and decided in ***Eveready Industries*** (supra), wherein the Court held that two valuable rights, one in the form of right of appeal and another in form of order of refund, are now sought to be taken away indirectly by taking recourse to Section 11A. What cannot be done directly cannot be done indirectly also.

45. Thus, the department, once the adjudication has taken place under Section 11B cannot proceed to recover on the basis of "erroneous refund" under Section 11A so as to enable the refund order to be revoked, as the remedy lied under Section 35E for applying to the Appellate Tribunal for determination and not invoking Section 11A.

46. In view of the above, we are of the considered opinion that the issuance of show-cause notice dated 17.08.2017 and, thereafter, order dated 30.11.2017 passed by respondent authority for repayment of refund pursuant to orders under Section 11B are unsustainable and are hereby quashed.

47. The writ petition stands **allowed.**

(2020)1ILR 405

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ Tax No. 850 of 2017

M/S Bundelkhand Health Care
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Manjari Singh, Sri Kunal Ravi Singh

Counsel for the Respondents:
C.S.C., Sri C.B. Tripathi

A. Tax – Reassessment/Classification – Uttar Pradesh Value Added Tax Act, 2008: Section 28, 29(7), Schedule II, Part A, Entry 20; Drugs and Cosmetics Act, 1940: Section 3(b)(ii); Drugs and Cosmetics Rules: Rule 126; HSN Explanatory Notes, 2002 - Reports of experts certify the nature of the products in question, which ought to be taken as sufficient evidence in support of classification. (Para 13)

The goods in question i.e. Harpic and Mortein are squarely covered under Entry 20, Part A of Schedule II of UPVAT Act. Harpic is a 'disinfectant' and Supreme Court has held that disinfectants which destroy/kill germs are in the nature of pesticides. Mosquito Coils including Mortein Coils would fall within the Entry "Pesticides and Insecticides" as the chemical composition used in the manufacturing of is allethrin which is an insecticide. No new material has been put forward by the respondents to show that the goods in question will be classifiable under Schedule V. (Para 8 to 22, 49)

B. In absence of no new material brought on record, the completed assessment cannot be reopened merely on the basis of change of opinion - Discovery of an inadvertent mistake or non-application of mind during assessment would not be justified ground to initiate reassessment proceedings**.** (Para 26, 43, 46 to 48)

Writ Petition allowed. (E-4)

Precedent followed: -

1. Ponds India Ltd. Vs. Commissioner Trade Tax, Lucknow, 2008 (8) SCC 369 (Para 13)

2. Bombay Chemicals Vs. Collector of Central Excise, (1995) Supp. 2 SCC 646 (Para 16 & 17)

3. Knight Queen Industries Vs. State of UP, 2006 (145) STC 226 (Para 18 & 19)

4. M/s Reckitt Benckiser (India)Ltd. Vs. State of Andhra Pradesh, Tax Revision No. 10 of 2007 (Para 20 & 30)

5. Reckitt Benckiser India Pvt. Ltd. Vs. State of Assam, W.P. (C) No. 1377 of 2010 (Para 20 & 31)

6. Reckitt Benckiser (India) Ltd. Vs. Assistant Commercial Taxes Officer Anti Evasion and others, S.B. Sales Tax Revision/Reference No. 11 of 2012 (Para 20 & 32)

7. State of A.P. Vs. Reckitt Benckiser India Ltd., Special Leave to Appeal (C) No. 18473 of 2014 (Para 20, 34 & 38)

8. M/s Bombay Chemicals Pvt. Ltd. Vs. Collector of Central Excise, 1995 (2) Supp. SCC 646 (Para 20)

9. The Commissioner Commercial Tax Vs. M/s Reckitt Benckiser (India) Ltd., Sales/Trade Tax Revision No. 91 of 2014 (Para 21, 35 & 41)

10. Bharat Heavy Electricals Ltd. Vs. State of U.P. and others, 2017 UPTC 205 (Para 24 & 44)

11. Rathi Industries Ltd. Vs. State of U.P., 2014 UPTC 960 (Para 24)

12. Varun Beverages Ltd. Vs. State of U.P. and others, (2017) 99 VST 393 (All.) (Para 24 & 47)
13. Vikrant Tyres Ltd. Vs. State of U.P., (2006) 148 STC 122 (All.) (Para 24)

14. State of U.P. and others Vs. Aryaverth Chawal Udyog and others, (2015) 17 SCC 324 (Para 24 & 46)

15. CIT Vs. Kelvinator India Limited, (2010) 320 ITR 561 (SC) (Para 44)

Notification referred/cited: -
1. Notification No. S.O. 1335 dated 02.06.1961

2. Notification No. X. 11013/2/72-D dated 09.07.1975

Petition challenges reassessment proceedings initiated vide order 24.11.2017, passed by Assistant Commissioner, Grade-1, Commercial Tax, Jhansi Division, Jhansi, Uttar Pradesh for the AY 2009-10.

(Delivered by Hon'ble Piyush Agrawal, J.)

1. By means of the present writ petition, the petitioner has challenged the reassessment proceeding initiated against it granting permission vide order dated 24.11.2017 passed by respondent-3 which reopened the completed assessement for assessment year 2009-10 under UPVAT Act.

2. Brief facts of the case are that the petitioner is a registered firm engaged in business of purchase and sale of cosmetic goods, soap, glucose, edible oils, pesticides etc.

3. It has been avered that the petitioner has been appointed as distributor of several products manufactured by Reckitt Benckiser (India) Pvt. Ltd. which manufactures various household products including insecticides such as Mortein, Pesticides such as Harpic and Lizol, Drugs and medicines including Disprin, Dettol etc. The petitioner has obtained registration under the UPVAT Act, bearing TIN No. 09132601751.

4. It has been averred that while passing the original assessment order dated 8.3.2013 the assessing authority has righly imposed the tax on the goods in question i.e. sale of Harpic and Mortein coil at the rate of 4% -5% treating the same as pesticide. It is further averred that the reassessment proceeding has been initiated under Section 29 (7) of UPVAT Act for which notice was issued, the petitioner has submitted the detailed reply bringing on record that items sold by it, have righly been imposed tax at the rate of 4 % as the commodity in question has been decided not only by Full Bench of Trade Tax Tribunal, Lucknow Bench in the case of Neha Trading, but also various other High Courts have treated Harpic and Mortein coil as pesticides. The proceeding initiated against the petitioner treating the items in question classifiable as under Schedule V of UPVAT Act at the rate of 12.5 %, is not correct. Being dissatisfied with the reply the impugned order dated 24.11.2017 has been passed extending the period of limitation.

5. On the contrary, the respondents has taken the stand that the goods in question i.e. Harpic and Mortein coil have not specifically been mentioned in the taxing Schedule-I, II, III, IV, of UPVAT Act, therefore, the goods in question have to be taxed at the rate of 12% under Schedule -V of UPVAT Act. The assessing authority had without application of mind had allowed the claim of the petitioner at the rate of 4 % and therefore, the goods in question have been under assessed, hence, justifying the reassessment proceeding and the impugned order.

6. Heard learned counsel for the petitioner Sri Kunal Ravi Singh and Sri C.B. Tripathi, learned Special Counsel for State of UP.

7. The counsel for the petitioner has submitted that the petitioner is carrying on the business of trading. In due course of business, Harpic and Mortein coil have been purchased and sold and accordingly tax at the rate of 4 % were charged and deposited with the department treating the

same to be covered under Schedule-II, Part A, Entry 20 of UPVAT Act at the rate of 4% -5%. The assessing authority while passing the original assessment order under Section 28 of UPVAT Act, treating the goods in question taxable as part of Schedule -II, Part A, Entry 20 of UPVAT Act and accordingly, imposed tax at the rate of 4% - 5 % and same was deposited by the petitioner.

8. Learned counsel for the petitioner submits that the active ingredient of Harpic is Hydrochloric Acid, which is a well-known disinfectant and in addition, it has other ingredients like Bis/2 Hydroxyethyl Oleylamine, Alkyl Trimethyl Ammonium Chloride, Butylated Hydroxy Toluene, Methyl Salicylte and other chemicals, used for disinfecting, the surface on which it is applied. Harpic is effective in killing various Micro-organisms (germs/ bacteria) like S. aurus, E.coli, S. flexnari, S. faecalis, K. pneumoniae, and C. albicans, which are generally found in toilet bowls that cause Skin, soft tissue and mucous membrane infections, Gastroenteritis, Inflammation of colon, bacillary dysentery, Diarrhoea; etc. Hence, it is apparent that the function of Harpic is disinfectant and it has additional function of completely removing tough stains from the surface on which it is applied. Hence, it is recommended for disinfecting (primary function) and cleaning toilets (additional function) and other porcelain surfaces.

9. He further submitted that Government recognizes Harpic as disinfectants.

10. Harpic being disinfectant is considered as a "drug' under Section 3(b) of the Drugs and Cosmetics Act, 1940 read with Rule 126 of the Drugs & Cosmetics Rules. Section 3 (b) (ii) of D&C Act defines drug to include such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette. In terms of Section 3 (b) (ii) of the D&C Act, Government of India is required to notify such goods and Government of India by its Notification No. S.O. 1335 dated 02.06.1961 read with Notification No. X. 11013/2/72-D dated 09.07.1975 has notified *"Disinfectant fluids from synthetic or naturally occurring substances by virtue of their composition possessing disinfectant properties or with claim to possess disinfectant properties"* as drugs.

11. Learned counsel for the petitioner further submits that for manufacture of Harpic, a drug license is required to be obtained under D&C Act as it is a substance used for the destruction of vermin or insects which cause disease in human beings. The manufacturer has accordingly obtained drug licence under the D&C Act. Even the label of Harpic is required to comply with the provisions of the Drugs & Cosmetics Rules framed under the Drugs and Cosmetics Act, 1940. Accordingly, the manufacturing license number as obtained is mentioned on the label along with other requirements such as batch number etc. Further as per Schedule K of the Drugs and Cosmetics Act, 1940, "substances intended to be used for destruction of vermin or insects which cause disease in human beings or animals" are considered as "insecticides and disinfectants" and such products are

exempted from the requirement of sale license. Hence, in terms of the provisions of D&C Act, Harpic is disinfectants.

12. Leraned counsel for the petitioner furhter submits that the Government lab certifies Harpic as Disinfectant.

13. The Indian Institute of Chemical Technology, Hyderabad ("IICT") a premier Institute under the Government of India by its Report dated 06.08.2010 has certified that Harpic has very high capability to kill bacteria and germs (99.999999%) and they are disinfectants. In the case of Ponds India Ltd., the Hon'ble Supreme Court laid stress on the fact that reports of experts certify the nature of the products in question, which ought to be taken as sufficient evidence in support of classification. Relevant paragraphs of the Judgment in Ponds India Ltd Vs. Commissioner Trade Tax, Lucknow, 2008 (8) SCC 369 is extracted below for ease of convenience:-

"72. Furthermore, an expert in the field has also given his opinion in favour of the appellant. This Court in Quinn India Ltd. v. CCE classified a product relying, inter alia, on the report of the clerical (sic chemical) examiner as under: (SCC p. 563, para 7).

"7. .. The Tribunal has completely ignored the report of the Chemical Examiner dated 6-10-1981 and the final opinion of the Chief Chemist dated 2-4-1992 coupled with the classification issued by the Department regarding use of wetting agents in the textile industries falling under Sub-Heading 3402.90. Test reports of the Chemical Examiner and Chief Chemist of the Revenue unless demonstrated to be erroneous, cannot be lightly brushed aside. The Revenue has not made any attempt to discredit or to rebut the genuineness and correctness of the report of the Government, Chemical Examiner and Chief Chemist. Thus, the reports are to be accepted along with other documentary evidence in the form of classification issued by the Department regarding use of wetting agents in the textile industries to hold that the product Penetrator 4893 possessed surface active properties and, therefore, is covered by Exemption Notification No. 101/66 dated 17-6-1966 as amended from time to time."

73. In this case also, the report of the chemical examiner is in favour of the assessee. Furthermore, in a case of this nature, where the Revenue itself has been holding the assessee to be a producer of a pharmaceutical product, the burden would be on the Revenue to establish that the goods cease to fall under a given entry. For the said purpose, no material was placed by the Revenue which was imperative."

14. Learned counsel for the petitioner further submits that the classification of tax entries worldwide are based on Harmonized System of Nomenclature, Brussels and even India has adopted the same for Customs and Central Excise Entries. The Sales Tax/VAT Entries are based on Customs/Central Excise Entries. Therefore, the HSN Entries and Explanatory Notes have relevance for understanding entries under Sales Tax/ VAT Acts. As per the HSN Explanatory Notes 2002, based on which Central Excise & Customs Entries are made in India, HSN Explanatory Notes 2002 provides as:

"Disinfectants are agents which destroy or irreversibly inactivate

undesirable bacteria viruses or other micro-organisms generally on inanimate objects.

Disinfectants are used for example in hospitals for cleaning walls etc. or sterilizing instruments. They are also used in agriculture for disinfecting seeds.

The group includes sanitisers bacteriostats and sterilisers."

15. Further, even as per the HSN Explanatory Notes it is provided that "Disinfectants are used in hospitals for cleaning walls". Thus, such disinfectants may also be used for cleaning and merely because they are also used for cleaning, it cannot be said that it is not a disinfectant.

16. Learned counsel for the petitioner has relied upon ***Bombay Chemicals vs. Collector of Central Excise*** (1995) Supp 2 SCC 646); wherein, the Supreme Court had an occasion to consider the classification of phenyl, which is held to be classifiable as insecticides/pesticides. In paragraph 8, the Supreme Court held that disinfectants are in the nature of pesticides. It was held by the Supreme Court that a disinfectant which, therefore, is used for killing may broadly be covered in the word "pesticide". Disinfectants may be of two types; one to disinfect and other to destroy the germs, the former, i.e., those products which are used as disinfectant for instance lavender, etc., may not be covered in the expression "pesticide". But those products which are used for killing insects by use of substances such as high boiling tar acid have the same characteristic as "pesticide".

17. Learned counsel for the petitioner further submits that the Harpic sold by the petitioner is squarely covered by the judgement of the **Bombay Chemicals** (supra), which is disinfectant and has very high capability to kill bacteria and germs (99.999999%) as is clear from the Test Reports.

18. Mortein is an insecticide and the primary/active ingredient of Mortein is the insecticide *d-trans* allethrin. This Court on a consideration of the various judgements of the Hon'ble Supreme Court as well as the High Courts has held that Mosquito Coils including Mortein Coils would fall within the Entry "Pesticides and Insecticides" as the chemical composition used in the manufacturing of Mosquito Coil is allethrin which is an insecticide. **This Hon'ble Court in Knight Queen Industries Vs. State of UP, 2006 (145) STC 226** has held as under:

19. The principles that emerge from the decisions referred to above are that while interpreting statues like the Trade Tax Act, the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product; that merely because the percentage of medicament in a product is less does not also ipso facto mean that the product is not a medicament; that the main criterion for determining classification is normally the use it is put to by the customers who use it that there is a mental association in the mind of the consumer in respect of certain products keeping in view the utility of the product and also the reputation the name of the product has acquired in the market and amongst the consumers: that when a consumer buys an

article, he buys it because it performs a specific function for him; and that it is not for the Court to determine for itself under which item a particular article falls, and it should be best left to the authorities. entrusted with the subject, but where the very basis for including the article under a residuary head in order to charge higher duty is foreign to a proper 'determination of this kind, the Court will be loath to hold that it will hot interfere.

24. .....Having considered the submissions advanced by learned Counsel for the parties, the material on record and examination of the facts of these petitions, we find from the pleadings that Articles/goods sold by the petitioners, though used as household articles, is never the less house hold 'insecticide' which fact is also mentioned on their products. The chemical composition used in manufacturing the goods in question (though widely known and popularly understood as Mosquito Repellent) is allethrin which is an 'insecticide. The petitioners are using chemicals for manufacturing the finished goods which have been treated as 'insecticides' and under the provisions of the Incecticides Act, 1968 a certificate has been issued by Government of India, Ministry of Agriculture which leave no scope of doubt that allethrin which is used in the product sold by the petitioners is 'insecticide'. Insecticides Rules, 1971 provides for the manner of labelling. Labelling/packing of the products of the petitioner is as per the afore-quoted Rule 19(4) of the Rules.

25. D-Trans 'allethrin' and 'pallethrin' are used in manufacturing the goods which have been described as household 'insecticides' on their products as per the statutory requirement under Insecticides Act. In the absence of any specific entry relating to Mosquito Repellent/Mosquito Destroyer and at the same time there being an entry mentioning 'insecticides', it can reasonably be said that an ordinary person will ordinarily understand the product of the petitioners falling under category of the insecticides.

26. These facts coupled with the Principles enunciated in the decisions referred to above leave us in no doubt that the products sold by the petitioners are basically in the categories of 'insecticides' particularly in the absence of any indication in the Notification in question.

27. It has, however, been urged by Sri Kesarwani, learned Counsel for the Revenue that the petitioner applied for registration under Section 8A of the Act "Form 14" wherein in column 7 it has been mentioned that the commodity traded is "Mosquito Repellent Mats/Coils etc.". Similarly under Section 7 of the Central Sales Tax Act, 1956, the petitioner applied for registration in Form-A wherein in column 16 it has been mentioned that the purchase and sales of "Mosquito Repellent Mats/Goils etc".

28. We are, however, unable to persuade ourselves to hold that merely because the petitioners have at various stages contended that the product is described or commonly traded as 'Mosquito Repellant' it should not fall in the category of insecticides'. We would have accepted such a contention if there was separate or specific exclusion entry of Mosquito Repellant in the existing entry of 'Pesticide & Insecticide'. In that case there would have been no difficulty but in the absence of specific mention as indicated above, the product in question falls under the entry insecticides'. The percentage of 'allethrin' used in the product is of no consequence at all, since it is admittedly an 'insecticide'.

29. We entirely agree with the view taken by the Madras High Court in Transelektra Domestic Products Pvt. Ltd. (supra), and by Kerala High Court in Transelektra Domestic Products Private Ltd. (supra) The learned Judge in M/s. Priya Distributor (supra) had also placed reliance upon the said decisions.'

19. In the case of **Knight Queen Industries *(supra),*** wherein this Hon'ble Court has held that Mortein Coil is classifiable under "insecticide". Against the judgment of this Hon'ble Court, State preferred an Special Leave Petition. i.e. S.L.P. (CC) 4803 of 2006, which was dismissed by Hon'ble the Apex Court. The order of aforesaid S.L.P. is on record as Annexure-11 to the writ petition. Thus the judgment given by this Court in case of Knight Queen (supra) has attained the finality and is binding on all the authorities.

20. The counsel for the petitioner relied upon the various judgements on disputed items of various High Courts i.e. High Court of Andra Pradesh in **Tax Revision No. 10 of 2007 (M/s Reckitt Benckiser (India) Ltd. Vs. State of Andra Pradesh,** The Guwahati High Court in **W.P. (C) No. 1377 of 2010 (Reckitt Benckiser India Pvt. Ltd. Vs. State of Assam,** High Court of Rajasthan Bench at Jaipur in **S.B. Sales Tax Revision/ Reference No. 11 of 2012 (Reckitt Benckiser (India) Ltd. Vs. Assistant Commercial Taxes Officer Anti Evasion and others** and judgment of Supreme Court in **Special Leave to Appeal (C) No. 18473 of 2014 (State of A.P. Vs. Reckitt. Benckiser India Ltd.) and M/s Bombay Chemicals Pvt. Ltd. Vs. Collector of Central Excise, 1995 (2) Supp. SCC 646.**

21. The counsel for the petitioner has further relied upon the judgment and order of this Court passed in Sales/Trade Tax Revision No. 91 of 2014, (The Commissioner Commercial Tax Vs. M/s Reckitt Benckiser (India) Ltd., wherein this Hon'ble Court after referring the various judgements of Supreme Court and High Court have come to the conclusion that goods in question is covered under Schedule-II, Part A under Entry 20 of UPVAT Act.

22. Learned counsel for the petitioner further submits that in the case of M/s Reckitt Benckiser (India) Ltd., itself on whose behalf the petitioner is selling the goods in the State of Uttar Pradesh, various High Courts have decided the issue that Harpic and Mortein coil as insecticide and hence, no higher rate of tax can be levied and therefore re-assessment proceeding should be dropped.

23. The counsel for the petitioner further submits that re-assemment proceeding under Section 29(7) of the Act, has been initiated illegally as there is no new material on the basis of which the impugned order could be passed. There is as such no cogent reason warranting invocation of powers under Section 29 (7) of the Act by respondent-3.

24. The counsel for the petitioner has relied upon various judgements passed under Section 21 (2) of UP Trade Tax Act, which is analogous of Section 29 (7) of UPVAT Act. Few of the references are as under; **Bharat Heavy Electricals Limited Vs. State of UP and others, 2017 UPTC 205, Rathi Industries Ltd. Vs. State of UP, 2014 UPTC 960, Varun Beverages Ltd. Vs. State of UP and others (2017) 99 VST 393 (All), Vikrant Tyres Ltd.**

Vs. State of UP (2006) 148 STC 122 (All), State of UP and others Vs. Aryaverth Chawal Udyog and others (2015) 17 SCC 324. He further submits that re-assemment proceeding initiated against the petitioner may be quashed.

25. The counsel for the petitioner further submits that re-assessement proceeding initiated against the petitioner is illegal and arbitrary in nature, as there is no case of escaped assessment, under assessment of being assessed to tax at the lower rate, than which, it has been assessable under UPVAT Act.

26. Rebutting the submissions of the counsel for the petitioner, Sri C.B. Tripathi, Special Counsel has submitted that re-assessement proceeding against the petitioner has righly been initiated as the goods sold by the petitioner have no specific entry regarding taxability of Harpic and Mortein coil and therefore the same was liable to be taxed under Schedule -IV of UPVAT Act at the rate of 12.5 % because the commodity is not covered under Schedule-I, II, III, IV of UPVAT Act. Learned Special Counsel further argued that assessing authority while passing the original assessment order has not applied its mind judicially and the claim of the petitioner has been accepted at the rate of 4%-5%. He further submits that under Section 29 of UPVAT Act, if the goods are being taxed at the lower rate than that which it is assessable under the Act, then re-assessement proceeding is justified. In view of the submissions, he submits that the writ petition is not at all maintainable and is liable to be dismissed.

27. The Court has perused the record and heard learned counsels for the parties.

28. For proper consideration of the matter relevant entries of Schedule II, Part A Entry 20 and Schedule V of UPVAT Act, are quoted below :-

Entry 20 of Part -A of Schedule II to the UPVAT Act reads as under:

"Chemical fertilizers, except those which are described in entry No. 26 of the Schedule-I; micro-nutrients and also plant growth promoters and regulators, herbicides, rodenticides, insecticides, weedicide and pesticides."

Schedule V to the UPVAT Act reads as under:

1. All goods except goods mentioned or decsribed in Schedule-I, Schedule-II, Schedule-III and Schedule-V of this Act.

29. Schedule-II, Part A, Entry 20 of UPVAT Act provides levy of 4%-5% tax on the sale of goods mentioned therein which includes all all kind of insecticides and pesticides. Schedule-V provides levy of tax at the rate of 12% on those goods which are not mentioned in any of the Schedule-I,II, III, IV.

30. The High Court of Andhra Pradesh in **Tax Revision No. 10 of 2007 (M/s Reckitt Benckiser (India) Ltd. Vs. State of Andra Pradesh** held Harpic as insecticide/pesticides. The relevant part is quoted below:

1. M/s. Reckitt Benckiser (India) Limited (hereafter, the manufacturer) is engaged in the manufacture and sale of Lizol (floor cleaner), Harpic (toilet cleaner) and Mortein mosquito repellents. Whether these goods are exigible to value added tax @ 4% under entry 20 of Schedule IV to the Andhra Pradesh Value Added Tax, 2005 (the VAT Act)? This

question falls for consideration in the tax revision case filed under Section 34 of the VAT Act and in all the Writ Petitions filed under Article 226 of the Constitution of India.

.....

4. The Tax Revision Case, in the circumstances, against the order of the STAT, would not lie. The manufacturer, therefore, filed two Writ Petitions being W.P. Nos. 143 and 145 of 2011 assailing the order of the STAT and also seeking declaration that Harpicand Lizol are exigible to VAT @ 4%. Thus, TREVC. No. 10 of 2007 and W.P. Nos. 143and 145 of 2011 are filed by the manufacturer assailing the order of the STAT confirming the decision of ARA. W.P. Nos. 2652, 18288 and 23875 of 2009, W.P.Nos. 2443, 7202 and 2408 of 2010 are filed assailing the order of the ARA for declaration as above. W.P. No. 11613 of 2009, W.P. Nos. 31010, 31012, 14521, 14522,. 14523, 14525, 14526, 14530, 27457, 27519, 27470 of 2011 are filed seeking a declaration that the good are liable to tax @ 4% under entry 20 to Schedule IV to the VAT Act. The Writ Petitions being W.P. Nos. 4033, 11272, 11301 and 11703 of 2009 are filed by the manufacturer or the distributors/dealers challenging assessment orders as well as orders imposing penalty, where the officials applied rate of tax at 12.5% under Schedule V. While doing so, needless to mention, the assessing officers relied on the ruling of ARA. In W.P. No. 27470 of 2011, M/s. Raghu Agencies, a dealer seeks a declaration that Mortein spray and Mortein Rat Kill are goods exigible to tax @ 4% under entry 20 of Schedule IV of the VAT Act.

....

26. ..... we hold that Harpic and Lizol are disinfectants capable of destroying germs and microorganisms like Escheriachia coli, Staphylococcus aureus, Enterococcus hirae, Pseudomonas aeruginosa and Candida albicans etc. Being disinfectants they fall within the category of pesticides covered by entry 20 of IV Schedule. We also conclude that even though Harpic Lizol are manufactured under drug licence issued in Form-25 issued under Rule 70 of the Drug Rules, they do not fall under entry 88 and, therefore, the question of these goods coming within the excluded category under entry 88(b) does not arise. Both the goods in question, therefore, are exigible to tax at 4% but not at 12.5%.

31. Guwahati High Court in the case of **W.P. (C) No. 1377 of 2010 (Reckitt Benckiser (India) Pvt. Ltd. Vs. State of Assam** held the following observations:

1. By this batch of writ petitions, W.P. (C) No. 1377 of 2010, W.P. (C) No. 1378 of 2010, W.P. (C) No. 1379 of 2010 and W.P. (C) No. 1377 of 2010, the petitioner company, registered under the Companies Act and engaged in manufacturing, sale and marketing of various household products including insecticides such as Mortein mosquito coils, mats, vaporizers and disinfectants like "Harpic" and "Lizol" dispirit and Dettol antiseptic liquid, cherry blossom shoe polish, etc., has challenged the assessment of the respondents authorities of the products of Harpic, Lizol and Dettol at the higher rate of these products at 12.5 per cent VAT charges classifying under the residual items under entry No. 1 of the Fifth Schedule of the Assam Value Added Tax Act, 2003 (hereinafter referred to as, "the Assam VAT Act"), contrary to the claim of the petitioner that the petitioner-company would be liable to pay only at

rate of four per cent as these items are covered by specific entries provided under Schedule to the said Act at the said rate. As all these writ petitions challenge similar orders and under similar fact-situations, these writ petitions are heard together and disposed of by this common judgment.

2. According to the petitioner, the petitioner had been paying taxes at the rate of four per cent in respect of the aforesaid products as these (Harpic and Lizol) are covered under entry No. 19 of Part A of the Second Schedule to the Assam Value Added Tax Act chargeable at four per cent and Dettol is covered under entry No. 21 of the Fourth Schedule to the Assam Value Added Tax Act also chargeable at the same rate of four per cent.

3. Entry No. 19 of Part A of the Second Schedule to the Assam Value Added Tax Act reads as follows:

Chemical fertilizers, pesticides, weedicides and insecticides excluding mosquito repellents including electric or electronic mosquito repellents gadgets and insect repellents, devices and parts and accessories thereof.

4 . The petitioner claims that the products Harpic and Lizol fall under the aforesaid entry No. 19 as these are disinfectants and covered by the expression "pesticides".

.....

21 . The petitioner has contended that the products "Harpic" and "Lizol" are disinfectants and since disinfectants are also covered by the expression "pesticides", these products would be covered by entry 19 of Part A of the Second Schedule.

22. The petitioner states that the active ingredient of Harpic is hydrochloric acid, which is a well known disinfectant and in addition, it has other ingredients like Bis/2 hydroxyethyl oleylamine, alkyl trimethyl ammonium chloride, butylated hydroxy toluene, methyl salicylte and other chemicals, used for disinfecting the surface on which it is applied and is effective in killing various micro-organisms (germs/bacteria) like S. Aurus, E. Coli, S. Flexnari, S. Feacalis, K. Pneumoniae, and C. Albicans, which are generally found in toilet bowls that cause skin, soft tissue and mucous membrane infections, gastroenteritis, inflammation of colon, bacillary dysentery, diarrhoea, etc. Before respondent No. 3, the petitioner had also furnished supporting documents/certification from experts, viz., SGS India Private Limited which is an affiliate of Societe Generale de Survellience S. A V Geneva, the world's independent international testing, verification and certification organisation, which hold accreditation from National Accreditation Board for Testing and Calibration Laboratories, Ministry of Science and Technology, New Delhi and is approved, among others, by the Bureau of Indian Standards, New Delhi and the Ministry of Environment and Forests, Government of India (under Environment Protection Act, 1986), New Delhi, to substantiate the contention that Harpic is a disinfectant.

23. The aforesaid contention of the petitioner that Harpic is a disinfectant was not doubted or contradicted by the Revenue. Similarly, the primarily disinfectant quality of "Lizol", supported by expert opinion also remained unrebutted.

24 . The petitioner also contended that similarly, "Lizol" has the active ingredient benzalkonium chloride solution I.P. and other ingredients fragrance-BBA P 2062 M, propylene

glyeel LP, sodium bicarbonate I.P, tartazine yellow, fatty alcohol ethoxylate, lsoprpyl alcohol I.P. and other chemicals, used for disinfecting floor, cooking platform, sink and similar hard surfaces. It is effective in killing microorganisms like S. Aurus E. Coli (MTCC 1687) Pseudomonas Aeruginosa (MTCC-741) which are generally found on hard surfaces like floors that cause urinary tract infections, respiratory system infections, dermatitis, soft tissue infections, bone and joint infections, infections to patients with severe burns, cancer and AIDS, etc.

25. Accordingly, it was submitted that the petitioner, through the product labels, had been publicly and commercially representing "Harpic" and "Lizol" as disinfectants and the consumers purchase the products for their disinfectant properties apart from the cleansing utility. The consumers purchase and use the same for mainly disinfectant purpose while keeping their toilets/homes clean. Thus, the primary purpose of the products is disinfectant and is not the secondary as held by the Revenue.

26. As regards the aforesaid contention, it is noticed that the product labels of both the products clearly indicate that the petitioner has made representation of their disinfectant property as the primary purpose. In the impugned order, though the label has been referred to, the representation about the disinfectant property has been glossed over, not highlighted and has held the disinfectant property to be only the secondary one. The products labels of both the products indicate that the said products are in the nature of disinfectant which prominently display the potential of the products to kill germs. In the product label of Lizol, it is clearly stated thereon that the product is a "disinfectant surface cleaner". Moreover, it is prominently stated on the face of the product that it "Kills 99.9 per cent germs". Even on the reverse of the product label the name of the product is shown as "Lizol disinfectant". There is also a logo of a house with a commonly used medical sign of "+" whereunder it is written "Kills 99.9 per cent germs". The same logo is prominently embossed on both the front and back of the bottle to indicate that the said product kills germs, thereby emphasizing that it is a disinfectant.

.....

82. In the light of the above discussions, we are of the view that these petitions should be allowed and the products Harpic and Lizol having been declared to be pesticides as discussed above, would be liable to tax under entry No. 19 of Part A of the Second Schedule to the Assam VAT Act and Dettol would be liable to be assessed as an item under entry 21 of the Fourth Schedule to the Assam VAT Act and will not fall within the excluded category under the Explanation.

32. In **S.B. Sales Tax Revision/ Reference No. 11 of 2012 (Reckitt Benckiser (India) Ltd. Vs. Assistant Commercial Taxes Officer Anti Evasion and others,** the High Court of Rajasthan has held as follows:-

3 . The brief facts noticed are that a survey came to be conducted at the business premises of the assessee on 03.05.2007 by the Anti Evasion Wing of the revenue wherein, it was noticed that the assessee is manufacturing/producing Anti- Mosquitoes devices and "repellents", "Dettol Soap", "Brasso", "Harpic Toilet Cleaner", "Lizol Floor Cleaner", "Manson Polish", "Robin Blue", "Ret Kill",

"Teenapole", Drugs & Medicines etc. and during the course of survey and further investigation material was collected on the basis whereof the Assessing Officer noticed that the assessee is selling Electrically Operated Anti-mosquito devices & repellents, Electrically Operated Anti-Mosquito Mat, Anti-Mosquito Coil, Rat Kill, "Harpic", "Lizol", "Dettol" Antiseptic on which VAT @ 4% was being collected and paid and the Assessing Officer was prima-facie of the opinion that the claim of the assessee that it falls in Schedule-IV of the R.V.A.T. Act is not correct rather it falls in the residuary Schedule on which rate prescribed is 12.5% which was required to be paid and not 4% as claimed by the assessee. ...

.....

7 . Learned counsel for the assessee contended that the two products namely; "Harpic" & "Lizol" are classifiable under Entry 21 or Entry 29 of Schedule IV of the R.V.A.T. Act. and the same being used as Insecticides or Pesticides and the entry being specific and clear, the Assessing Officer as well as the Appellate Authorities have gone wrong in holding that they fall under the residuary entry namely; Schedule (V).....

9 . Counsel also contended that the Central Excise Authorities have also considered these products as Insecticides/Pesticides. Counsel also drew attention of the Court to the dictionary meaning of "Pest/Pesticide" and other products as given in the Chamber's Twentieth Century Dictionary as well as "Glossary/Pesticides" Users. Counsel contended that the active ingredient of "Harpic" is Hydrochloric Acid, which is a well known Benzalkonium Chloride Solution I.P., and other ingredients and these products are used for disinfecting the surface on which it is applied. "Harpic" is effective in killing various Micro Organisms (germs/bacteria) and the function of "Harpic" is disinfectant and it has additional function of completely removing tough stains from the surface on which it is applied.

....

20. The assessee in the aforesaid cases has been able to procure and place reports of Government owned Laboratories which do specify that these products are falling in the category of Insecticide/Pesticides. In my view, such test reports ought not to have been discarded by the lower authorities without referring even rather should have been adverted either to distinguish or reject the same. It would be appropriate to refer the judgment in the case of Ponds India Limited (supra) where insofar as test/Laboratory report is concerned, it has been held as under:-

"72. Furthermore, an expert in the field has also given his opinion in favour of the appellant. This Court in Quinn India v. CCE classified a product relying, inter alia, on the report of the clerical (sic chemical) examiner as under:

"7. ...The Tribunal has completely ignored the report of the ChemicalExaminer dated 06-10-1992 coupled with the classification issued by the Department regarding use of wetting agents in the textile industries falling under Sub-Heading 3402.90. Test reports of the Chemical Examiner and Chief Chemist of the Revenue unless demonstrated to be erroneous, cannot be lightly brushed aside. The Revenue has not made any attempt to discredit or to rebut the genuineness and correctness of the reports of the Government, Chemical Examiner and Chief Chemist. Thus, the reports are to be accepted along with

other documentary evidence in the form of classification issued by the Department regarding use of wetting agents in the textile industries to hold that the product Penetrator 4893 possessed surface active properties and, therefore, is covered by Exemption Notification No. 101/66 dated 17-6-1966 as amended from time to time."

73. In this case also, the report of the chemical examiner is in favour of the assessee. Furthermore, in a case of this nature, where the Revenue itself has been holding the assessee to be a producer of a pharmaceutical product, the burden would be on the Revenue to establish that the goods cease to fall under a given entry. For the said purpose, no material was placed by the Revenue which was imperative."

21. The Apex Court in the case of ***Bharat Sanchar Nigam Limited and Another v. Union of India and Others MANU/SC/1091/2006 : (2006) 3 SCC 1*** *has also held that if an entry has been interpreted consistently in a particular manner for several assessment years ordinarily it would not be permissible for the revenue to depart therefrom unless there is a material change.*

...

23. It would also be appropriate to quote the judgment of the Apex court in the case of Bombay Chemical Pvt. Ltd. (supra) where disinfectant fluids was in issue, held to be entitled to exemption in respect of item 18 added to list of extract items under the Central Excise and Salt Act, 1944 where the Entry 18 was added to it which reads as under:-

"18. Insecticides, Pesticides, Weedicides and Fungicides."

The Apex Court in the aforesaid case defined after taking note of the dictionary meaning of "disinfectant" and "Pesticides" and it would be appropriate to quote relevant paras of the said judgment which reads ad-infra:-

"5. 'Disinfectant' is defined in Webster Comprehensive Dictionary "as a substance used to disinfect or to destroy the germs of infectious and contagious diseases". In the Concise Oxford Dictionary of Current English, 'disinfectant' is defined as "a commercially produced chemical liquid that destroys germs". In Encyclopedia Britannica, Vol.4, it is explained to mean, "any substance, such as creosote or alcohol, applied to inanimate objects to kill microorganisms. Disinfectants and antiseptics are alike in that both are germicidal, but antiseptics are applied primarily to living tissue. The ideal disinfectant would rapidly destroy bacteria, fungi, viruses and protozoans, would not be corrosive to surgical instruments, and would not destroy or discolour materials on which it is used". It thus cannot be disputed that a disinfectant is also a killing agent. Even the Tribunal found that the goods produced by the appellant which contained high boiling tar acid kill the bacteria in the gutters and the bathrooms. In the Report of the Deputy Chief Chemist it was mentioned that all above products numbering 14 were formulations containing high boiling tar acid as the principal active ingredient. It then noticed the definition of pesticide and disinfectant and observed that, "it appears from the above definition that disinfectants are used for killing or inactivating micro-organisms, in some literature for oils (containing high boiling tar acid) are mentioned in pesticide manual". But he opined that it was not clear whether the formulations containing tar acids, as in the case of the goods produced by the appellant which were used as

disinfectants, will be covered broadly by term 'pesticides'.

6. 'Pesticide' has been defined in Butterworths Medical Dictionary, 2nd Edn., as "a comprehensive word to include substances that will kill any form of pests, e.g., insects, rodents and bacteria". The term 'pesticide' includes a large variety of compounds of diverse chemical nature and biological activity grouped together usually on the basis of what kind of pests they are used to destroy or eliminate. Under the US Federal Environment Pesticide Control Act, the term 'pesticide' has been defined to include "(1) any substance ormixture of substances intended for preventing, destroying, repelling, or mitigating any pest, insect, rodent, nematode, fungus, weed, other forms of terrestrial or aquatic plants or other forms of animal life, e.g., viruses, bacteria, or other micro-organisms, which the administrator declares to be a pest and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant" (Pesticides in the Indian Environment, by P.K. Gupta p.2).

7 . 'Fungicide' inhibits growth or destroys fungi pathogenic to man or other animals or inanimate surfaces. The appellant had imported tar acid to

manufacture insecticide, pesticide and fungicide. The Director General had permitted import for this purpose. In the letter written by the appellant claiming exemption, it was stated that disinfectant fluids manufactured by it were capable of being used for the purpose of destroying fungi of medical importance.

8 . A disinfectant which, therefore, is used for killing many broadly be covered in the word 'pesticide'. Disinfectants, may be of two types; one to disinfect and other to destroy the germs. The former, i.e., those products which are used as disinfectant for instance lavender etc. may not be covered in the expression 'pesticide'. But those products which are used for killing

insects by use of substances such as high boiling tar acid have the same characteristic as 'pesticide'.

9. Item No. 18 which was added in 1978 grants exemption to the categories of goods which can be classified as insecticides, pesticides, weedicides or fungicides. They have to be understood in broad sense. The reasoning of the Tribunal that if an expression is capable of a broader and a narrower meaning then it is the latter which could be preferred does not appear to be correct. Where entries are descriptive of category of goods they have certain characteristics. Therefore, when a question arises whether a particular goods is covered in any category or not, it has to be examined if it satisfies the characteristic which go to make it a goods of that category. And whether in trade circle it is understood as such and if it is a goods of technical nature then whether technically it falls in the one or the other category. Once it is found that a particular goods satisfies the test then the issue which arises for consideration is whether it should be construed broadly or narrowly. One of the settled principles of construction of an exemption notification is that it should be construed strictly, but once a goods is found to satisfy the test by which it falls in the exemption notification then it cannot be excluded from it by resorting to applying or construing such notification narrowly. Item 18 is an exemption notification. As stated earlier, it mentions broad categories of goods which are entitled to exemption. Once a goods is found to fall even narrowly in any of these

categories, there appears no justification to exclude it. The test of strict construction of exemption notification applies at the entry, that is, whether a particular goods is capable of falling in one or the other category but once it falls then the exemption notification has to be construed broadly and widely. Each of the words insecticides, pesticides, fungicides or weedicides are understood both in the technical and common parlance as having broad meaning. Therefore, if any goods or items satisfy the test of being covered in either of the expression, then it is entitled to exemption. The broad and basic characteristic for exemption under the notification is that the goods must have the property of killing germs and bacteria, insects or pests and it should be understood in the common parlance as well as being covered in one of the broad categories mentioned in the notification. Since the goods produced by the appellant are capable of killing bacteria and fungi which too, is covered in the expressions 'pesticide' and 'fungicide' there appears no reason to exclude the goods from the aforesaid notification."

This Judgment supports the claim of the assessee and in my view, squarely covers the issue in favour of the assessee.

24. The Gauhati High Court in assessee's own case ***Reckitt Benckiser (India) Pvt. Ltd. v. The State of Assam and Ors*** *(supra) had also an occasion to consider the similar & identical entries and it would be appropriate to quote relevant para Nos. 3 & 4 of the aforesaid Judgment which reads ad-infra:-*

"3. Entry No. 19 of Part A of the Second Schedule to Assam VAT Act reads as follows:-

"Chemical fertilizers, pesticides, weedicides and insecticides excluding mosquito repellents including electric or electronic mosquito repellents gadgets and insect repellents, devices and parts and accessories thereof."

The petitioner claims that the products Harpic and Lizol fall under the aforesaid Entry No. 19 as these are disinfectants and covered by the expression "pesticides".

4. Entry 21 of the Fourth Schedule of the Assam VAT Act, as existed prior to 07.08.2005 which read as, "Drugs & Medicines (On Maximum Retail Price basis)" was modified by the subsequent notification dated 08.08.2005, which now reads as follows:-"Drug and medicines including vaccines, disposable hypodermic syringes, hypodermic needles, catguts sutures, surgical dressing (On Maximum Retail Price basis).

Explanation: The expression "drugs and medicines" shall not include products capable of being used as cosmetics and toilet preparations including tooth paste, tooth powder, cosmetics, toilet articles and soaps."

(emphasis added)"

25. Taking into consideration the entry existing under the R.V.A.T. Act, the characteristic and phraseology is almost identical to the Assam VAT Act, the High Court after detailed reasoning observed in para Nos. 38, 39 & 41 of the judgment of the Gauhati High Court (supra) which reads ad-infra:-

"38. In respect of the aforesaid products, as discussed above, the disinfectants qualities of the Harpic and Lizol and the prophylactic qualities of Dettol have not been denied by the revenue authorities. The only stand taken by the revenue authorities is that these were not dominant nature of the products. However, it cannot be denied that these

disinfectant and the prophylactic qualities of the aforesaid products are not insignificant, rather because of the aforesaid disinfectant and prophylactic qualities, the aforesaid products are used.

It is now well settled principle of law that when two views are possible, the one which favours assessee should be adopted. In Mauri Yeast India Private Limited v. State of Uttar Pradesh, MANU/SC/7514/2008 : (2008) 5 SCC 680.:

"46. It is now a well-settled principle of law that when two views are possible, one which favours the assessee should be adopted.(See Bihar 4: MANU/SC/0642/1997 : (1997) 5 SCC 289"

Here, in the present case, there are two possible view: either to take the products Harpic and Lizol to be merely stain remover and cleansing agents or as disinfectants and in respect of Dettol, to treat it as a mere toilet preparation or a drug or medicine. Since there are sufficient materials to consider Harpic and Lizol as disinfectants and accordingly, as pesticides, and Dettol as medicament, following the aforesaid principle of law, it can be held that the said products are pesticides and drugs respectively.

39 . In view of the aforesaid possible views taken to consider Harpic and Lizol as pesticides and Dettol as a drug, based on material as discussed above, it will not be appropriate to deny their qualification under the aforesaid Entry Nos. 19 and 21 and consign them to the residuary entry. In this connection, we may recollect the observations of the Hon'ble Supreme Court in the Dunlop India Ltd. v. Union of India, MANU/SC/0555/1975 : (1976) 2 SCC 241, where the Hon'ble Supreme Court held as:-

"35. It is good fiscal policy not to put people in doubt and quandary about their liability to duty. Ween a particular product like V.P. Latex known to trade and commerce in this country and abroad is imported, it would have been better if the article is, eo nomine, put under a proper classification to avoid controversy over the residuary clause. AS a matter of fact in the Red Book (Import Trade Control Policy of the Ministry of Commerce) under Item 150, in Section II, which relates to "rubber, raw and gutta percha, raw", synthetic latex including vinyl pyridine latex and copolymer of styrene butadiene latex are specifically included under the sub-head "Synthetic Rubber". We do not see any reason why the same policy could not have been followed in the ICT book being complementary to each other. When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of competition between two rival classifications will, however, stand on a different footing.

36. It is not for the Court to determine for itself under Article 136 of the Constitution under which item a particular article falls. It is best left to the authorities entrusted with the subject. But where the very basis of the reason for including the article under a residuary head in order to charge higher duty is foreign to a proper determination of this kind, this Court will be loath to say that it will not interfere."

.....

41 . In the light of the above discussions, we are of the view that these petitions should be allowed and the

products Harpic and Lizol having been declared to be pesticides as discussed above, would be liable to tax under Entry No. 19 of the Part A of the Second Schedule of the Assam VAT Act and Dettol would be liable to be assessed as an item under Entry 21 of the Fourth Schedule of the Assam VAT Act and will not fall within the excluded category under the Explanation."

26 . The Apex Court in the case of Ambey Laboratories v. Collector (supra) was considering the case of "Liquid Phenyle" an identical product and, held in a case of Central Excise Tariff Act, 1985 that "Liquid Phenyle" is disinfectant.

27. The Division Bench of Andhra Pradesh High Court in the case of (assessee) M/s. Reckitt Benckiser (India) Ltd., v. State of Andhra Pradesh (supra) was also considering case under Andhra Pradesh VAT Act and vide judgment dt. 13.06.2013, of the same product being "Mortein", "Lizol" & "Harpic" while the claim of the assessee was that it falls under Entry 20 of Schedule (iv) of the Andhra Pradesh Value Added Tax payable @ 4% but the claim of the revenue was that it is exigible to tax in Schedule (V) of the Act under rate of 12.5% and taking into consideration the judgment rendered by the Apex Court in the Bombay Chemical Pvt. Ltd. observed in the said judgment which reads as under:-

"We may passingly mention that Section 18 of Drugs Act mandates a licence for manufacture, sale or distribution of any drug, cosmetic or medicine. The word "drug" is defined in Section 3(b) of the Drugs Act. It is inclusive definition. A plain reading of Section 3(b)(iv) thereof shows that not only medicines for internal or external use of human beings or animals but substances that affect structure or function of human beings or animals but substances that affect structure or function of human body or used for destruction of vermin or insects which cause disease in the human beings and animals are also drugs. Further all substances intended for use as components of a drugs. Further all substances intended for use as components of a drug and such devices intended for internal or external use among others, in the "mitigation or prevention of disease" would be drugs. When a manufacturer produces any disinfectant fluids, they are basically intended for prevention of disease by destroying and/or controlling bacteria and microorganisms that are unusually present. That may be one reason why even under the Drugs and Cosmetics Rules, 1945 (the Drugs Rules) the disinfectants are placed in Schedule-K in respect of which they were exempted from the provisions of Chapter IV and the Rules made thereunder. Harpic and Lizol are the products/goods sold even in general stores and on the counters of departmental stores. We therefore reject the submission of the State that Harpic and Lizol fall under entry 88 merely because they are manufactured under drug licence."

28. Placing of reliance by the counsel for the revenue on a judgment of Kerala High Court in assesses own case (supra) is misplaced as the Apex Court reversed and remanded the matter back to Kerala High Court to re-decide and counsel for the respondent was unable to bring on record the subsequent judgment of Kerala High Court.

33. In addition to above, as discussed above, in judgments given by various High Courts, i.e., High Court of Andhra Pradesh, Guwahati and Rajasthan, on the case filed by the manufacturer of Harpic

and Mortein, i.e., M/s Reckitt Benckiser (India) Pvt. Ltd., after considering the relevant entries and provisions of the respective States, have held that Harpic and Mortein Coil, manufactured and sold, are to be classified under the heading "Insecticides/ Pesticides" and "Disinfectant", and are subject to tax at the rate of 4% to 5% and therefore, the Revenue's contention that the item sold by the petitioner should be taxed as residue entry at the rate of 12.5% to 13.5% has been rejected.

34. The Apex Court has dismissed the Special Appeal filed by the State of Andhra Pradesh against the judgement & order passed by the Andhra Pradesh High Court in S.L.P. No. 18473 of 2014 (State of A.P. Vs. M/s Reckitt Benchiser (India) Pvt. Ltd).

35. This Court in T.T.R. No. 91 of 2014 (supra), after a very detailed discussion, has held that Harpic sold by the manufacturer, i.e., M/s Reckitt Benckiser (India) Pvt. Ltd. is to be taxed @ 4%-5%.

36. When a pointed question was put to the learned Special Counsel as to whether any special appeal before the Apex Court has been filed against the judgement & order dated 09.10.2018 passed by this Court, the answer was in negative.

37. The petitioner before this Court has been appointed as a Distributor of the manufacturer (i.e. Reckitt Benchiser India Pvt. Ltd) of Harpic and Mortein Coil, who had already approached not only this Court, but also other High Courts; the issue has been settled treating the same as "Pesticides". Furthermore, on the issue arising from the Andhra Pradesh High Court; the Andhra Pradesh High Court has held that Harpic to be taxed under the head "Pesticides".

38. The Apex Court in **Special Leave to Appeal (C) No. 18473 of 2014 (State of A.P. Vs. Reckitt Benckiser India Ltd.)** had an occasion to decide the issue arising out of Andhra Pradesh High Court and vide judgement dated 06.12.2016, has held as under:

"Delay condoned.

Mr. S. Ganesh, learned senior counsel appearing for the respondent has submitted that the High Court of Andhra Pradesh at Hyderabad, vide judgment dated 13th June, 2012, decided number of writ petitions and revisions and granted relief, but the State has not chosen to assail all the orders, but except few. Additionally, it is submitted that the stand of the assessee has been accepted in subsequent assessment years and it has been allowed to be made final.

In view of the aforesaid obtaining factual matrix, we are not inclined to interfere with the impugned judgment and order of the High Court and, accordingly, the special leave petitions stand dismissed.

The question of law that has been raised in these special leave petitions, in case arises in future from a different judgment, it shall be addressed to on merits. "

39. After the order of Apex Court in the aforesaid S.L.P., the issue stand settled as regard to levy of tax at the rate of 4%-5% on the goods in question i.e. Harpic and Mortein Coil. No different view can legally be permitted.

40. The record reveals that the manufacturer of the petitioner, i.e., M/s Reckitt Benckiser (India) Pvt. Ltd., has treated the item as "Pesticides" and accordingly, a tax was charged from it and on the subsequent sales, the petitioner has charged tax as "pesticides" and has deposited the same along with its monthly returns, which has rightly been accepted by the assessing authority while framing the original assessment orders.

41. This Court in T.T.R. No. 91 of 2014 (supra) has decided the issue vide judgement & order dated 09.10.2018. The relevant paragraphs of the said judgment are quoted below:-

"The brief facts of the case are that the Assessee-Opposite Party-Dealer is carrying on a business of manufacture, purchase and sale of Lizol / Harpic. For the assessment year in question, the Assessee-Opposite Party has charged and deposited the tax on the sale of Harpic and Lizol treating the same are covered under Schedule-II, Part-A, Entry No. 20 of VAT Act at the rate 4% - 5%.

.....

Per contra, learned counsel for the Assessee-Opposite Party has placed reliance of the judgments of the Apex Court as well as of the High Courts.

Learned counsel for the assessee-Opposite Party has placed reliance of a judgment reported in (1995) Suppl. 2 SCC 646 in the case of the Bombay Chemicals Pvt. Ltd. v. Collector of Central Excise.

.....

Learned counsel for the Assessee-Opposite Party submitted that the Revision has been filed by the Revenue against the Judgment dated 17.03.2013, passed by the Commercial Tribunal, Ghaziabad, who has allowed the Appeal filed by the assessee and has upheld and held that the classification of Harpic Disinfectant Toilet Cleaner ("Harpic") and Lizol Disinfectant Floor Cleaner ("Lizol") under Entry 20 of Part-A of Schedule II to the UPVAT Act as an "insecticide" or "pesticide" subject to VAT @ 4%/5% for Assessment Year 2008-09 and rejected the submission of the Revenue that Harpic and Lizol are classifiable under the residual entry (viz. Schedule V to the UPVAT Act and subject to VAT @ 12.5%/13.5%).

The Tax Tribunal passed the Impugned Judgment based on the Judgment of the Supreme Court in Bombay Chemicals Pvt. Ltd. Vs. Collector of Central Excise (1995 Supp. (2) SCC 646), where the Supreme Court was seized of classification of Phenyl, held (at para 8 of the judgment) that disinfectants are classifiable as insecticide/pesticide.

Learned counsel for the Assessee-Opposite Party has submitted that the classification of Harpic and Lizol arose in VAT laws of other States and the High Court of Andhra Pradesh, Gauhati High Court and Hon'ble Rajasthan High Court (under the respective VAT Laws of the State) have held that Harpic and Lizol are "insecticide" and/or "pesticide", liable to tax @4% and do not fall under the residual entry.

Learned counsel further submitted that the State of Rajasthan filed the SLP before the Supreme Court which was dismissed, by the Supreme Court.

Learned counsel for the Assessee-Opposite Party has submitted that after coming into force UP VAT Act, the Assessee-Opposite Party has been bonafide classifying the item namely Harpic and Lizol under Entry 20, Part-A

of Schedule II to the UP Act, which reads as under :-

Rationale for classification adopted by the Respondent:

Since coming into force of the UPVAT Act, the Respondent has been bona-fide classifying Harpic and Lizol under Entry 20 of Part-A of Schedule-II to the UPVAT Act, which reads as:

"Chemical fertilizers, except those which are described in entry No. 26 of the Schedule I; micro-nutrients and also plant growth promoters and regulators, herbicides, rodenticide, insecticide, weedicide and pesticides."

The Respondent classified Harpic and Lizol under Entry 20 of Part II of Schedule II to the UPVAT Act, based on the following principles:

(a) Classification adopted under UP Trade Tax Act as well as other Sales Tax Act, CST and Central Excise;

(b) supported by a large number of Judgments including Judgment of Hon'ble Supreme Court in Bombay Chemicals (supra);

(c) Test Reports of Indian Institute of Chemical Technology, Hyderabad certifying Harpic & Lizol as disinfectants; hence a pesticide/ insecticide, which are relevant as held by the Hon'ble Supreme Court in Ponds);

(d) definition under the relevant statute - Section 3 (b) of the Drugs and Cosmetics Act (definition of drugs) read with Rule 126 of the Drugs & Cosmetics Rules;

(e) Licenses issued for Harpic and Lizol by the Drug Controller, Government of India treating them as a disinfectant;

(f) HSN Classification;

(g) Technical and Dictionary meaning; and

(h) common/commercial parlance etc. (taken note of by the Hon'ble Supreme Court in Bombay Chemicals and by various High Courts (in paras 26 and 27 below).

These principles have been recognized by the Supreme Court in Ponds India Ltd. v. Commissioner of Trade Tax, Lucknow (2008) 8 SCC 369.

Based on such classification, the assessee-dealer had collected VAT @ 4%/5% and deposited VAT @ 4%/5% with the Revisionist. The monthly as well as annual returns of the assessee-dealer were accepted for years. Now, the Revisionist has questioned the classification adopted by the Department, claiming that Harpic and Lizol ought to be classified under the residual entry i.e. Schedule V to the UPVAT Act, which reads as:

"Schedule V

1. All goods except goods mentioned or described in Schedule I, Schedule II, Schedule III and Schedule IV of this Act"

Learned counsel for the assessee-dealers submitted that the active ingredient of Harpic is Hydrochloric Acid, which is a well-known disinfectant and in addition, it has other ingredients like Bis/2 Hydroxyethyl Oleylamine, Alkyl Trimethyl Ammonium Chloride, Butylated Hydroxy Toluene, Methyl Salicylte and other chemicals, used for disinfecting, the surface on which it is applied. Harpic is effective in killing various Micro-organisms (germs/ bacteria) like S. aurus, E.coli, S. flexnari, S. faecalis, K. pneumoniae, and C. albicans, which are generally found in toilet bowls that cause Skin, soft tissue and mucous membrane infections, Gastroenteritis, Inflammation of colon, bacillary dysentery, Diarrhoea; etc. Hence, it is apparent that the function of Harpic is disinfectant and it has

additional function of completely removing tough stains from the surface on which it is applied. Hence, it is recommended for disinfecting (primary function) and cleaning toilets (additional function) and other porcelain surfaces.

The active ingredient of "Lizol" is Benzalkonium chloride solution I.P. The other ingredients of "Lizol" are Fragrance-BBA P 2062 M, Propylene Glycol I.P, Sodium bicarbonate I.P, Tartazine Yellow, Fatty Alcohol Ethoxylate, Isoprpyl alcohol I.P and other chemicals, used for disinfecting the floor, cooking platform, sink and similar hard surfaces. It is effective in killing Micro-organisms like S. aurus, E.coli (MTCC 1687) Pseudomonas aeruginosa (MTCC-741) which are generally found on hard surfaces like floors that cause urinary tract infections, respiratory system infections, dermatitis, soft tissue infections, bone and joint infections, infections to patients with severe burns, cancer etc.

Hence, it is apparent that the primary function of Harpic and Lizol is to act as disinfectant and to kill germs, bacteria and microorganisms and it has additional function of completely removing tough stains from the surface on which it is applied.

He has further submitted that Government recognizes Harpic and Lizol as disinfectants.

Harpic and Lizol being disinfectants are considered as a "drug' under Section 3(b) of the Drugs and Cosmetics Act, 1940 read with Rule 126 of the Drugs & Cosmetics Rules. Section 3 (b) (ii) of D&C Act defines drug to include such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette. In terms of Section 3 (b) (ii) of the D&C Act, Government of India is required to notify such goods and Government of India by its Notification No. S.O. 1335 dated 02.06.1961 read with Notification No. X. 11013/2/72-D dated 09.07.1975 has notified "Disinfectant fluids from synthetic or naturally occurring substances by virtue of their composition possessing disinfectant properties or with claim to possess disinfectant properties" as drugs.

Accordingly, for manufacture of Harpic and Lizol, a drug license is required to be obtained under D&C Act as it is a substance used for the destruction of vermin or insects which cause disease in human beings. The Respondent has accordingly obtained drug licence under the D&C Act. Even the labels of Harpic and Lizol are required to comply with the provisions of the Drugs & Cosmetics Rules framed under the Drugs and Cosmetics Act, 1940. Accordingly, the manufacturing license number as obtained is mentioned on the label along with other requirements such as batch number etc. Further as per Schedule K of the Drugs and Cosmetics Act, 1940, "substances intended to be used for destruction of vermin or insects which cause disease in human beings or animals" are considered as "insecticides and disinfectants" and such products are exempted from the requirement of sale license. Hence, in terms of the provisions of D&C Act, Harpic Lizol are disinfectants.

He has also submitted that the Government lab certifies Harpic and Lizol as Disinfectants.

The Indian Institute of Chemical Technology, Hyderabad ("IICT") a

premier Institute under the Government of India by its Report dated 06.08.2010 has certified that Harpic and Lizol have very high capability to kill bacteria and germs (99.999999%) and they are disinfectants. In Ponds India (Annexure B herein) the Hon'ble Supreme Court laid stress on the fact that reports of experts certify the nature of the products in question, ought to be taken as sufficient evidence in support of classification. Relevant paragraphs of the Judgment in Ponds India Ltd is extracted below for ease of convenience:-

"72. Furthermore, an expert in the field has also given his opinion in favour of the appellant. This Court in Quinn India Ltd. v. CCE classified a product relying, inter alia, on the report of the clerical (sic chemical) examiner as under: (SCC p. 563, para 7)

"7. .. The Tribunal has completely ignored the report of the Chemical Examiner dated 6-10-1981 and the final opinion of the Chief Chemist dated 2-4-1992 coupled with the classification issued by the Department regarding use of wetting agents in the textile industries falling under Sub-Heading 3402.90. Test reports of the Chemical Examiner and Chief Chemist of the Revenue unless demonstrated to be erroneous, cannot be lightly brushed aside. The Revenue has not made any attempt to discredit or to rebut the genuineness and correctness of the report of the Government, Chemical Examiner and Chief Chemist. Thus, the reports are to be accepted along with other documentary evidence in the form of classification issued by the Department regarding use of wetting agents in the textile industries to hold that the product Penetrator 4893 possessed surface active properties and, therefore, is covered by Exemption Notification No. 101/66 dated 17-6-1966 as amended from time to time."

73. In this case also, the report of the chemical examiner is in favour of the assessee. Furthermore, in a case of this nature, where the Revenue itself has been holding the assessee to be a producer of a pharmaceutical product, the burden would be on the Revenue to establish that the goods cease to fall under a given entry. For the said purpose, no material was placed by the Revenue which was imperative."

In support the learned counsel for the assessee-dealer placed the Dictionary meaning.

Dictionary meaning including technical dictionaries are a relevant factor, as held in Ponds India by the Hon'ble Supreme Court and disinfectant is defined as:

Webster Comprehensive Dictionary:

"as a substance used to disinfect or to destroy the germs of infectious and contagious diseases".

In the Concise Oxford Dictionary of Current English, "disinfectant" is defined as:

"a commercially produced chemical liquid that destroys germs".

In Encyclopedia Britannica, Volume 4, it is explained to mean:

"any substance, such as creosote or alcohol, applied to inanimate objects to kill micro-organisms. Disinfectants and antiseptics are alike in that both are germicidal, but antiseptics are applied primarily to living tissue. The ideal disinfectant would rapidly destroy bacteria, fungi, viruses, and protozoans, would not be corrosive to surgical instruments, and would not destroy or discolour materials on which it is used". It

thus cannot be disputed that a disinfectant is also a killing agent."

Technical dictionaries:

Under Indian Pharmacopoeia, 1996 issued by the Government of India, Ministry of Health & Family Welfare, the active ingredients of Harpic and Lizol are said to contain antiseptic/disinfectant qualities. Similarly, the internationally authoritative Encyclopedia on Chemicals, Drugs and Biologicals - The Merck Index states that the active ingredients of Harpic and Lizol have disinfectant properties.

He has also pointed out that the Tax authorities recognize Harpic and Lizol as Disinfectants.

Harpic and Lizol being disinfectants fall under Chapter 3808.91 of Central Excise Classification and the Entry reads as under:

"Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packagings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly-papers)"

Accordingly, the Respondent / assessee had paid excise duty on the said Products, treating them as "disinfectants' and the Returns are being accepted by the Central Excise authorities. In fact, even under GST, the Respondent has been paying GST treating Harpic and Lizol as disinfectants. The classification of tax entries worldwide are based on Harmonized System of Nomenclature, Brussels and even India has adopted the same for Customs and Central Excise Entries. The Sales Tax/VAT Entries are based on Customs/Central Excise Entries. Therefore, the HSN Entries and Explanatory Notes have relevance for understanding entries under Sales Tax/ VAT Acts. As per the HSN Explanatory Notes 2002, based on which Central Excise & Customs Entries are made in India. HSN Explanatory Notes 2002 provides as:

"Disinfectants are agents which destroy or irreversibly inactivate undesirable bacteria viruses or other micro-organisms generally on inanimate objects.

Disinfectants are used for example in hospitals for cleaning walls etc. or sterilizing instruments. They are also used in agriculture for disinfecting seeds.

The group includes sanitisers bacteriostats and sterilisers."

Further, even as per the HSN Explanatory Notes it is provided that "Disinfectants are used in hospitals for cleaning walls". Thus, such disinfectants may also be used for cleaning and merely because they are also used for cleaning, it cannot be said that it is not a disinfectant.

Common parlance evidence:

The primary function of Harpic and Lizol is to act as a disinfectant and in addition to disinfecting/killing bacteria and germs, they also clean. Consumers purchase Harpic and Lizol for their disinfectant properties and expect it to, also clean; therefore as a secondary use, ingredients for cleaning has been added to Harpic Lizol. To extend the logic of the Revisionist, products which have multiple attributes cannot be classified under the specific entry and has to be classified under the residual entry - tablet for cold and fever, cannot be classified as a drug, since it has multiple attributes and has to be classified under the residual entry only. There would be thousands of goods which have multiple attributes in which case, all of them have to be classified under the residual entry only. Such an interpretation

militates and does violence to principles of classification.

In common/commercial parlance also, Harpic and Lizol are understood as "disinfectants' and consumers purchase Harpic and Lizol for its disinfectant properties. This fact is clear from the letters written to the Respondent by some of the consumers and Hospitals, which clearly state that they purchase Harpic and Lizol for its disinfectant properties as well as the advertisement and label of Harpic and Lizol.

.....

Also, the following principles relating to classification ought to be taken into consideration in any matter relating to classification under a taxing statute:

(a) plain meaning to be given to the taxing provision;

(b) burden to prove classification in a particular entry is always on the Revenue;

(c) any ambiguity has to be resolved in favour of the assesse; and

(d) resort to residuary entry is to be taken as a last measure.

Going by the aforesaid principles and applying the same to the present case, it is amply clear that Harpic and Lizol fall under Entry 20 of Part A of Schedule II to the UP VAT Act and not under Schedule V to the UP VAT Act.

Re: Resort to a residuary entry only as a last measure:

The principles governing inclusion of any goods under the residuary entry is well settled. The resort to residuary entry is to be taken as a last measure when an article cannot by any means be classified under any other entry. The Supreme Court in Dunlop India Ltd. Vs. Union of India & Ors (1976 (2) SCC 241) has held that when an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of competition between two rival classifications will, however, stand on a different footing. Further, the Supreme Court held that the Department-Revenue cannot resort to arbitrary classification and in this regard it observed that where the very basis of the reason for including the article under a residuary head in order to charge higher duty is foreign to a proper determination of this kind, the Court will be loath to say that it will not interfere.

Re: Burden to prove classification in a particular entry is always on the Revenue:

The burden to prove that a particular item falls under a specific entry is on the Revenue and not the assesse. The Hon'ble Supreme Court in Union of India Vs. Garware Nylons Ltd. 91996 (10) SCC 413); HPL Chemicals Vs. Commissioner of Central Excise) 2006 (5) SCC 208) and Voltas Ltd. Vs. State of Gujarat (2015 (7) SCC 527) has held that the burden of proof is on the taxing authority to demonstrate that a particular class of goods or item in question is taxable in the manner claimed by the Revenue and that a mere assertion in that regard is of no avail. The said principle has been so stated by the Hon'ble Supreme Court in para 26 of Voltas Ltd. which is extracted herein below for ease of reference:

"Qua the issue of classification of goods to determine the chargeability thereof and the rates of levy applicable, it is no longer res integra that the burden of proof is on the taxing authority to demonstrate that a particular class of goods or item in question is taxable in the

manner claimed by them and that mere assertion in that regard is of no avail as has been enunciated by this Court in Union of India v. Garware Nylons Ltd. and relied upon with approved in HPL Chemicals Ltd. v. CCE."

In the present case, the Department-Revenue has failed to discharge the burden as to how Harpic and Lizol fall under the residuary entry and not under Entry 20 of Part A of Schedule II to the UPVAT Act. The Department-Revenue except for making a bald allegation that Harpic and Lizol have failed to substantiate the said allegation with any documentary proof and justify that Harpic and Lizol are unclassified items under the UPVAT Act and thus exigible to tax at a higher rate.

Re: If two views are possible, the view in favour of assesse to be adopted:

It is a settled principle of law that any ambiguity with respect to classification of a product has to be resolved in favour of the assesse and not the Department. The well settled view was reiterated in Voltas Ltd. vs. State of Gujarat (2015 (7) SCC 527) by the Hon'ble Supreme Court in para 24 has held that in case of a reasonable doubt, the construction most beneficial to the assesse has to be adopted. Applying the aforesaid principles to the facts and circumstances of the present case assuming though not in any manner admitting that there are two plausible views about the classification of Harpic and Lizol then the view favouring the assessee has to be adopted and not the Revenue, especially when the contention of the Revenue is that the items in question fall under the residuary category. Therefore even by the aforesaid principle Harpic and Lizol are liable to be classified under Entry 20 of Part A of Schedule II to the UPVAT Act.

The classification adopted by the Respondent / dealer is based on classification adopted under Uttar Pradesh Trade Tax Act as well as other Sales Tax Act, CST and Excise, supported by a large number of Judgments, test reports from Central Government laboratories certifying Harpic and Lizol as a disinfectant; hence a pesticide/insecticide (as held by the Supreme Court in Bombay Chemicals vs. Collector of Central Excise (1995) Supp 2 SCC 646), definition under Drugs and Cosmetics Act & Rules in respect of Harpic and Lizol, licenses obtained from the Drug Controller, Government of India (treating them as a disinfectant) for Harpic and Lizol, HSN Classification, technical and dictionary meaning, common/commercial parlance, etc.

The Counsel appeared before the High Court contended that Harpic and Lizol are manufactured under license under the Drugs Act. The Special Counsel nextly submits that Harpic and Lizol are manufactured under licence under the Drugs Act; and they are therefore drugs falling under entry 88 but being toilet preparations stand excluded therefrom. A careful reading of entry 88(b) would show that Harpic and Lizol would be "odd men out" among the goods mentioned in the entry. The said entry speaks of only the products capable of being used as cosmetics and toilet preparations. Illustratively it mentions tooth pastes, tooth powders, cosmetics, toilet articles and soaps. It does not deal with toilet cleaner or floor cleaner used as disinfectants to kill bacteria and germs. When the language of the taxing entry is plain, it is not for the Courts, to introduce

words to uphold the assessment. The High Court, however, has observed as follows:

"We cannot read Harpic and Lizol as being included in toilet preparations to bring them under the excluded category under entry 88(b) of IV Schedule to the VAT Act. Even if the manufacturer obtained drug licence, for manufacturing disinfectants they do not cease to be pesticides and hence fall under in entry 20.

The view that disinfectants do not fall under excluded category of goods under entry 88(b) and are broadly covered in the term "pesticides" also derive support from HSN Code based classification of items in IV Schedule as ordered by the Government in G.O.Ms.No.1615, dated 31.8.2005. As seen from the said G.O. extracted hereinabove, all the goods in entry 20 of IV Schedule are covered under the HSN Code (heading) 3808 except three products, namely, repellents for mosquitoes, Gibberillic acid and plant growth regulators. The product "disinfectants" are in sub-heading 3808.40.00 and they are not excluded from the main "heading". Thus all the disinfectants would fall within HSN Code 3808 which deals with most of the goods mentioned in entry 20. That being the position, in our considered opinion, any reference to entry 88 may not be called for. Even if the manufacturer obtained drug licence for producing Harpic and Lizol the same cannot be a conclusive that these goods within the ambit of entry 88."

The High Court has also considered the provisions of Section 18 of Drugs Act, which mandates a licence for manufacture, sale or distribution of any drug, cosmetic or medicine. The word "drug" is defined in Section 3(b) of the Drugs Act. It is inclusive definition. A plain reading of Section 3(b)(iv) thereof shows that not only medicines for internal or external use of human beings or animals but substances that affect structure or function of human body or used for destruction of vermin or insects which cause disease in the human beings and animals are also drugs. Further all substances intended for use as components of a drug and such devices intended for internal or external use among others, in the "mitigation or prevention of disease" would be drugs. When a manufacturer produces any disinfectant fluids, they are basically intended for prevention of disease by destroying and/or controlling bacteria and microorganisms that are unusually present. That may be one reason why even under the Drugs and Cosmetics Rules, 1945 (the Drugs Rules) the disinfectants are placed in Schedule-K in respect of which they were exempted from the provisions of Chapter IV and the Rules made thereunder. Harpic and Lizol are the products/goods sold even in general stores and on the counters of departmental stores. We therefore reject the submission of the State that Harpic and Lizol fall under entry 88 merely because they are manufactured under drug licence.

In view of the aforesaid, the High Court reached at a conclusion and held that Harpic and Lizol are disinfectants capable of destroying germs and microorganisms like Escheriachia coli, Staphylococcoccus aureus, Enterococcus hirae, Pseudomonas aeruginosa and Candida albicans etc. Being disinfectants they fall within the category of pesticides covered by entry 20 of IV Schedule.

Against the aforesaid judgment of the Andhra Pradesh High Court dated 13 June 2012, a Special Leave Petition

was filed by the department which was dismissed on the ground of delay.

Similar issue was also considered by the Division Bench of the Guwahati High Court in case bearing Writ Petition No. 1377 of 2010, Reckitt Benckiser India Pvt. Ltd. v. The State of Assam and Others, vide judgment and order dated 18.9.2012. A Division Bench of Guwahati High Court has held that harpic and Lizol having been declared to be pesticide, would be liable to Tax under Entry No. 19 of the Part A of the Second Schedule of the Assam VAT Act being as pesticides while allowing the writ petition.

It is, however, submitted by the learned counsel for the parties that no SLP has been filed against the said judgment of the Guwahati High Court as such, the State Government has accepted the verdic of the High Court.

Learned counsel for the Assessee has also brough to the notice of this Court a judgment of the Rajasthan High Court in the case of Reckitt Benckiser (India) Ltd. v. Assistant Commercial Taxes Officer Anti Evasion, Commercial Taxes Department Ward-III, Jaipur and Another and the Rajasthan High Court has also considered above mentioned judgments and has held that the products being sold by the assessee would fall in Entry 21 or 29 of the Act, which provides that the products namely Harpic and Lizol classifiable under the aforesaid entry of Schedule IV of Rajasthan VAT Act and the same being used as insecticides or pesticides and further that the entry being specific and clear as such has held that the departmental authorities were wrong in holding that the items harpic and Lizol fall under the residuary entry namely Schedule (V). The relevant extract of the judgment, which are mentioned in paragraph 29, which is quoted herein below :-

Taking into aforesaid, in my view, the claim of the assessee that the products being sold by the assessee would fall in Entry 21 or 29 of the Act as the case made be is well taking it under the residuary Schedule (V). The claim of the assessee is just and proper.

Learned counsel for the appellant has placed reliance of an order passed by the Apex Court in Special Leave Petition (Civil) Diary No (s). 42434/2017 arising out of the judgment of the Rajasthan High Court dated 7.4.2017. The following order has been passed by the Supreme Court by dismissing the SLP, which is quoted herein below :-

"Heard the learned counsel for the petitioners and perused the relevant material.

Application for exemption from filing official translation is allowed.

Special Leave Petition (c) No.3876 of 2017 arising out of the same impugned judgment has been dismissed by order of this Court dated 02.02.2018. Consequently, the present special leave petitions are also dismissed."

In view of the aforesaid decisions of Apex Court and the High Courts the issue, which is involved in the instant revision is decided in favour of the Assessee by all the High Courts and Supreme Court. Respectfully following the said decisions, the revision petition filed by the department is dismissed as no question of law is involved and it is hereby held that Harpic and Lizol are covered under Schedule-II, Part A, Entry No.20 of UP VAT Act as such the same are classified items. I find no error in the impugned judgment and order of the Tribunal. The Revision Petition is, accordingly, dismissed."

42. Keeping in mind the principles of law laid down by Supreme Court, this Hon'ble Court as well as other High Courts i.e. Andhra Pradesh, Guwahati and Rajasthan as indicated in the writ petition hereinabove, we find that the goods in dispute are squarely covered and can easily be classifiable under "pesticides" as per Entry No. 20, Part -A of Schedule II of UPVAT Act.

43. The record reveals that the assessing authority while passing the original assessment order have considered all relevant material and rightly imposed tax at the rate of 4 %, therefore, there is no fresh or tangible material to form a reasonable belief that the turnover has escaped assessment, which could legally be permitted for initiating the reassessment proceeding under Section 29(7) of the Act. At the best it can be said that there is only a change of opinion, which is not permissible under the Act.

44. In the case of ***CIT Vs. Kelvinator India Limited,*** reported in (2010) 320 ITR 561 (SC) and ***M/s Bharat Heavy Electronics Limited Vs. State of U.P. and Others*** 2017, UPTC 205. The relevant observations made in the judgment (in pages 11, 12, 19, & 20) are quoted below:-

"It is settled law that the jurisdiction to initiate reassessment proceedings arises only after the assessing authority records his reason to believe that any turnover has escaped assessment Thus, not only is the belief of escapement essential but more importantly, it is necessary for the Assessing Authority to record his reason/s as to existence of the belief of such escapement. In Commissioner of Sales Tax Vs. Bhagwan Industries (P) Ltd. (1973) 31 STC 293 (SC) the phrase "reason to believe"appearing in a similar provision in Section 21 of the U.P, Sales Tax Act, 1948 providing for reassessment was interpreted thus:

"The words "reason to believe" in Section 21 of the U.P. Sales Tax Act convey that there must be some rational basis for the assessing authority to form the believe that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the ground are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relavant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the ground are adequate or not is not a matter which would be gone into by the High Court or the Supreme Court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency or reasons for the belief. At the same time, the belief must be held in good faith and should not be a mere pretence."

Applying the above principle, this court, in the case of Rathi Industries Limited Vs. State of U.P. and another has further elaborated-

From a perusal of the aforesaid, it is apparently clear that the words

"reason to believe" in Section 21 of the U.P. Trade Tax Act conveys that there must be some rational basis for the assessing authority to form a belief that the whole or any party of the turnover of a dealer has for any reasons escaped assessment. Such reason or reasonable ground to believe that the whole or any part of the turnover had escaped assessment must be germane to the formation of the believe regarding escaped assessment. Such reasons or grounds must have a nexus with the formation of the belief. The approach has to be practical and not pedantic."

In absence of any material it was not open to the authorities to assume existence of such facts for the purpose of acquiring jurisdiction and to later, in the course of reassessment proceedings to conduct an inquiry as to its existence or otherwise. The Supreme Court in the case of Arun Kumar & Ors Vs. Union of India & Ors (2007) 1 SCC 732 has categorically held :

74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.

75. In Halsbury's Laws of England, it has been stated:

"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs my be described as preliminary to, or collateral to the merits if, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling it not conclusive."

76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.

....

84. From the above decisions, it is clear that existence of "jurisdictional fact" is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."

Thus we accept the contention of the petitioner that in this case, in the state of the reason to believe as contained in the proposal made by the petitioner's assessing authority, the jurisdictional fact of applicability of Rule 9 (3) of the Rules is not established

He further submits that even the discovery of inadvertent mistake or non-application of mind during the assessment

would not be justifiable ground for re-initiating proceeding under Section 29 (7) of the Act.

45. The respondent's counsel has argued that the original assessment order was passed without application of mind and relied upon paragraph no. 31 of the counter affidavit and has made the following averments:-

"..... The assessing authority while passing original assessment order did not consider the relevant notification and there is no application of mind regarding taxability. ....."

46. The argument of the counsel for the respondent is in teeth of the judgement of the Apex Court in the case of ***State of U.P. Vs. Arayaverth Chawal Udyog Limited (2015) 17 SCC 324,*** wherein, in paragraph nos. 30 & 31, the Apex Court has specifically held as under:-

"30. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings Under Section 21(1) of the Act on the basis of change in subjective opinion (Commissioner of Income-tax v. Dinesh Chandra H. Shah: [1972] 3 SCC 231 : and Income-tax Officer v. Nawab Mir Barkat Ali Khan Bahadur: [1975] 4 SCC 360.

31. The above observations regarding the import of the words "reason to believe" though made in the context of different statutes have, in our opinion, equal bearing on the construction of those words in Section 21 of the Act."

47. In the case of ***Varun Beverages Ltd. Vs. State of U.P. & Others*** reported in (2017) 99 VST 393 (All); wherein, this Court has held as under:-

"8. It is not disputed before us that if there is a change of opinion, reassessment under Section 29(7) is not permissible. When it can be said "change of opinion" has been recently considered by Apex Court in State of Uttar Pradesh and others Vs. Aryaverth Chawl Udyoug and others (2016) 91 VST 1 (SC) wherein after referring to its earlier decisions in Binani Industries Limited, Kerala Vs. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore 2007 (15) SCC 435 and A.L.A. Firm Vs. Commissioner of Income-tax 1991 (2) SCC 558 the Court said as under:

"If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment."

9. In the present case, entire material which is now being taken into consideration for the purpose of impugned notice and approval granted was available before Assessing Authority and after having considered the same, assessment was made. Now authorities, taking a different view, have issued impugned notice. Thus, it is a clear case of change of

opinion, hence reassessment is not permissible in view of aforesaid exposition of law."

48. This Hon'ble Court, time and again has taken the view that in absence of no new material brought on record, the completed assessment cannot be re-opened merely on the basis of change of opinion.

49. In addition to above as discussed above, there is no new material on record to be put forward by the respondents that the goods in question i.e. Harpic and Mortein Coil will be classifiable under Schedule-V of UP VAT Act so as to justify the higher rate of tax, at the rate of 12 %. On the contrary keeping in mind of the principles laid down by Supreme Court, the other High Courts as well as this Court, the goods in question i.e. Harpic and Mortein are squarely covered under Entry 20, Part-A of Schedule-II of UPVAT Act. In view of facts and circumstances of the case, the impugned order dated 24.11.2017 is hereby quashed.

50. The writ petition is, accordingly, **allowed.** No order as to costs.

(2020)1ILR 436

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2019

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1312 of 2019

Siti Networks Limited ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik J. Nagar, Sri Ritiwika Nanda

Counsel for the Respondents:
C.S.C., A.S.G.I.

A. Constitution of India – Arts. 226 and 227 – if one approaches the writ Court, which is essentially a high prerogative discretionary jurisdiction bestowed by the Constitution of India to the Supreme Court and the High Courts – equity has to be held not only with clean hands but with fairness, transparency and with full disclosure of material facts. (Para 3)

Writ Petition dismissed as withdrawn. (E-4)

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

1. Yesterday, we had directed the Registry to produce the records relating to Writ-C No. 10025 of 2018, before us today.

2. Perusing the records of that matter and going through the instant writ petition, we find that the issues raised in both the matters are quite similar to each other. However, what is distressing to note is the fact that in the present writ petition, i.e. Writ Tax No. 1312 of 2019, the writ petitioner is totally silent with regard to the fact of filing of the earlier writ petition, being Writ-C No. 10025 of 2018.

3. If one approaches the writ Court ? which is essentially a high prerogative discretionary jurisdiction bestowed by the Constitution of India to the Supreme Court and the High Courts ? equity has to be held not only with clean hands but with fairness, transparency and with full disclosure of material facts. In the facts of the instant case, not even a whisper of the earlier writ petition finds its place in any

of the averments made in the instant writ petition by Siti Networks Limited, being the writ petitioner in both the matters.

4. We not only deprecate the manner in which the writ petitioner has taken the writ Court for granted, we must hasten to emphatically state that this approach is nothing sort of a gross abuse of process of Court.

5. In such circumstances as stated above, the writ petition is liable to be summarily dismissed and stands accordingly dismissed with costs assessed at Rs. 50,000/-, which shall be deposited by the writ petitioner with the State Legal Services Authority of Uttar Pradesh within four weeks from date.

6. List this matter four weeks hence only for the purpose of ascertaining compliance of the above direction.

7. At this stage, the learned advocate for the writ petitioner seeks leave of Court to withdraw the writ petition. Although withdrawal of a writ petition is not a matter of right, especially under such circumstances as stated above, nevertheless, taking a lenient view, we allow the writ petition to be dismissed as withdrawn .

(2020)1ILR 437

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE
THE HON'BLE NEERAJ TIWARI, J.

Application U/S 482 Cr. P.C. No. 992 of 2006

Dr. Satyamvada Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Jagdish Singh Sengar, Sri Sudhir Solanki, Sri Umesh Dwivedi

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

A. Summoning Order-issuance of summoning order in not merely a formality-it initiates criminal proceedings against a person - Courts need to examine and apply mind to the facts of the case and testify the incidents of the complainants as well as accused before issuing summoning order.

The applicants are teachers and Security Officer of the College. The College has assigned administrative posts to them and they have no criminal antecedents. The learned Chief Judicial Magistrate had issued summoning order without considering the facts, application of mind and even without testing the incidents of complainants as well as accused. The Chief Judicial Magistrate should consider each and every facts about the complainant as well as accused before issuance of summoning order and record reasons for the same. The continuance of criminal proceeding would be hazardous as no teachers of College would come forward to hold Administrative post for smooth and peaceful functioning of Educational Institution. (Para 17)

Application u/s 482 allowed. (E-10)

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

1. Heard learned counsel for the applicants and learned A.G.A. appearing for opposite party no. 1.

2. Notice was issued to opposite party no. 2 but neither any one appeared on his behalf nor any counter affidavit has been filed.

3. Brief facts of the case is that applicant no. 1 is Lecturer in C.M.P.

Degree College (hereinafter referred to as the 'College') which is affiliated to Allahabad University, Allahabad and holding the post of Chief Proctor also, applicant no. 2 is Principal and applicant no. 3 is Security Officer of the said College. Opposite party no. 2 was the Publication Secretary of the Students Union of the College. On 15.03.2005, one Ranjeet Sonkar, brother of opposite party no. 2 was caught red handed using unfair means in the examination and thus his answer books and other materials were taken by the Invigilator and deposited in the Office of the College. After getting information of this fact, opposite party no. 2 along with 2-3 other persons, forcibly entered into the Central Room of College and pressurized the College Administration to return the materials recovered from his brother, Ranjeet Sonkar. They have also threatened the College Administration, broken Maruti Van of the Allahabad University and beaten the driver. For that incident dated 15.03.2005, applicant no. 2 has lodged F.I.R. at Police Station, George Town, Allahabad against opposite party no. 2 and three others under sections 323, 506, 336, 427 I.P.C. giving rise to Crime No. 49 of 2005. A news item of this incident was also published in daily newpaper Amar Ujala on 17.03.2005.

4. Opposite party no. 2 again forcibly entered into the College campus on 11.06.2005 and fired by rifle in the air, entered in the Office of Principal and created pressure for admitting the students for which applicant no. 2 has again given information to Station House Officer, George Town, Allahabad on the very same date i.e. 11.06.2005. Opposite party no. 2 along with other students has again started pressurising the College Administration in favour of students, who caught using unfair means and on 23.06.2005, opposite party no. 2 along with others committed theft by breaking the door of Maruti Car of applicant no. 1 and stolen three sarees, blowses and Rs. 1500/- and for this occurence, applicant no. 1 lodged F.I.R. against the opposite party no. 2 and others which was registered under sections 379, 506 I.P.C. at P.S. George Town, Allahabad as Case Crime No. 106 of 2005. Similar complaint was also lodged by other staff of the College against opposite party no. 2 on 28.06.2005 for forcibly closing the College counter by pelting stones for which applicant no. 2 again wrote a letter to the Station House Officer, George Town, Allahabad and made a complaint against opposite party no. 2 and prayed for lodging F.I.R. vide letter dated 28.06.2005. This incident was also published in the newspaper.

5. Opposite party no. 2 along with others continued their tirade against applicants and other office bearers of the College and indulge in stone pelting, regarding which news items were also flashed from time to time in the newspapers. On 19.07.2005, applicant no. 2 informed A.D.M. City, Allahabad that opposite party no. 2 along with some unsocial elements are disrupting the peaceful administration of the College by insisting illegal demands and prayed for deployment of additional force. When Station House Officer, George Town, Allahabad has not taken any action against opposite party no. 2, applicant no. 1 on 08.08.2005 wrote a letter to Zonal Officer, L.I.U., Allahabad against opposite party no. 2 seeking protection to her life as she had no faith in the police of P. S., George Town, Allahabad.

6. Again on 06.09.2005, admission for Evening Classes was going on and

opposite party no. 2 along with others entered into the College, interfered with the process of administration and forcibly closed the counters and indulge in scuffle with Rajat Srivastava, Proctor and Security Officer, applicant no. 2 tried to snatch his gun and damaged number of Cars of the teachers, parked in the College campus. Regarding this occurence, applicant no. 1 lodged F.I.R. dated 06.09.2005 which was registered as Case Crime No. 151 of 2005 under sections 147, 148, 323, 352, 504, 506, 427 I.P.C. at P.S. George Town, Allahabad. In the said incident dated 06.09.2005, applicant no. 3 was manhandled by opposite party no. 2 and others and received injuries for which medical examination was also conducted at T.B. Sapru Hospital, Allahabad on the very same day i.e. 06.09.2005 and doctor noted three injuries. This incident was also published in the daily newspaper Amar Ujala on 07.09.2005.

7. Considering all these incidents, College Administration has finally rusticated opposite party no. 2, his brother and three others from the College for a period of two years vide order dated 06.09.2005.

8. Learned counsel for the applicants submitted that as the number of complaints has been lodged against opposite party no. 2 and others, as a counter blast, just to pressurize the applicants to withdraw the criminal proceedings initiated by them against opposite party no. 2 and others, opposite party no. 2 has filed impugned complaint on 07.10.2005 against the applicants in the Court of Special Chief Judicial Magistrate, Allahabad and the said complaint was registered as Criminal Case No. 1668 of 2005 (Ishu Sonkar vs. Dr. Satyamvada Singh and others). As per complaint, on 06.09.2005, admission for Evening Classes was going on and from the students, affidavits were being taken by College Administration that they would not make claim of their admission for day classes in the future and after hearing this news, opposite party no. 2 had gone to enquire from applicant no. 1, where he was misbehaved by applicant no. 3 and also abused and chased by applicant no. 3, who was armed with Revolver. He was caught and assaulted by them and Chief Security Officer along with 10-15 persons, broken the wind screen of the car parked in the College premises and called the police. It is further alleged that on 15.09.2005, when opposite party no. 2 went to Office of the Students Union, without any reason, he was again assaulted by applicant nos. 1 & 3 and he was also called by his caste name, beaten, insulted and ousted from the College Campus.

9. Learned counsel for the applicants submitted that by perusal of sequence of facts, this is very much clear that opposite party no. 2 is an unsocial element involved in negative students politics and his brother was caught using unfair means and for the illegal activities of opposite party no. 2, several F.I.R.s have also been lodged. He further submitted that so far as applicants are concerned, they are Principal, Teacher and Security Staff of the College having no criminal antecedents.

10. From perusal of complaints, it is very much clear that all allegations are totaly bogus, fabricated, absurd and not reliable at all coupled with the facts that the complainant is a person with criminal antecedents who was rusticated from the College for a period of two years and number of complaints, F.I.R.s have also

been lodged against him. The complainant-opposite party no. 2 examined himself on 07.10.2005 under section 200 Cr.P.C. thereafter examined complainant no. 1, Raju Pasi and his brother complainant no. 2, Ranjeet Sonkar under section 202 Cr.P.C., who was caught using unfair means by the College Administration.

11. Learned Chief Judicial Magistrate has passed impugned summoning order dated 01.12.2005 without application of mind and without recording any reason. He has also not considered this fact that accused-opposite parties in complaint are respected Principal, Teacher and Secrurity Staff of the College.

12. It is further reiterated that on one hand, applicants are academicians having no criminal antecendents to their credits and on other hand, complainant against whom several complaints have been lodged in police station George Town, Allahabad and without considering any of the facts, summoning order has been issued in a very mechanical way which is liable to be set aside.

13. No counter affidavit has been filed on behalf of opposite party no. 2 even after issuance of notice.

14. Learned A.G.A. has opposed the submissions made by learned counsel for the applicants on the basis of counter affidavit filed by the State and submitted that as the incident took place, therefore, after recording statements of the complainant under section 200 Cr.P.C. and witnesses under sections 201 and 202 Cr.P.C., impugned summoning order has rightly been issued.

15. On being confronted by the Court, learned A.G.A. could not deny this fact that the applicants are Principal, Teacher and Security Staff of the College having no criminal antecedents and also could not deny the several facts of criminal activities about the complainant in the affidavit. He is also not in a position to put a case of malafide against the applicants.

16. I have considered the rival submissions made by learned counsel for the parties and perused the record.

17. From the perusal of facts, this is very much clear that out of three applicants, two are Teachers and third one is Security Officer of the College. Apart from teaching assignment, two applicants are also having Administrative post as applicant no. 1 is Chief Proctor, applicant no. 2 is Principal and all three applicants are having no criminal antecedents. In fact, all of them are performing their administrative duties for smooth and peaceful functioning of College Administration, which was interrupted by opposite party no. 2 in the name of Students Union Leader. It is very surprising that learned Chief Judicial Magistrate has issued summoning order without considering the facts, without application of mind and without testing the incidents of complainant as well as accused before him i.e. applicants, who are teaching and administrative staff of a College. In all eventuality, issuance of summoning order is not a mere formality, in fact it initiates criminal proceedings against a person and compel him to face criminal trial, therefore, it is required on the part of learned Chief Judicial Magistrate to consider each and every facts about the complainant as well as

accused before issuance of summoning order and further reasons has to be recorded. If in such case, which is before this Court, continuance of criminal proceeding is permitted then this would be hazardous as no teachers of College would come forward to hold Administrative post for smooth and peaceful functioning of Educational Institution.

18. Learned Chief Judicial Magistrate was required to see this aspect of the matter before issuing summoning order, therefore, proceedings in Criminal Complaint Case No. 1668 of 2005 (Ishu Sonkar Vs. Dr. Satyamvada Singh and others) under sections 323, 504, 506 I.P.C. and summoning order dated 01.12.2005 are bad in the eye of law and are hereby quashed.

19. With the aforesaid observations, present 482 Cr.P.C. application is **allowed.**

20. No order as to costs.

(2020)1ILR 441

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/S 482 Cr. P.C. No. 9184 of 2002

Praveen Kumar & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Samit Gopal, Sri G.S. Chaturvedi, Sri Gopal Chaturvedi, Sri Viresh Mishra, Sri Amit Misra, Sri Imran Ullah

Counsel for the Opposite Parties:
A.G.A., Sri Govind Saran, Sri Manish Tiwari, Sri Ankit Saran, Sri Atharva Dixit

A. Criminal Procedure Code, Section 156 (3) - Section 197 of the Cr.P.C - Section 397/401 and Section 482 of the Cr.P.C- ***Suo Motu inherent and revisional power of High Court-*** **Application moved by opposite party no.2 u/s 156(3) Cr.P.C. allowed -Magistrate directed the police to lodge F.I.R. against the applicants, who are Government servants -Previously applicant no.1 had passed order under the Land Revenue Act in continuation thereof, the applicant no.2 submitted report on basis of which First Information Report was got lodged - F.I.R. was challenged by one of the accused before the Division Bench of this Court which took a serious view of the matter and entrusted investigation of said criminal case to the CBI -Applicant no.2 appeared before the trial court as prosecution witness.**

B. (First Issue)- Action of the applicants on the date of incident was unmistakably within discharge of their official duty and was as such so inextricably intertwined with their official obligations that the two cannot be separated and thus the provision of section 197 of Cr.P.C. is duly applicable in the matter and the magistrate could not have taken judicial notice of the complaint u/s 156(3) Cr.P.C. unless the same would have been accompanied with the requisite sanction order- Categories no. 6 and 7 expounded in *Bhajan Lal's case* squarely applicable in present case.

C. (Second Issue)- Maintainability of the criminal application-locus standi of proposed accused to challenge order passed under section 156(3) of Cr.P.C.- full bench case of *Father Thomas* - Norms of judicial propriety and decorum and law of precedent-Not proper for this court while sitting singly to observe anything except to act on the supposition as if the second issue has been answered in negative.

D. (Third Issue when the second issue has been answered in the negative)- *Suo*

***Motu* authority of High Court under Section 397 read with 401 of Cr.P.C. or under section 482 of Cr.P.C. -Fairly well settled and if the facts so warrant, there is no fetter on the power of this Court to obviate or correct the miscarriage of justice in an appropriate case by exercising its extensive supervisory jurisdiction under Sections 397 read with Section 401 of Cr.P.C. or its inherent power under section 482 of Cr.P.C. without being moved by any party.** (Para 12, 24, 25, 26, 29, 33, 36, 41, 46 & 47)

Criminal Misc. Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Hinch Lal Tiwari Vs. Kamla Devi & ors., 2001 (92) RD 689 (SC)

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

3. Anil Kumar Vs. M.K.Aiyappa, (2013) 10 SCC 705

4. L. Narayana Swamy Vs. St. of Kar., (2016) 9 SCC 598

5. Father Thomas Vs. St. of U.P, (2000) 41 ACC 435

6. Manharibhai Muljibhai Kakadia & Anr. Vs. Shaileshbhai Mohanbhai Patel & Ors, 2012 (10) SCC 517

7. Priyanka Srivastava & anr. Vs St. of U.P. & ors., (2015) 6 SCC 287

8. Cricket Association of Bengal Vs. St. of W.B, 1971 (3) SCC 239

9. Nadir Khan Vs. St. (The Delhi Administration), 1976 CriLJ 1721

10. Eknath Shankarrao Mukkawar Vs. St. of Maha.(1977) 3 SCC 25

11. Municipal Corp. of Delhi Vs. Girdharilal Sapuru, 1981 (2) SCC 758

12. Janata Dal Vs. H.S. Chowdhary and Ors., (1992) 4 SCC 305

13. Bhima Naik & Ors. vs State, 1975 CriLJ 1923 (Orrisa)

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application u/s 482 of Cr.P.C. has been preferred by applicants Praveen Kumar and Vijai Shankar Mishra for quashing of the order dated 25.9.2002 passed by the court of Additional Chief Judicial Magistrate, Court No.9, Allahabad whereby Misc. Application No.172/XII/2002 (Ram Surat Pasi vs. Vijai Shankar and another), P.S.-George Town, District-Allahabad, moved on behalf of opposite party no.2 u/s 156(3) Cr.P.C. was allowed and directions were issued to lodge the F.I.R. and to investigate into the matter and submit report of investigation before the Court.

2. It appears that after filing of this petition the operation of the impugned order was put in abeyance. Eventually the matter has come up now to be heard and decided finally.

3. Short counter affidavit filed on behalf of opposite party no.2 today in the court, is taken on record.

4. Heard Shri Gopal Swaroop Chaturvedi, learned Senior Counsel assisted by Shri Imran Ullah, Advocate appearing on behalf of applicants and Shri Ankit Saran, Advocate assisted by Shri Atharva Dixit, Advocate holding brief of Shri Manish Tiwari, learned Senior Counsel appearing on behalf of opposite party no.2. Learned A.G.A. has also been heard and record has been perused.

5. Brief facts, as emerge from the pleadings, are that the applicant no.1 was

working as S.D.M. (Sadar), Allahabad at the relevant point of time and the applicant no.2 was working as Nayab Tehsildar (North) in the office of applicant no.1. In the year 2002, the applicant no. 1 after being selected in the Indian Police Service (I.P.S) was waiting for his appointment and training schedule for the same. According to the pleadings, there was a land of high economic worth being Plot No.408 (admeasuring about 10 bighas) in Mauza Fatehpur Bichhua, Pargana and Tehsil Sadar, District-Allahabad, which had market value of Rs.16 crores at the time of filing of this petition in the year 2002. The said piece of land being nazul land was a government property and as such, it could not have been sold or purchased by anyone without proper sanction of the State Government. The pleading of the instant petition reveals that the land in question is situated in the midst of the city in posh prime locality of George Town, Allahabad. It has also been pleaded in this petition that the said 10 bighas of land having plot no.408 had a long lineage of history and the ownership thereof along with other lands (total 509 bigha and 6 biswa) travelled from Ex-Zamindar Maharaja Sewai Ram Singh of Jaipur up to the State Government and ultimately it was being managed, controlled and governed by the Board of Revenue and the land of said Gata No.408 along with other gata numbers was transferred to the Municipal Board vide order No.2125N/XI-868, dated 04.08.1911. The land in question i.e. approximately 10 bighas land of Gata No.408 was entered into the register of government property (nazool) as 'pond' at serial no.16 having entry of transfer of land by the Board of Revenue. Subsequently when certain unscrupulous persons made efforts to illegally trespass and possess the land in question, a report about the status of land was called by the District Magistrate, Allahabad from the Additional District Government Counsel (Civil), Allahabad namely Maya Shankar Srivastava, who submitted report dated 07.09.1999 with an opinion that along with certain legal formalities, the possession of land in question is liable to be resumed by the State Government in the interest of the Government of Uttar Pradesh.

6. It has also been pleaded in this petition that the Chairman, Board of Revenue circulated a letter No.G865/5-9-R/2001 dated 24.01.2002 to all the Commissioners and District Magistrates of State of U.P. giving the reference of Hon'ble Supreme Court decision given in the case of ***Hinch Lal Tiwari vs. Kamla Devi and others reported in 2001 (92) RD 689 (SC)*** with specific instructions that the public lands be secured, managed and maintained by the Revenue Departments as well as the State Government to maintain ecological balances. Yet another government order No. 3135/1-2-2001 Rajaswa dated 08.10.2001 was also circulated by the State Government to all the District Magistrates of State of U.P. to ensure compliance of the judgment of *Hinch Lal Tiwari's case (supra)* having observation about removal of illegal possessions from such lands of public utility as well as land of ponds. It has been further pleaded in the petition that applicant no.1 wrote several letters to the Vice Chairman, Allahabad Development Authority; Commissioner Allahabad; S.S.P. Allahabad and the District Magistrate, Allahabad as well as the Board of Revenue and the State Government showing grave concern about illegal grabbing of State land causing huge losses to the government exchequer and about illegal constructions upon such State lands.

7. In the petition, two letters dated 05.08.2002 and 06.09.2002 have been annexed as Annexure No.5 to the petition. In the letter dated 06.09.2002, the concern about the land of Plot No.408 i.e., the land in question, was specifically expressed and mentioned. Subsequently the District Magistrate, Allahabad also wrote a letter to the Commissioner, Allahabad on 07.09.2002 in respect of safety and security of land in question and also in respect of unauthorized construction thereupon.

8. According to the pleadings of the petition and the Annexure no.7 thereof, it is revealed that applicant no.1 had passed order dated 27.08.2002 in Case No.138 of 2002 u/s 33/39 of Land Revenue Act in connection with the land of plot no.408, Mauza Fatehpur Bichhua, Pargana and Tehsil Sadar, District-Allahabad, whereby it was ordered that the land in question be entered into the name of State Government in the revenue record and in continuation thereof, the applicant no.2 submitted report dated 24.09.2002 to the In-charge Inspector Police Station Colonelganj, Allahabad for lodging of first information report against several persons including concerned Lekhpals and Revenue Inspectors for committing cheating and forgery in the revenue records in connection with the land of Plot No.408 i.e. the land in question.

9. It has also been pleaded in the petition that First Information Report was got lodged on 25.09.2002 and was registered as Case Crime no.361 of 2002 u/s 419, 420, 466, 467, 468, 470 and 471 I.P.C., P.S.-Colonelganj, District-Allahabad. According to the pleadings, certain civil suits and writ petitions were instituted by a few persons in which orders were passed by the concerned courts as well as High Court in the form of status-quo to be maintained on the land in question. It has also been pleaded in the petition that no layout plan was ever passed by any authority and no map for raising construction over the land in question was ever submitted by any person, despite which certain persons were trying to raise illegal constructions over the land in question and in view of the provisions of Urban Planning Act, 1973, the Allahabad Development Authority issued notices to such persons for demolition of existing construction.

10. It has also been pleaded in the petition that one Mr. Subhash Chandra Bose (opposite party no.3 in the present petition) was posted as Additional District and Session Judge in the judgeship of Allahabad since last several years and had purchased a piece of land which was part of the land in question by means of a sale-deed executed on 15.02.1999 for a sale consideration of Rs.53,000/-, whereas the cost of land was shown in the deed as Rs.4,21,000/-. Mr. Subhash Chandra Bose also purchased a disputed land in the name of his wife Smt. Madhuri Srivastava by surreptitiously showing her identity, not as his wife, but as Km. Madhuri d/o Shri Gopal Narayan Srivastava. According to the pleadings of the petition, the applicant no.1 was directed by the superior authorities to remove the illegal constructions over the leased land of the State Government and in continuation of such exercise by the applicants, the constructions over two plots purchased by opposite party no.3 were obstructed and as such, being indignated the opposite party no.3 evolved an evil design in order to blackmail, harass and pressurize the applicants as well as other government

officials and with such ulterior oblique motive and a disingenuous modus operandi, one Original Suit No.1054 of 1998 was got filed by Mr. Subhash Chandra Bose in his own court through one person namely Munna seeking the relief of permanent injunction and in the said original suit, authorities of U.P. State Road Transport Corporation were impleaded as defendant no.1 and 2 and Smt. Madhuri Srivastava w/o Shri Subhash Chandra Bose himself was also impleaded. Mr. S.C. Bose also purchased a house situated at Muirabad from the scheme developed by the Allahabad Development Authority and in this manner, the opposite party no.3 Mr. S.C. Bose started misusing his official position being a judicial officer posted in the judgeship of Allahabad itself. As the applicants being officers of District Administration and Revenue Department were creating hindrance and putting a spanner in the unfair design of Mr. S.C. Bose, he got a contempt petition filed in his own court in the name of Sri Dhara Singh, Advocate which was numbered as Contempt Petition No.21 of 2002, wherein notices were issued to the applicants as well as the Secretary, Allahabad Development Authority and other officers. Those notices for contempt were issued by Mr. S.C. Bose in the capacity of Additional District Judge-XII, Allahabad.

11. It has also been pleaded in this petition that the opposite party no.3 in furtherance of his vicious design got one application dated 16.9.2002 u/s 156(3) Cr.P.C. filed in the court of Chief Judicial Magistrate, Allahabad through the opposite party no.2, who is admittedly said to be none else than an employee of aforesaid Sri Dhara Singh Advocate making absolutely baseless and imaginary allegations against the applicants. In the said application dated 16.9.2002, it was alleged that opposite party no.2 being Pasi by caste belongs to scheduled caste category and was raising construction on behalf of Dhara Singh, Advocate and Munna Pandey, Advocate over Plot No.408/2 Fatehpur Bichhua, P.S.- George Town, Allahabad, during which, on 12.9.2002 the applicant no.1 Praveen Kumar and applicant No.2 Vijai Shankar Mishra along with 7-8 unknown persons in plain dress came on the spot and started beating the laborers of opposite party no.2 and upon being objected, the opposite party no.2 was abused and beaten up and was also threatened with dire consequences. It was also alleged in the said application that the damage to the tune of Rs.10,000/- was caused and an amount of Rs.5000/- was snatched away by the applicants and the report was not lodged by the concerned police station George Town under the influence of the applicants.

12. It has also been pleaded in this petition that upon this application dated 16.9.2002, a report was called by the court of Chief Judicial Magistrate, Allahabad from the concerned police station, whereupon the Station House Officer started inquiry about the contents of application dated 16.9.2002 and approached the applicant no.2 to ascertain the factual status. The applicant no.2 submitted a written reply to the allegations made by opposite party no.2 before the Station House officer, Police Station-George Town, Allahabad on 24.9.2002. Upon this, the Station House Officer made efforts to get the version of opposite party no.2 but an incident of terrorist attack on the temple in State of Gujrat took place on 25.09.2002, because of which a high alert

was made all over the country and some political party had claimed for entire Bharat Band on 26.09.2002. Under such eventuality, the Station House officer, George Town appeared before the A.C.J.M.-VIII, Allahabad and prayed for two days' further time for submitting his report by disclosing that the opposite party no.2 could not be contacted despite best efforts and before submitting any report, it would be proper to obtain his version also. Despite application moved by the Station House officer seeking only two days' further time to submit report, the court of Additional Chief Judicial Magistrate, Court No. IX, Allahabad without granting any time passed the impugned order dated 25.09.2002 in questionable haste, whereby application moved on behalf of opposite party no.2 u/s 156(3) Cr.P.C. was allowed and the Station House officer, P.S. George Town was directed to lodge the F.I.R. and to investigate into the matter and submit report of investigation before the Court. This order dated 25.09.2002 is being challenged by the applicants.

13. The applicants have also filed a supplementary affidavit dated 26.09.2019, in which averments have been made to the effect that the F.I.R. lodged by the applicant no.2 on 25.09.2002 and registered as Case Crime No.361 of 2002 was challenged by one of the accused namely Ram Prasad Singh before the Division Bench of this Court in Criminal Misc. Writ Petition No. 5969 of 2002, which was disposed of finally by means of order dated 11.10.2002 and while disposing of the writ petition, the Division Bench of this Court took a serious view of the matter and noted the fact about the valuable land worth crores of rupees and involvement of high officials in the land grabbing scam and with such observations, the Division Bench of this Court entrusted investigation of said criminal case to the Central Bureau of Investigation and directed the Senior Superintendent of Police, Allahabad to hand over all the papers relating to aforesaid case to the C.B.I. for investigation and even a direction was issued to the C.B.I. to submit report about the progress of investigation up to 16.12.2002.

14. It has also been stated in the supplementary affidavit that after taking over of the investigation, the C.B.I. registered a case as R.C.No.14(A)/2003 and after completing investigation in compliance of the order of this Court, the C.B.I. submitted charge sheet dated 18.01.2006 against the accused persons including aforesaid Dhara Singh Advocate before the concerned court of Lucknow Judgeship and subsequently the trial of said criminal case was registered as Case No.15 of 2007 (C.B.I. vs. Kamal Narayan Mishra and others) and recently applicant no.2 was also called for his deposition before the trial court by means of notice dated 22.08.2019. In compliance of said notice the applicant no.2 has appeared before the trial court and deposed as prosecution witness being P.W.-3 on 06.08.2019 and 28.08.2019 and his cross-examination is to be done on the next dates. It has also been stated in the said supplementary affidavit that against the show cause notice issued by Sri S.C. Bose in the capacity of Additional District Judge on 13.9.2002, both the applicants had preferred Civil Misc. Writ Petition No.42396 of 2002 before this Court which came up for admission on 30.09.2002 and after considering the facts of the case, this Court vide order dated 30.9.2002 was pleased to make prima facie observation about malafide and oblique intent of Shri S.C. Bose in following words:

"The cognizance taken by Shri S.C. Bose prima facie appears to be malafide and for some oblique purpose".

15. In the short counter affidavit filed on behalf of opposite party no. 2 i.e. the complainant, it has been stated that he had filed the application under section 156(3) of Cr.P.C. under some misconception on the basis of hearsay information and he does not want to prosecute the applicants any further and assures this court that he will not file further litigation or complaint against the applicants in any manner whatsoever before any forum or the court of law with regard to issue involved in present matter. He has also stated in his short counter affidavit that the application is bonafide and has been filed in the interest of justice.

16. With aforesaid factual backdrop, Mr. Gopal Chaturvedi learned senior counsel appearing for applicants has submitted that the applicants being upright officers were faithfully imparting their official duties in connection with the land in question and the case in hand is a classic example of malicious prosecution brought against them as an arm twisting contrivance in order to cause sheer harassment of upright officers for committing no offence whatsoever so that they may not pursue the matter against the wrong doers in right earnest. It was further urged before the Court that in a matter like this even if a regular F.I.R. had been lodged by police on its own at the instance of the complainant, the same would have overwhelmingly deserved to be quashed by this Court in view of the law laid down by Hon'ble Supreme Court in the case of ***State of Haryana and others vs. Bhajan Lal 1992 (Supp.1) SCC 335.*** Further submission is that in any case, the learned court below was obliged to consider the applicability of section 197 of Cr.P.C. before passing the impugned order in view of law laid down in ***Anil Kumar vs. M.K.Aiyappa, (2013) 10 SCC 705 and L. Narayana Swamy vs. State of Karnataka, (2016) 9 SCC 598***, according to which sanction for prosecution of applicants by the competent authority was a mandatory requirement in the circumstances of the case. Mr. Gopal Chaturvedi learned senior counsel, while placing reliance upon the documents filed in support of factual background of the controversy in question, has submitted that the documents appended with the petition and supplementary affidavit are of unimpeachable nature, most of them being official documents or documents forming part of court's record, and are liable to be considered and deserve to be seen by this Court for adjudication over controversy in hand. Further submission is that the abuse of process of the court and miscarriage of justice is apparent on the face of record and in case, this court does not come forward to the judicious rescue of applicants, it would be a travesty of justice, especially in view of the fact that the opposite party no. 2 i.e. the complainant himself does not want to proceed with his complaint. In support of submissions, various case-laws have been cited, which may be dealt with accordingly at appropriate stage.

17. Mr. Ankit Saran, Advocate appearing on behalf of opposite party no.2, in the light of short counter affidavit has supported the submissions made on behalf of the applicant and submits that the impugned order may be quashed and his client does not wish to pursue the matter anymore.

18. Learned A.G.A. has also not disputed the factual and legal submissions made on behalf of the applicant. However, he has pointed out that the proposed

accused lack locus standi to challenge order passed under section 156(3) of Cr.P.C. and as such, the criminal misc. application is not maintainable. Reliance was placed on the case of ***Father Thomas vs. State of U.P, (2000) 41 ACC 435.***

19. In rejoinder reply, Mr. Gopal Chaturvedi learned senior counsel has submitted that the position of law with regard to Locus Standi of proposed accused to challenge order passed under section 156(3) of Cr.P.C. needs to be seen in the light of various pronouncements of Hon'ble Supreme Court given in ***Anil Kumar's case (supra)*** and ***L. Narayana Swamy's case (supra)*** as well as in the cases of ***Manharibhai Muljibhai Kakadia & Anr vs. Shaileshbhai Mohanbhai Patel & Ors, 2012 (10) SCC 517*** and ***Priyanka Srivastava and another vs State of U.P. and others, (2015) 6 SCC 287***, and when we juxtapose the obiter and ratio of these Apex court's pronouncements against the view taken in the case of Father Thomas (supra) which circumscribes the rights of proposed accused, the embargo imposed upon the locus standi of the proposed accused for the purposes of challenging the order passed against him u/s 156(3) Cr.P.C., gets automatically lifted. Contention is that if the impugned order suffers from some illegality *per se* or in case the order has been passed without acquiring necessary jurisdiction to pass such order, such an illegality cannot be allowed to perpetuate or exist and any view to the contrary would be tantamount to putting the crown of infallibility upon an order which has been passed in complete violation of law. According to counsel, aforesaid pronouncements given by Hon'ble Apex Court make the procurement of sanction a mandatory requirement in matters where the alleged offences are said to have been committed in discharge of official duty and in that situation the non procurement of the same will cut at the very root of the matter and will hit adversely at the jurisdictional base of the order. If the sanction is *sine qua non*, a condition precedent, then it is only in the presence of the same that the court of Magistrate could have obtained necessary jurisdiction to proceed in the matter and if a particular order has been passed without procuring such jurisdiction, such kind of order shall be a nullity and cannot be allowed to exist for reasons of absence of necessary sanction in this regard. In matters like this the normal principles as have been laid down in cases which de-recognize the right of accused to challenge such order, would not come into play which only in general restrict the right or the *locus standi* of an accused to challenge order passed under Section 156(3) of Cr.P.C. against him in ordinary circumstances. The other limb of the argument upon which emphasis has been laid by learned senior counsel is that even otherwise the criminal misc application is liable to be entertained by this court *suo moto* in exercise of its inherent or revisional jurisdiction, which is a well recognized independent power and which must be used in view of glaring factual background of the case and in view of the *per se* illegality that has been committed by the Magistrate showing the lack of jurisdiction to pass such order in the absence of sanction which appears to be mandatory in the conspicuous backdrop and the conspicuous circumstances of the case.

20. In the light of rival submissions, the record of the case has been perused, which demonstrates peculiar factual history of the controversy. However, at the

same time, the controversy in hand gives rise to three main issues to be answered by this court.

Firstly, whether the impugned order is vitiated by non compliance of section 197 of Cr.P.C. in view of Anil Kumar's case (supra) and L. Narayana Swamy's case (supra) and whether the impugned order passed under section 156 (3) of Cr.P.C. directing the registration of F.I.R. on the basis of complainant's application, falls within any of the categories illustrated in Bhajan Lal's case (Supra).

Secondly, in case the answer to 1st issue is in affirmative, whether this court can exercise its inherent or revisional jurisdiction at the instance of proposed accused challenging an order passed under section 156(3) of Cr.P.C. for registration of criminal case and for investigation thereof.

Thirdly, in case the answer to 1st issue is affirmative and the answer of 2nd issue in negative, whether this court can suo motu exercise its inherent or revisional jurisdiction to quash the impugned order in the light of peculiar factual history of the controversy.

21. To answer the first issue, it would be appropriate to observe that the record available before this court includes the main petition, its enclosures as well as the supplementary affidavit and its enclosures. The enclosures of main petition and supplementary affidavit, in order to support the averments made therein, are mostly official documents like communications between senior officers of district administration as well as their superior authorities, the reports of subordinate government officers, the government orders and circulars. In addition to this, orders of this Court and Hon'ble Supreme Court as well as copy of first information report and charge-sheet as well as the order-sheets are also enclosed with petition in support of facts stated on behalf of applicants. *On the other hand,* the court has before it the short counter affidavit filed by the opposite party no. 2, in which there is no paragraph wise rebuttal of the contents of main petition. In fact the counter affidavit not only does not deny any of the averments of affidavit filed on behalf of applicant, it rather contains admission of opposite party no. 2 that he had filed application under section 156(3) of Cr.P.C. under some misconception and he does not want to prosecute the applicants any further and will not proceed to any other forum or court against him.

22. Considering the nature of documents available before the court, the undisputed facts of the case disclose that applicants are government servants and the land in question i.e. land of Gata No. 408 (approximately 10 bighas), Mauza Fatehpur Bichhua, Pargana and Tehsil Sadar, District-Allahabad was nazul land and thus, it was a government property, for which there is an entry in the register of government property (nazool) as 'pond' at serial no.16. The applicants were duty bound to protect said government property as is unmistakably deducible in view of report dated 07.09.1999 submitted by Additional District Government Counsel (Civil), Allahabad before D.M., Allahabad, the letter dated 06.09.2002 sent by the applicant no. 1 to the D.M., Allahabad, letter dated 07.09.2002 sent by the D.M., Allahabad to the Commissioner, Allahabad as well as in view of judgment of Hinch Lal Tiwari's case (supra). The applicant no.1 had passed order dated

27.08.2002 in Case No.138 of 2002 u/s 33/39 of Land Revenue Act in connection with the land of plot no.408, Mauza Fatehpur Bichhua, Pargana and Tehsil Sadar, District-Allahabad, whereby it was ordered that the land in question be entered into the name of State Government in the revenue record and in continuation thereof, the applicant no.2 submitted report dated 24.09.2002 to the In-charge Inspector Police Station Colonelganj, Allahabad for lodging of first information report against several persons including concerned Lekhpals and Revenue Inspectors for committing forgery and cheating in the revenue records in connection with the land of Plot No.408 i.e. the land in question, in continuation to which first information report dated 25.09.2002 was also registered as Case Crime no.361 of 2002 u/s 419, 420, 466, 467, 468, 470 and 471 I.P.C., P.S.-Colonelganj, District-Allahabad. The investigation of said criminal case was transferred to the Central Bureau of Investigation vide order dated 11.10.2002 passed by the Division Bench of this Court in Criminal Misc. Writ Petition No. 5969 of 2002 and after due investigation in compliance of the order of this Court, the C.B.I. submitted charge sheet dated 18.01.2006 against the accused persons including Dhara Singh Advocate before the concerned court of Lucknow Judgeship and subsequently the trial of said criminal case has been registered as Case No.15 of 2007 (C.B.I. vs. Kamal Narayan Mishra and others), wherein applicant no.2 has appeared before the trial court and deposed as prosecution witness being P.W.-3 on 06.08.2019 and 28.08.2019 and his cross-examination is awaited.

23. It is also discernible that the application dated 16.09.2002 u/s 156(3) Cr.P.C. filed by the opposite party no.2 contains allegation about interference, obstruction and damage to the tune Rs. 10,000/- by applicants while construction was being raised by the opposite party no.2 on behalf of aforesaid Dhara Singh, Advocate and one another advocate on the land in question i.e. Gata No. 408 and it also contains allegation about snatching of Rs. 5,000/- by the applicants. The applicants were arrayed as proposed accused in that application showing their post held by them at the relevant point of time. In the considered view of this Court the manner in which the Additional Chief Judicial Magistrate, Court No. IX, Allahabad dealt with the matter u/s 156(3) Cr.P.C. and passed the impugned order dated 25.09.2002 is not appreciable and does not satisfy this court either about its propriety or about its correctness and leaves much to be desired.

24. At any rate, the least that may be said in the wake of the factual background as has been enumerated hereinbefore, the action of applicants in respect of land in question appears to be absolutely justified and was well within the four corners of their official duties and there cannot be any doubt in this regard. There is also no doubt that hindrance was being created by unscrupulous persons in performance of official duties by the applicants, who performed their duties with utmost diligence without any fear, despite there being several odds in such state of affairs, as is depicted from perusal of record. This court feels itself vindicated to observe that the uprightness of these two officers is writ large and the manner in which they performed their duties in order to save Government property is commendable. Even otherwise, all the allegations leveled against the applicants appear to be otiose

and obsolete now in view of contents of short counter affidavit filed by opposite party no.2, noted above.

25. This Court has also cogitated upon the submissions raised by applicants' counsel based on the pronouncement of Hon'ble Apex Court given in the case of *Priyanka Srivastava and another (supra)* whereby he has sought to emphasize that the exercise of power u/s 156(3) of Cr.P.C. warrants application of judicial mind as it is a court of law required to act which is verily different from a police official supposed to act u/s 154 of the Code and in appropriate cases where higher officers are being embroiled as accused who normally act in exercise of their statutory functions, the judicial power ought to be exercised with circumspection and not in routine or in a cavalier manner and there ought to be an endeavour on his part to have at least a preliminary satisfaction about the possibility that the allegations made may be true. This Court has been taken through the pronouncement of of Hon'ble Apex Court given in Priyanka Srivastava's case (supra) in which while dealing with an order passed u/s 156(3) of Cr.P.C. against certain accused who were protected for action taken in good faith u/s 32 of SARFAESI Act the Apex Court proceeded to observe as follows :

"17. The learned Magistrate, as we find, while exercising the power under Section 156(3) Cr.P.C. has narrated the allegations and, thereafter, ***without any application of mind,*** *has passed an order to register an FIR for the offences mentioned in the application. The duty cast on the learned Magistrate, while exercising power under Section 156(3) Cr.P.C., cannot be marginalized. To understand the real purport of the same, we think it apt to reproduce the said provision:*

"156. Police officer's power to investigate congnizable case. -(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was no empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned."

18.....

19. In Anil Kumar v. M.K. Aiyappal [3], the two-Judge Bench had to say this:

"The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed [(2008) 5 SCC 668] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. ***The application of mind by the Magistrate should be reflected in the order.*** *The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be*

sufficient. After going through the complaint, documents and hearing the complainant, ***what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order,*** *though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."*

20. .....

21. .....

22. .....

23. .....

24. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. ....

25. .....

26. At this stage it is seemly to state that ***power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code.*** *A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but* ***when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.***

27. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the

Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.

28. .....

29. At this juncture, we may fruitfully refer to Section 32 of the SARFAESI Act, which reads as follows :

"32. Protection of action taken in good faith.-

No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act."

30. In the present case, we are obligated to say that learned Magistrate should have kept himself alive to the aforesaid provision before venturing into directing registration of the FIR under Section 156(3) Cr.P.C. It is because the Parliament in its wisdom has made such a provision to protect the secured creditors or any of its officers, and needles to emphasize, the legislative mandate, has to be kept in mind.

31. In view of the aforesaid analysis, we allow the appeal, set aside the order passed by the High Court and quash the registration of the FIR in case Crime No.298 of 2011, registered with Police Station, Bhelupur, District Varanasi, U.P.

32. A copy of the order passed by us be sent to the learned Chief Justices of all the High Courts by the Registry of this Court so that the High Courts would circulate the same amongst the learned Sessions Judges who, in turn, shall circulate it among the learned Magistrates so that they can remain more vigilant and diligent while exercising the power under Section 156(3) Cr.P.C."

26. It is worth mentioning at this stage that though the impugned order was passed long back much before the pronouncement of the Apex Court was given in *Priyanka Srivastava's* case, but as has already been referred to hereinbefore that so far as complainant's affidavit is concerned, the complainant of the present case has now filed an affidavit not in support of the allegations made in the application u/s 156(3) of Cr.P.C. but in denial of the same.

27. Adverting further to the law laid down by Hon'ble Supreme Court in the case of ***Anil Kumar's case (supra)*** and ***L. Narayana Swamy's case (supra)***, we find that the magistrate is expected to consider the applicability of provision of section 197 of Cr.P.C. before passing order u/s 156(3) Cr.P.C.; In this regard, the relevant part of ***Anil Kumar's case (Supra)*** is reproduced hereinbelow:-

13. Learned senior counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or

altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C. The above legal position, as already indicated, has been clearly spelt out in Paras Nath Singh and Subramanium Swamy cases (supra).

28. The above quoted proposition of law has been affirmed by the Hon'ble Supreme Court in ***L. Narayana Swamy's*** *case (supra).*

29. In the present matter, there is overwhelming material available on record to demonstrate that the applicants alleged visit to spot was for the reason that unlawful encroachments or constructions had reportedly taken place there on the government property and their action on the date of incident was unmistakably within discharge of their official duty, as has already been observed herein before, and was as such so inextricably intertwined with their official obligations that the two cannot be separated and thus the provision of section 197 of Cr.P.C. is duly applicable in the matter and the magistrate could not have taken judicial notice of the complaint u/s 156(3) Cr.P.C. unless the same would have been accompanied with the requisite sanction order. Just as the Hon'ble Apex Court was pleased to make certain observations in paragraphs 29 and 30 of *Priyanka Srivastava's case (supra)* while it kept in perspective the protecting provision of SARFAESI Act, this Court too feels persuaded to observe that the learned Magistrate should have kept himself alive to the protecting provision of Section 197 of Cr.P.C. before directing the registration of the F.I.R. In absence of previous sanction, the impugned dated 25.09.2002 becomes extremely vulnerable and hard to sustain.

30. Like-wise, the law laid down by Hon'ble Supreme Court in *Bhajan Lal's case (supra)* enumerates certain category of cases, in which superior court may exercise its inherent or extra ordinary jurisdiction to quash the criminal proceeding. The relevant part of the case-law is quoted herein below:

"108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

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

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

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

5. Where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

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

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

109. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

31. Under peculiar facts of the case in hand, as discussed above, this court has no hesitation to observe that except category no. 4, all other above noted illustrations expounded in ***Bhajan Lal's case (Supra)*** are to a large extent applicable in present case. The applicants were posted as S.D.M. and Naib Tehsildar and Ms. Mayawati was the Chief Minister those days. It is impossible to imagine that these two officers in broad-day light in full public gaze for no rhyme or reason, for no vested interest of their own, would be calling names using filthy invectives not only against complainant but against their own Chief Minister, who is the highest repository of all powers. It does not need any unnecessary elaboration on the point as everybody knows that just an unfavourable frown of the Chief Minister is more than capable to ruin the career of an S.D.M. or a Naib Tehsildar. There is no reason for this Court to hold that the applicants were insane or lunatics who felt happy inviting their own doom just for the sake of it. The bare reading of the allegations made by the complainant in his application would make it manifestly clear

that just in order to carve out certain offences under SC/ST Act and lend some kind of gravity and colour to the allegations and to give it a caste complexion, such absurd allegations have been levelled against the applicants. Another allegation that these officers of the district who were posted as S.D.M. and Naib Tehsildar committed a robbery and snatched away Rs.5000/- from the complainant also competes in its absurdity with the earlier allegation. This Court cannot be so gullible as to swallow such unpalatable absurdities. That seems to be the reason as to why the Hon'ble Apex Court while giving illustrations in the case of **Bhajan Lal** (supra), has recognized in category number-5 that it will be fit to quash the proceedings in matters where the allegations made in the F.I.R. or the complaint are 'so absurd and inherently improbable that on its basis no prudent man can ever reach a just conclusion that there is a sufficient ground for proceeding against the accused.' This Court also finds enough material on record to show as to how a number of persons which included the aforesaid Dhara Singh were involved in the unlawful encroachment and trespass over the Government property and as to how the applicants were instrumental in initiating and carrying out an assiduous campaign against such poaching offenders. One cannot miss to see that the complainant who is admittedly a man of aforesaid Dhara Singh, has been simply used to bring this complaint 'with an ulterior motive for wrecking vengeance on the applicants with a view to spite them due to private and personal grudge' and the proceedings are 'manifestly attended with malafides and have been instituted with malice.' All these features bring this case squarely within the ambit of category no. 7. It further goes without saying that non-procurement of sanction under Section 197 of Cr.P.C. would certainly bring the impugned order or the proceedings within the category no. 6. Again, if one finds enough material on record to suggest that visit of the applicants on the place of occurrence could not have been inspired by any other purpose than to impede or stop the unlawful encroachments on Government property, such an act or conduct would certainly not amount or constitute any offence which will once again bring the case in other category recognized by Hon'ble Apex Court in which the criminal proceedings against an accused would become liable to be quashed. It is also not different to see that as the alleged visit of these applicants to the spot with such officially justified purpose, did not constitute any offence, the other imaginary allegations were concocted but which cannot persuade any person of common prudence to accept them even as being plausible, much less than being true. Resultantly, the impugned order dated 25.09.2002 passed u/s 156(3) Cr.P.C. deserves to be quashed on this score too. Accordingly, the first issue is answered in affirmative.

32. Now the *second issue* comes for determination, for which the referral question and its answer observed in full bench case of *Father Thomas (supra)* needs to be quoted herein below:

"Referral Questions:

5.A. Whether the order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C directing the police to register and investigate is open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued?

B. Whether an order made under Section 156(3) Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973?

C. Whether the view expressed by a Division Bench of this Court in the case of Ajay Malviya Vs. State of U.P and others reported in 2000(41) ACC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is correct?

.....

.....

Answer given by the Bench:

64. In this view of the matter, the Opinion of the Full bench on the three questions posed is:

65.A. The order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued.

B. An order made under Section 156(3) Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973.

C. The view expressed by a Division Bench of this Court in the case of Ajay Malviya Vs. State of U.P and others reported in 2000(41) ACC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, and no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is not correct."

33. According to the full bench case of *Father Thomas (supra),* the order under section 156(3) of Cr.P.C will not be amenable to challenge in a criminal revision or an application under section 482 Cr.P.C at the instance of proposed accused. Although various pronouncements of Hon'ble Supreme Court have been placed by the applicant's side in order to demonstrate that the view taken by Full Bench of this court is not now in consonance with the dicta of Hon'ble Supreme Court and the same ought to be held per *incuriam*, however, following the norms of judicial propriety and decorum and law of precedent, it would not be proper for this court while sitting singly to observe anything on this self framed second issue except to act on the supposition as if the second issue has been answered in negative.

34. To deal with the *third issue* framed hereinbefore as to whether this court can *Suo Motu* exercise its inherent u/s. 482 of Cr.P.C. or revisional jurisdiction u/s. 397 r/w. 401 of Cr.P.C. in the light of peculiar factual history of the controversy, it may be useful to recapitulate the language used in these sections. Section 482 of Cr.P.C. reads as follows:

"482. Saving of inherent powers of High Court.--Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice"

Subsection (1) of Section 397 is as follows:

"397. Calling for records to exercise powers of revision.--

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding. Sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

Like-wise, Sub-section (1) of Section 401 is as follows:

"401. High Court's powers of revision.

(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392."

35. To appreciate the *Suo Motu* exercise of inherent or revisional power of High Court inbuilt under above quoted provisions of law, a brief survey of few salutary representative judgments of Hon'ble Supreme Court shall be conducive, wherein various instances of *Suo Motu exercise of revisional and inherent power* of High Court have been examined and law in this regard has been expatiated upon.

36. In the case of ***Cricket Association of Bengal vs. State of West Bengal, 1971 (3) SCC 239,*** a Division Bench of Calcutta High Court, on the basis of news paper report, issued *suo motu* Rule (Criminal Revision under the statutory authority of section 397 read with 401 of Cr.P.C.) to the complainant and accused persons of the criminal case to show cause why the orders discharging the accused persons should not be set aside and after hearing the parties, the High Court reversed the orders passed by the Magistrate, discharging the accused. The Hon'ble Supreme Court, while examining the correctness of said judgment, set aside the judgment for certain other reasons but recognized the *suo motu* authority of High Court and observed in following terms: -

"16. We accordingly hold that the Division Bench was not justified in interfering with the orders dated March 20, and June 8, 1967 passed by the Chief Presidency Magistrate, in the circumstances of this case. ***We, however, make it clear that we have no doubt that in proper cases the High Court can take action suo motu against the orders passed by the subordinate Courts without being moved by any party."***

(Emphasis supplied)

37. Hon'ble Supreme Court in ***Nadir Khan v. State (The Delhi Administration), 1976 CriLJ 1721 (paragraphs 1, 4 and 5)***, which reads as follows:

"I am reluctant to leave this matter with the usual monomial order since the submission of the learned counsel has sought to cast an ***unmerited doubt on the undoubted jurisdiction of***

the High Court in acting suo motu in criminal revision in appropriate cases. *The attempt has to be nipped in the bud.*

.....

.....

4. It is well known and has been ever recognized that the High Court is not required to act in revision merely through a conduit application at the instance of an aggrieved party. ***The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil, and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law.*** *The character of the offence and the nature of disposal of a particular case by the subordinate court prompt remedial action on the part of the High Court for the ultimate social good of the community, even though the State may be slow or silent in preferring an appeal provided for under the new Code. The High Court as given case of public importance e.g. in now too familiar cases of food adulteration, reacts to public concern over the problem and may act* ***suo motu*** *on perusal of newspaper reports disclosing imposition of grossly inadequate sentence upon such offenders. This position was true and extant in the old Code of 1898 and this salutary power has not been denied by Parliament under the new Code by rearrangement of the sections. It is true, the new Code has expressly given a right to the State under Section 377 Cr.P.C. to appeal against inadequacy of sentence which was not there under the old Code.* ***That however does not exclude revisional jurisdiction of the high Court to act suo motu for enhancement of sentence in appropriate cases. What is an appropriate case has to be left to the discretion of the High Court.*** *This Court will be slow to interfere with exercise of such discretion under Art. 136 of the Constitution.*

5. Section 401 expressly preserves the power of the High Court, by itself, to call for the records without the intervention of another agency and had kept alive the ancient exercise of power when something extraordinary comes to the knowledge of the High Court."

(Emphasis supplied)

38. Once again the Hon'ble Supreme Court, in the case of ***Eknath Shankarrao Mukkawar vs. State of Maharashtra (1977) 3 SCC 25,*** clarified the law in respect of High Court's *suo motu* Revisional powers. The relevant extract of the judgment is quoted thus:

"6. We should at once remove the misgiving that the new CrPC, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, *suo motu*. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. High Court's power of enhancement of sentence, in an appropriate case, by exercising *suo motu* power of revision is still extant under Section 397 read with Section 401 Criminal Procedure Code, 1973, inasmuch as the High Court can "by itself call for the record of proceedings of any inferior criminal court under its jurisdiction, ***The provision of Section 401(4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. Such a legal bar under Section 401(4) does not stand in the way of the High Court's exercise of power of revision, suo motu, which***

continues as before in the new Code." (Emphasis supplied)

39. Again in the case of ***Municipal Corporation of Delhi vs. Girdharilal Sapuru, 1981 (2) SCC 758,*** the Hon'ble Supreme Court elucidated the scope of High Court's *suo motu* Revisional power. The relevant observations made in this regard are as follows:

"5. It, however, appears that the respondents contended that the revision petition was barred by limitation. Even this contention is founded on a very technical ground that even though the revision petition was filed very much in time the requisite power of attorney of the learned advocate on behalf of the petition was not legally complete and when it was re-submitted the limitation had expired. Without going into the nicety of this too technical contention, we may notice that Section 397 of the Code of Criminal Procedure enables the High Court to exercise power of revision suo motu and when the attention of the High Court was drawn to a clear illegality the High Court could not have rejected the petition as time barred thereby perpetuating the illegality and miscarriage of justice. The question whether a discharge order is interlocutory or otherwise need not detain us because it is settled by a decision of this Court that the discharge order terminates the proceeding and, therefore, it is revisable under ***Section 397 (1), Cr. P. C. and Section 397 (1) in terms confers power of suo motu revision on the High Court, and if the High Court exercises suo motu revision power the same cannot be denied on the ground that there is some limitation prescribed for the exercise of the power because none such is prescribed. If in such a situation the suo motu power is not exercised what a glaring illegality goes unnoticed can be demonstrably established by this case itself.*** *We, however, do not propose to say a single word on the merits of the cause because there should not be even a whisper of prejudice to the accused who in view of this judgment would have to face the trial before the learned Magistrate."*

(Emphasis supplied)

40. In the case of ***Janata Dal vs. H.S. Chowdhary and Ors., (1992) 4 SCC 305,*** the Hon'ble Supreme Court was examining the question as to whether Mr. Justice M.K. Chawla, the then Judge of the High Court of Delhi, in exercise of inherent power, was justified in making certain observation regarding the authority of C.B.I. for launching an investigation in a criminal case and directing the office of the High Court to register a case under the title, "Court on its own motion vs. State and CBI" so that he could exercise his discretionary revisional and inherent powers to call upon the CBI and the State to show cause as to why the proceedings of criminal case be not quashed. In that case, the C.B.I. had launched and was investigating a criminal case regarding allegation broadcasted by Swedish Radio Broadcast that bribes had been paid to senior Indian politicians and key Defence figures to win the contract awarded by the Government of India to the Swedish firm for arms order. The Hon'ble Supreme Court with elaborated discussion on various legal issues quashed the latter part of the order of Single Judge whereby he had taken *Suo Motu* cognizance under Sections 397, 401 read with 482 of the Code issuing show-cause notice to the CBI and the State. However, the relevant part of determination of Hon'ble Supreme

Court, which may be useful for present controversy, is as follows:

"125. The next question of law that comes for our consideration is the ***suo motu power of the High Court*** *in exercise of its powers under Sections 190 (dealing with powers of the Magistrate to take cognizance of the offence), 397 (empowering the High Court or any Session Judge to exercise powers of revision), 401 (dealing with the High Court's powers of revision) and 482 (dealing with the inherent powers of the High Court) of the CrPC.*

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128. ***Sections 397, 401 and 482 of the new Code*** *are analogous to Section 435, 439 and 561(A) of the old code of 1898 except for certain substitutions, omissions and modifications. Under Section 397, the High Court possesses the general power of superintendence over the actions of Courts subordinate to it which the discretionary power when administered on administration side, is known as the power of superintendence and on the judicial side as the power of revision. In exercise of the discretionary powers conferred on the High Court under the provisions of this Section, the High Court can, at any stage, on its own motion, if it so desires and certainly when illegalities and irregularities resulting in injustice are brought to its notice, call for the records and examine them. The words in Section 435 are, however, very general and they empower the High Court to call for the record of a case not only when it intends to satisfy itself about the correctness of any finding, sentence or order but also as to the regularity of any proceeding of any subordinate court.*

129. By virtue of the power under Section 401, the High Court can examine the proceedings of inferior Courts if the necessity for doing so is brought to its notice in any manner, namely, (1) ***when the records have been called for by itself,*** *or (2) when the proceedings otherwise comes to its knowledge.*

130. The object of the revisional jurisdiction under Section 401 is to confer power upon superior criminal Courts - ***a kind of paternal or supervisory jurisdiction - in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted on the one hand, or on the other hand in some underserved hardship to individuals.*** *The controlling power of the High Court is discretionary and it must be exercised in the interest of justice with regard to all facts and circumstances of each particular case, anxious attention being given to the said facts and circumstances which vary greatly from case to case.*

131. Section 482 which corresponds to Section 561A of the old Code and to Section 151 of the Civil Procedure Code proceeds on the same principle and deals with the inherent powers of the High Court. The rule of inherent powers has its source in the maxim "Quadolex a liquid alicia concedit, conceder videtur id sine quo ipso, ess uon protest" which means that ***when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist.***

132. ***The criminal Courts are clothed with inherent power to make such orders as may be necessary for the ends of justice****. Such power though unrestricted and undefined should not be capriciously*

or arbitrarily exercised, but ***should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the Courts exist.*** *The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles."* ***(Emphasis supplied)***

41. In view of above, the position of law in this regard may be summarized in following points:

The High Court possesses the general power of superintendence over the actions of Courts subordinate to it. The discretionary power when administered on administration side, is known as the power of superintendence and on the judicial side as the power of revision.

The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil, and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law.

Section 401 expressly preserves the power of the High Court, by itself, to call for the records without the intervention of another agency and had kept alive the exercise of power when something extraordinary comes to the knowledge of the High Court. Section 401 empowers the High Court to call for the record of a case not only when it intends to satisfy itself about the correctness of any finding, sentence or order but also as to the regularity of any proceeding of any subordinate Court. (Emphasis supplied)

The object of the revisional jurisdiction under Section 401 is to confer power upon superior criminal Courts - a kind of paternal or supervisory jurisdiction - in order to obviate or correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted on one hand, or on the other in some undeserved hardship to some individual.

The High Court possesses undoubted jurisdiction to act suo motu in criminal revision and in appropriate cases, can take action suo motu against the orders passed by the subordinate Courts without being moved by any party.

42. Submission of counsel for appellant is that if the procurement of sanction u/s 197 of Cr.P.C. is a legal requirement then the impugned order passed by the Magistrate in absence of the same would be an order without jurisdiction and shall be per se illegal. Argument is that orders may be passed by the authorities correctly or incorrectly reaching at right conclusions or wrong conclusions by making appropriate inferences or inappropriate inferences, but the order has to be passed by the authority concerned who has the jurisdiction to pass such order. Procurement of sanction is such a necessary legal requirement in a given case with regard to certain accused who are said to have committed certain offences in the process of discharge of their official duty that non procurement of the same hits at the very root of the jurisdiction of the court to proceed further in the matter. If procurement of statutory sanction is a condition precedent or *sine qua non* to take cognizance of the matter or if it is a condition precedent, as per the

pronouncement of the Apex Court in order to judicially proceed further in direction of making an order for registration of the F.I.R., then the absence of the same will result in a situation where the concerned court shall be lacking the necessary jurisdiction to pass that order. Such kind of orders would be non est in the eyes of law and for all practical purposes cannot be deemed to have any legal existence. Before an order may be termed interlocutory or final, revisable or not revisable, it has to be firstly an order which has been legally passed by an authority having legal jurisdiction to pass the same. If the jurisdiction is wanting, such an order will be non est and even the statutory bar which prohibits a revision in that regard will not operate. Certain authorities have been cited in order to substantiate such plea and it has been sought to be argued that the orders passed without jurisdiction can always be challenged by filing a revision even though a revision against such orders in normal circumstances might have been prohibited by the Statute for reason of being interlocutory.

43. Reliance in this regard has been placed on ***Bhima Naik And Ors. vs State, 1975 CriLJ 1923 (Orrisa)***, wherein the division bench of Orrisa High Court presided by the Chief Justice discussed various legal issues, while dealing with the legality, proprietary and jurisdictional correctness of an order passed under section 117(3) of Cr.P.C. calling upon the petitioners of that case to execute interim bonds. In said case, the division bench came to the conclusion that the order being interlocutory in nature is not amenable to revisional jurisdiction under section 397 of Cr.P.C. and is also not amenable to inherent jurisdiction under section 482 of Cr.P.C., however while ascertaining so, the division bench considered the issue of lack of jurisdiction, jurisdictional correctness and proprietary of the order under challenge and the division bench reached to the conclusion in following manner:

"4. In (Shri M.L. Sethi v. Shri R. P. Kapur) the meaning of the word 'jurisdiction' was fully examined. The majority view in Anisminde Ltd. (1969) 2 AC 147 was followed. Therein the absence of jurisdiction was not confined to entitlement to enter upon the enquiry in question. It was extended to subsequent error in the exercise of jurisdiction. The observations of Lord Reid may be quoted:

"But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

Lord Pearce made similar observations.

5. Adopting the majority view the Supreme Court observed thus:

11. The dicta of the majority of the House of Lords, in the above case would show the extent to which 'lack' and 'excess of jurisdiction have been assimilated or in other words, the extent to which we have moved away from the traditional concept of 'jurisdiction'. The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point.

6. Both on the conclusion in AIR 1971 SC 2481 : 1971 Cri LJ 1715 that the order calling for execution of interim bond before the commencement of the enquiry is completely illegal and ***on the application of the concept of jurisdiction propounded in the impugned order is without jurisdiction and is a nullity.***

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15. The last contention urged by Mr. Das is that the impugned order is a complete illegality and without jurisdiction as was held in AIR 1971 SC 2481 : 1971 Cri LJ 1715 and (1974) 40 Cut LT 148. Being without jurisdiction it is a nullity and is nonest in the eye of law and therefore, it is no order at all despite the fact that it was passed at an intermediate stage of the proceeding and has the physical form and shape of an interlocutory order and as such Section 397(2) is no bar for interference by this Court in exercise of its power under Section 401 or Section 482 Cri. P. C.

The contention requires careful examination. The object of enacting Section 397(2) was that by coming up in revision against interlocutory orders there was delay in the disposal of criminal proceedings resulting in great harassment to the litigants. If interlocutory orders passed without jurisdiction cannot be interfered with at any earlier stage, then the harassment would be much greater and would be more oppressive. As we have already indicated, the High Court cannot invoke its inherent jurisdiction even in case of instances enumerated in. Interlocutory orders which are without jurisdiction and are nullities have no existence in the eye of law. Such orders are to be ignored. The litigants cannot escape harassment merely by ignoring them and it is why the jurisdiction of the High Court is invoked to quash such orders. Section 397(2) will have no application to such interlocutory orders which though have the form of interlocutory orders are no orders at all. On this analysis Section 397(2) will be out of the way and exercise of the power by the High Court under Section 401 or Section 482 cannot be ousted.

On the other hand if interlocutory orders are passed within jurisdiction, then they cannot be interfered with on account of the ban imposed by Section 397(2). Certain instances may be given to illustrate this concept.

An order calling for execution of an interim bond under Section 117(3) was passed after the commencement of the enquiry under Section 107, Cri. P. C. Evidence taken up to that stage may be such on which another court of fact may take a different view. The Magistrate's conclusion one way or the other cannot be interfered with in revision as he acts within jurisdiction and in exercise of such jurisdiction he might have come to a wrong conclusion on facts. Section 397(2) is a bar in the path of interference under Section 401 or Section 482.

Under Section 145, Cri. P. C. if an Executive Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land, he shall pass a preliminary order in writing stating

the grounds of his being so satisfied. Suppose, the Magistrate in his order writes that there was no apprehension of breach of peace and yet called upon the parties to the dispute to file written statements, the order of the Magistrate would be without jurisdiction. Such an order, though interlocutory, can be revised. A Criminal Court has no jurisdiction to deal with civil rights. The Magistrate gets jurisdiction only when there is an apprehension of breach of peace. If there is no apprehension of breach of peace there is lack of jurisdiction and the preliminary order so issued will be without jurisdiction and a nullity. In such a case if Section 397(2) will be a bar, the entire proceeding would continue till it is finally found out that the Magistrate acted without jurisdiction.

On the other hand if there was an apprehension of breach of peace, he gets jurisdiction and any interlocutory order passed by him subsequently cannot be interfered with in revision.

16. In this case the impugned order, as has already been pointed out, was passed without jurisdiction and was completely illegal and is a nullity. ***It is no order - much less an interlocutory order - in the eye of law. Section 397(2) will have no application to such an order. It would therefore, be open to the High Court to interfere in revision under Section 401 or 482." (Emphasis supplied)***

44. On the strength of the above noted case-law it has been sought to be argued that the general legal principle laid down in the *Father Thomas* case proscribing the rights of proposed accused to assail the order passed under Section 156(3) of Cr.P.C. against them, shall not come in the way in matters where the impugned order or proceedings drawn may be justly castigated for being without jurisdiction.

45. Another limb of the arguments is that Section 482 of Cr.P.C. is a provision which actually is in the nature of recognition of inherent power of the court and the statute is a saving clause. Section 482 of Cr.P.C. does not create inherent jurisdiction in the court but simply saves and recognizes the same. And though the exercise of such power has to be done very sparingly in rare cases but if it comes to the notice of the court that some such mighty abuse of court process is likely to affect due course of administration or where a particular order passed by the court is inevitably going to lead to misuse of government machinery and where there are apparent circumstances to conclusively demonstrate that the power exercised by the court below was not bonafide but was a colorable exercise of power which has been in all probability influenced by some unfair circumstances, the court has to come forward and exercise the same in order to stop the abuse of court's process and meet the ends of justice. The facts as have come up before the Court unerringly show as to how a particular judicial officer has been posted in a particular district who has been prima facie found to have acted in an injudicious partisan manner having vested interest of his own at the back of his mind and regarding whom even the High Court has come to a prima facie conclusion that he was inspired with malafide intentions.

46. This court finds reason to see that the submissions made by the applicants' counsel that there are circumstances to suggest that the impugned order was passed under the unsavoury influence of the aforesaid judicial officer, who had

purchased a property in the name of his wife which was part of a land regarding which a campaign or mission was being managed by the applicants and other executive authorities in compliance of directions issued by the Hon'ble Supreme Court (so that the illegal occupations of such lands and illegal possession over such government property may be removed), is not wholly without substance or entirely without a clue. The facts of the case staring in the face are so glaring that after they having come to the notice of the court, it is simply not possible for this Court to shut the eyes and feign ignorance and not to exercise its own inherent jurisdiction as well as its own power of revision in order to adjudge and pronounce upon the legality, correctness and propriety of such an order and to secure the ends of justice and also to avert the gross abuse of court's process. This Court finds occasion to observe that even though these facts have come to the notice of the court at the instance of the applicants who are the proposed accused yet after the facts having been brought to the notice of the court, this Court on its own feel irresistibly persuaded to exercise both its powers that is to say its *inherent jurisdiction* and its *suo motu* revisional power regarding orders or proceedings of the court below.

47. To conclude in sum and substance, the *Suo Motu* authority of High Court under Section 397 read with 401 of Cr.P.C. or under section 482 of Cr.P.C. is fairly well settled and if the facts so warrant, there is no fetter on the power of this Court to obviate or correct the miscarriage of justice in an appropriate case by exercising its extensive supervisory jurisdiction under Sections 397 read with Section 401 of Cr.P.C. or its inherent power under section 482 of Cr.P.C. without being moved by any party. Accordingly, the *third issue* is answered in affirmative.

48. Resultantly, in the wake of conspicuous facts and circumstances, improprieties and illegalities committed in this matter, even if this Court acts on the supposition that the relief sought in this Criminal Misc. Application was not amenable to be entertained at the instance of the applicants, this court finds itself well equipped to examine on its own the correctness, veracity, legality and sanctity of order dated 25.09.2002 and also to examine and assuage the miscarriage of justice in the present matter caused by the order in exercise of its *Suo Motu inherent and revisional power.*

49. In totality of facts and circumstances of the case, discussed herein above and before, this Court feels that it owes an inevitable obligation to obviate, avert or heal the miscarriage of justice caused in the present matter by exercising its *Suo Motu* authority under Section 397 read with 401 as well as under section 482 of Cr.P.C. and hence, the order dated 25.9.2002 passed by the court of Additional Chief Judicial Magistrate, Court No.9, Allahabad on Misc. Application No.172/XII/2002 (Ram Surat Pasi vs. Vijai Shankar and another), P.S.-George Town, District-Allahabad is hereby quashed.

50. However, this court refrains itself from proposing any administrative or otherwise action against Mr. Subhash Chandra Bose, the judicial Officer who has been arrayed as opposite party no.3 in the instant petition, on two counts, *firstly* that no notice has been issued to him to submit his response against the

circumstances set forth in this petition about his act and conduct. *Secondly* that the issue of taking any administrative or otherwise action by the High Court against said judicial officer primarily appears to be subject matter of Civil Misc. Writ Petition No.42396 of 2002.

51. The office is directed to send the copy of this order to the court of Additional Chief Judicial Magistrate, Court No.9, Allahabad forthwith.

52. The instant application is decided in aforesaid terms.

(2020)1ILR 467

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr. P.C. No. 20022 of 2017

Bhawar Singh & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Sushil Kumar Shukla, Sri Abhitab Kumar Tiwari

Counsel for the Opposite Parties:
A.G.A., Sri Santosh Mani Shukla, Sri Satyendra Kumar Singh, Sri Vikash Singh

A. Code of Criminal Procedure - Section 482 - Abuse of Process of Court -FIR u/s 406 IPC was lodged by Secretary of the Committee- Final report submitted-In another criminal case charge sheet against O.P. No.2 was filed and case is under trial- Instead of the informant, O.P No.2, who was neither Secretary nor President nor authorized person to file any proceeding in and on behalf of Committee, filed Protest Petition-Treated as a complaint- Neither the name of complainant was changed nor complainant was examined and summoning order was passed, wherein it was repeatedly written that complainant was examined under Section 200 Cr.P.C-Compromise application filed before Magistrate rejected - Challenged before court of Sessions through criminal revision but the aforesaid point was not considered by learned Sessions Judge amounting to misuse of process of law-Complainant always has the liberty to withdraw from the prosecution but Magistrate failed to appreciate facts and law placed on record. (Para 5 & 6)

Criminal Misc. Application u/s 482 Cr.P.C allowed. (E-3)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 Cr.P.C. has been filed with a prayer for quashing the entire proceeding including impugned order dated 24.01.2017, passed by learned court of Additional Session Judge / Special Judge E.C. Act, Meerut in Criminal Revision No. 190 of 2016 (Bhawar Singh and 8 others Versus State of U.P. through Collector Meerut) and impugned summoning order dated 16.04.2016, passed by Judicial Magistrate, Sardhana, District Meerut in Complaint Case No. 84 of 2013 (Veer Singh Versus Bhawar Singh and others), under Section 406 I.P.C., pending in the court of learned Judaical Magistrate, Sardhana, District Meerut.

2. Learned counsel for applicants argued that first information report for alleged criminal breach of trust was filed by way of an application moved under Section 156(3) Cr.P.C. by Veer Singh,

who was the then Secretary of Sadhu Jagram Smarak Gaushala Samiti, situated in village and post Kapsad, Police Station Sardhana, District Meerut. Investigation resulted submission of final report. After that, Veer Singh informant has not filed any protest petition, rather it was Brijpal, who was neither Secretary nor President nor authorized person to file any proceeding in and on behalf of above Committee. This application was treated to be a complaint case, but complainant remained Veer Singh in the proceeding of complaint, whereas statement under Section 200 Cr.P.C. was got recorded of Brijpal. Brijpal himself was an accused for the same criminal breach of trust, punishable under Section 406 I.P.C. in a report, wherein charge sheet was filed and cognizance was taken. Since beginning, it was being said that amount realized from the auction of bullocks could not be deposited in Bank because of the closure hours of Bank, but it was given by President to his younger brother Brijpal for getting in safe till deposit in Bank, but the amount was not deposited. In between, President died. Hence, Brijpal was having no locus to file any protest, because he himself was accused for above misuse of money of society, for which charge sheet was filed, but on the basis of above protest petition this summoning was passed. Moreso, Society had entered in compromise and this application was moved before Magistrate that parties have entered in compromise and complainant does not want to proceed with above proceeding, but this application was rejected by Magistrate, mentioning therein that the protest was filed by Brijpal and summoning was on the protest of Brijpal, hence, this compounding will not be accepted, whereas Brijpal was neither Secretary nor President nor was having any authority for entering in compounding and admittedly money was of above Society and its office bearer had entered in compromise for offence punishable under Section 406 I.P.C., which is compoundable in the table under Section 321 Cr.P.C. Hence, on the basis of compromise too, the proceeding ought to be quashed. Moreso, the proceeding is in the misuse of process of law and the summoning was wrong. Hence, this application with above prayer.

3. Learned A.G.A. has vehemently opposed the application.

4. Learned counsel for opposite party no. 3 Brijpal has vehemently opposed this argument by saying that against him FIR was lodged by Prempal Shastri, S/o Kashmir, whereas this has been wrongly said that it was filed by Prem Pal, S/o Sohan Singh. This statement is against the fact. Moreso, Brijpal was falsely implicated in this proceeding for some criminal breach of trust, wherein charge sheet has been filed and he is facing trial. Hence, he had filed protest petition against final report and he was examined under Section 200 Cr.P.C. Thereafter, this order of summoning was there. Hence, Veer Singh or any other member of Committee is not competent to enter in compromise. Rather, they all are in conspiracy to each other. Thereby, this application be dismissed.

5. Having heard learned counsel for both sides and gone through material placed on record, it is apparent that auction of bullocks was performed by Committee, wherein Secretary was Veer Singh, Cashier was Bhawar Singh and President was Sukhpal Singh. Part payment was made and remaining was to be paid

subsequently, but this part paid money, which was said to be handed over to younger brother of President i.e Brijpal was not deposited in Bank account of Society concerned. The other money was also not deposited. Hence, case by way of application under Section 156(3) Cr.P.C. was got filed, wherein investigation resulted submission of final report i.e. no offence was made out, whereas in another criminal case the accusation of usurpation of Rs.43,900/- was substantiated in investigation and charge sheet against Brijpal was filed, wherein cognizance was taken and case is being said to be under trial. The final report was given notice to informant, but Veer Singh who was Secretary of Society did not file any protest nor President of Society filed any protest. It was same Brijpal, against whom charge sheet was filed, filed protest petition and it was treated to be a complaint case, wherein Brijpal was examined under Section 200 Cr.P.C. and the summoning order for offence under Section 406 I.P.C. was passed. This order was challenged before court of Sessions and it was made a point in memo of revision that protest was not filed by informant. Rather, it was filed by Brijpal, who himself is accused of criminal breach of trust, but Sessions Judge in its finding has not disclosed this fact neither this was considered nor pointed or concluded by Sessions Judge on this point. Hence, the point raised was not considered by learned Sessions Judge and it was misuse of process of law.

6. Brijpal, who is contesting this proceeding, is himself an accused facing trial and in this proceeding too it has been specifically said that Brijpal usurped Rs.43,900/-, which was received at the time of auction and was given in his possession by his brother, who is now no more, and who was President at that time. Hence, it is apparent that for saving himself from above criminal trial, this step was taken by Brijpal by filing of this protest petition. Neither the name of complainant was changed nor complainant was examined and this summoning order was passed, wherein repeatedly this has been written that complainant was examined under Section 200 Cr.P.C. The complainant was Veer Singh, who had not been examined under Section 200 Cr.P.C. Moreso, in a criminal proceeding, running on the basis of complaint, complainant always remain with liberty to withdraw from the prosecution and it was moved before Magistrate that now Society and its members had decided not to proceed with this trial and this proceeding be ended, but Magistrate failed to appreciate facts and law placed on record. Thereby, rejected above request for withdrawal and ending of this proceeding, whereas it was moved by Secretary and President of Committee. Hence, on overall appreciation of those situations, it is very clear that both the courts below failed to appreciate this fact on record, thereby it was apparently misuse of process of law. Hence, this application merits to be allowed.

7. The application is allowed. The entire proceedings of Complaint Case No. 84 of 2013 (Veer Singh Versus Bhawar Singh and others) under Section 406 I.P.C., pending in the court of learned Judaical Magistrate, Sardhana, District Meerut including impugned order dated 24.01.2017 and impugned summoning order dated 16.04.2016 is hereby quashed.

(2020)1ILR 470

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/S 482 No. 23886 of 2019

Lal Bahadur Maurya & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Oposite Parties

Counsel for the Applicants:
Sri Rajesh Kumar Shukla, Sri P.N. Ojha

Counsel for the Opposite Parties:
A.G.A., Sunil Kumar Patel

A. First Information Report - Criminal Procedure Code, 1973, Section 156 (3) - the powers of a Judicial Magistrate under Section 156(3) of Cr.P.C. and the Administrative powers to maintain law and order in order to ensure appropriate administrative action against the wrong doers are two qualitatively different spheres of operation.

Even otherwise if the local police which is a law and order implementing limb of local administration, does not act properly with efficient alacrity and if somebody feels aggrieved by such lackadaisical attitude, it is frequently seen that a protest or a complaint in that regard is made before the District Magistrate or the Superintendent of Police. It is also frequently seen that on such application, District Magistrate directs the concerned local officials who may be of police or may be of police or may be officials of other department, that they should "do the needful" or "take necessary actions in accordance with law". Being in charge of the administration, the District magistrate has to pass orders almost on regular basis on a large scale every day which relate to multiple departments of all kinds including police. (Para 6)

B. Inherent Jurisdiction - Section 482 - Cr.P.C. - Scope - the Trial Court and not the High Court is expected to analytically analyze the facts and factual matrix of case.
Application u/s 482 rejected. (E-10)

List of cases cited: -

1. State of Haryana Vs. Bhajan lal 1992 SCC (Cr.) 426

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Supplementary affidavit has been filed by the counsel for applicants, which is taken on record.

2. This application u/s 482 Cr.P.C. has been moved on behalf of applicants seeking the quashing of Charge Sheet dated 25.09.2018 and cognizanc order dated 11.02.2019 as well as the entire proceedings of Criminal Case No. 433 of 2019 (State Vs. Lal Bahadur), arising out of Case Crime No. 60 of 2018, under Section 457 I.P.C., Police Station Pawara, District Jaunpur, pending in the court of Additional Chief Judicial Magistrate 3rd Jaunpur.

3. Heard Shri N.P. Ojha holding brief of Shri Rajesh Kumar Shukla counsel for the applicants, counsel for opposite party No.2 and learned A.G.A. and also perused the record.

4. Submission of learned counsel for the applicants is that the F.I.R. of the case could have been directed only by a Judicial Magistrate while in the present case the same has been registered on the orders of S.D.M. or District Magistrate. Therefore, according to the counsel, the registration of F.I.R. will be an illegal act and the consequent investigation and submission of charge sheet will also

become illegal and it deserves to be quashed for that reason. It has been submitted that if the police did not register the F.I.R. then the only course open for the complainant was to have moved an application under Section 156(3) of Cr.P.C. and it was none of his business to have made any protest regarding that on the administrative side. This is the only submission that has been pressed by the counsel before the Court in order to seek quashing of charge sheet that has been submitted by the police after registering the case under Section 457 of I.P.C. against the accused-applicants. Counsel for the applicants has not sought to point out any other irregularity, illegality or impropriety much less than any abuse of court's process in the impugned order or proceedings which in the estimate of the counsel could persuade this Court to interfere in the same.

5. This Court has cogitated upon the submissions raised by the counsel and has considered them in the light of the facts of this case and the record.

6. With regard to the submission made by the counsel that only a Judicial Magistrate could have directed the police to register the F.I.R. under Section 156(3) of Cr.P.C. and therefore, the present F.I.R. and the subsequent investigation and the charge sheet deserves to be quashed for the reason of having been lodged at the instance of the District Magistrate or the Sub Divisional Magistrate, the same does not appear to be a sound argument in the peculiar facts of the case. It goes without saying that so far as the implied power to direct registration of F.I.R. and direct the investigation into the case under Section 156 (3) of Cr.P.C. is concerned, the Judicial Magistrate no doubt possess such power. But the contents of the present F.I.R. show that it was never lodged on the basis of any application under Section 156(3) of Cr.P.C. at all. In fact, the contents of the application on the basis of which F.I.R. has been lodged show that the same had been addressed to the S.H.O. of Police Station Pawara, District- Jaunpur and not to any Magistrate whether Judicial or Executive. It is not at all a case in which it may be said that some application in the form of 156(3) Cr.P.C. was moved before the court of Executive Magistrate on which the Magistrate might have passed the order directing the police to register the F.I.R. and initiate investigation into the case. To the contrary it appears to be the case where some application has been addressed to S.O. of Police Station Pawara on the basis of which the F.I.R. has been registered. In fact, the perusal of the record shows that probably initially the police was reluctant to lodge the F.I.R. and in that regard protests were made by some local political leaders and the matter came to the notice of the District Magistrate who then set up an enquiry in this regard. The perusal of annexure no. 2 shows that this inquiry was conducted by the Circle Officer of the police and the Sub Divisional Magistrate of Machhalishahar, Jaunpur jointly and it was found by them that the opposite party no. 2 Rajendra Prasad Maurya had purchased the land in question which was duly mutated in his favour. After ascertaining so many other facts it was found prima facie in the enquiry that the house in question was constructed by the first informant Rajendra Prasad Maurya regarding which the accused persons had committed criminal trespass and unlawful possession of the same was taken by the accused by breaking into the house. The inquiry report also indicated that the accused persons had

committed cognizable offence and the balance of equity and justice was clearly therefore in favour of the first informant who was wronged by the accused and the locks of his house were forcibly broken and the unlawful possession of the property in question was illegally taken by the accused persons. It was also indicated in the preliminary inquiry report that the political protest was justified and the police ought to have registered the F.I.R. for committing cognizable offences. It appears that in all probability it was in the wake of this background that the officials of local police station having found that the higher police officer i.e. Circle Officer of Machhalishahr himself has submitted such kind of report to the District Magistrate which also contained the signature of the Sub Divisional Magistrate, endorsing the same view, that they (the local police) decided to register the F.I.R. into the case on the basis of application that was moved and addressed to S.H.O. The perusal of the the check report does not show any such direction that may be said to have been issued either by the District Magistrate or the Sub Divisional Magistrate to register the case. The registration of F.I.R. therefore cannot at all be said to have been by any such order passed by the Executive Magistrate which may be equated to an order which is normally passed on an application moved under Section 156(3) of Cr.P.C. by the Judicial Magistrate. Even otherwise if the local police which is a law and order implementing limb of local administration, does not act properly with efficient alacrity and if somebody feels aggrieved by such lackadaisical attitude, it is frequently seen that a protest or a complaint in that regard is made before the District Magistrate or the Superintendent of Police. It is also frequently seen that on such application being moved before the District Magistrate, he directs the concerned local officials who may be of police or may be officials of other department, that they should "do the needful" or "take necessary action in accordance with law." Being incharge of the District Administration, the District Magistrate has to pass such orders almost on a regular basis on a large scale every day which relate to multiple departments of all kinds including police. Even though in the present case we do not have any material before us to indicate that any such formal specific direction to lodge F.I.R. was issued to the local police on the basis of which the present F.I.R. in question might be said to have been registered. But even if we presume it to be so such kind of general orders to "take appropriate action in accordance with law" or "do the needful in accordance with law" or to "do the needful and maintain law and order" cannot be equated and will not be tantamount to a direction issued under Section 156(3) Cr.P.C. The powers vested in the Judicial Magistrate to pass an order under Section 156(3) of Cr.P.C. is a statutory power and it is within the rights of every aggrieved individual to invoke such power if he is so advised. It can also be said with equal force that the powers of a Judicial Magistrate under Section 156(3) of Cr.P.C. and the Administrative Powers to maintain law and order in order to ensure appropriate administrative action against wrong doers are two qualitatively different spheres of operation. Sometimes it may appear in the ultimate analysis that the relief which an aggrieved person may get by approaching the District Magistrate was such which in part might also have been achieved by approaching a Court of Law but such kind of ostensible overlapping would not mean that the aggrieved person had no right to make a

complaint on the higher administrative side or to raise a protest on the higher executive side against the dereliction of duty committed by some subordinate administrative officials. If the local incharge of police station refuses to register the F.I.R. and shoes away the complainant or misbehaves with him, it is very much natural and permissible both that the aggrieved complainant may go to the Superintendent of Police and may even go the District Magistrate, who is the overall head of the District Administration, in order to express his grievance. Approaching the Superintendent of Police in such a situation has even got a statutory recognition in the Code of Criminal Procedure itself. If the aggrieved complainant approaches the District Magistrate, narrates his grievances and makes a complaint about the dereliction of duty in which the local police official indulged or as to how the local police appeared to have colluded with the other side and has not properly behaved in the matter, what else is expected from a District Magistrate in such a situation than to either call for an explanation or to initiate a departmental inquiry or to entrust somebody to find facts or to call up the erring police officer to explain his conduct or to reprimand him to watch the step, behave properly, do the right thing, and act in accordance with law and perform his duty. It cannot be said with any reasonableness that the aggrieved complainant in such situation was wrong to have approached either the Superintendent of Police or the District Magistrate or any other Executive Magistrate of higher rank whom the complainant found to be within his reach or accessibility nor can it be contended with any amount of reasonableness that if any higher Executive Officer or the Superintendent of Police in such circumstances tried to ameliorate the grievance of the complaint and endeavored to mend the ways of such erring police officer, he did or would do anything wrong. In fact, if the higher administrative officers in such a situation would just shrug their shoulders and tamely plead to be helpless and simply remained content with giving a pontificating advice to the complainant to engage a counsel, approach the Court of Law and move an application under Section 156(3) of Cr.P.C., they themselves might be held guilty for dereliction of their own duty. What has happened in the present matter is an event which by its recurring frequency has become banal and we often come across such matters where instead of performing their duty, the police officers refuse to register the F.I.R. just to keep the crime graph low in their police station and the aggrieved persons are shown the doors in a most insensitive manner. As it appears in the present matter also that despite the crime committed against the complainant their grievance remained unregistered and unaddressed. The initial report was clearly not registered in the manner as it ought to have been and attempts were made to dilute the offences and keep them on low key. As the complainant was conscious of his rights he did not give up and staged a "Dharna" which impelled the District Magistrate to set up a higher level inquiry which was conducted by the Deputy Superintendent of Police and the Sub Divisional Magistrate together and who gave a detailed fact finding report affirming the highhandedness and wrongs committed against the complainant. It appears that when the matter got exposed and the reality got unearthed the local police thought it prudent to mend its way and do what they ought to have done much

earlier in accordance with law. For all these reasons as discussed above, this Court does not find any substance in the contention raised by the applicant's counsel that the only way permissible to get the F.I.R. registered, was to move an application under Section 156(3) of Cr.P.C. and the matter should not have been brought to the notice of the higher Administrative Authorities of the District. Nor this Court finds any substance in the contention raised by the applicant's counsel that the initiative taken on the administrative side by the District Magistrate where by it set up a fact-finding inquiry, he did anything wrong. In the considered opinion of this Court, what the District Magistrate did was not only right but it was his duty to do what he did. Any cold-shouldering on his part in such circumstances could have been termed as nothing but a meek refusal on his part to look into what was rotting under his nose and what was growing wild right under his foot.

7. No other submission worth consideration has been raised by the counsel. All other contentions that have been raised relate to pure questions of fact which can be adjudicated upon only during the course of trial and related to appreciation of evidence. In exercise of inherent jurisdiction, this Court does not propose to have a pre-trial of accused before the actual trial may began. The perusal of the F.I.R. and the other material collected during the course of investigation clearly disclose the commission of cognizable offnece and the matter certainly does not fall in any of the categories recognized by the Apex Court in its decision given in the case of ***State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426*** on the basis of which the impugned proceedings could have been quashed. This Court also does not see any illegality much less than any abuse of court's process having been committed by the court below and in the wake of the allegations made in the F.I.R. and the material that has been collected during the course of investigation in the case there is no good reason to scuttle the impugned criminal proceedings at its threshold.

8. The application lacks merit and stands dismissed.

(2020)1ILR474

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/S 482 No. 35253 of 2019

Ram Avtar Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kuldeep Kumar

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

A. Abetment of Suicide - Section 306 of Indian Penal Code - somebody's misbehavior also may abet a person to commit suicide.

There may be cases where the nature of ill-treatment meted out to a person, the constancy of humiliation to which the other person has been subjected to, and the continuation of ill-treatment towards that person may be so extreme that even a normal self-respecting person having normal levels of sensitivity may be driven to commit suicide. The act of abatement may be direct and it can also be indirect in a particular case. (Para 10)

Application u/s 482 rejected. (E-10)

List of cases cited: -

1. Chandra Deo Singh Vs. Prokash Chandra Bose AIR 1963 SC 1430

2. Vadilal Panchal Vs. Sattatraya Dulaji Ghadigaonker AIR 1960 SC 1113

3. Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736

4. R.P. Kapur Vs. State of Punjab AIR 1960 866

5. State of Haryana Vs. Bhajan Lal 1992 SCC (Cr.) 426

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application u/s 482 Cr.P.C. has been filed seeking the quashing of the entire criminal proceedings of Criminal Case No. 8831 of 2019, arising out of Case Crime No. 115 of 2017, under Section 306 I.P.C., P.S.- Kharkhaunda, District-Meerut as well as the impugned charge sheet no. 282 of 2018, dated 15.7.2019 and the cognizance order dated 24.7.2019 passed by the C.J.M., Meerut in the aforementioned case.

2. Heard applicant's counsel and learned AGA.

3. Entire record has been perused.

4. Submission of counsel for the applicant is that there is no direct evidence available to show that the applicant abetted the deceased to commit suicide. There are no such words spoken by the deceased which may be said to have been aimed with the purpose of instigating the deceased to put an end to his life. Contention is that in the absence of any such direct evidence of abetment the applicant cannot be held guilty for the offence punishable u/s 306 I.P.C. Argument is that a man may behave properly with the other and may also misbehave with them, but if his misbehaviour leads the other man to take the extreme step, this should not be termed to be an act of abetment on the part of the person who is guilty of such misbehaviour. Certain other submissions have also been raised on behalf of the applicant's counsel assailing the truthfulness of prosecution evidence. Several other contentions have also been raised by the applicant's counsel but all of them relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by the learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded.

5. The law regarding sufficiency of material which may justify the summoning of accused and also the court's decision to proceed against him in a given case is well settled. The court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ground to proceed in the matter is required.

6. Through a catena of decisions given by Hon'ble Apex Court this legal aspect has been expatiated upon at length and the law that has evolved over a period of several decades is too well settled. The

cases of (1) ***Chandra Deo Singh Vs. Prokash Chandra Bose AIR 1963 SC 1430 ,*** *(2)* ***Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker AIR 1960 SC 1113 and*** (3) ***Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736*** may be usefully referred to in this regard.

7. The Apex Court decisions given in the case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and in the case of **State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426** have also recognized certain categories by way of illustration which may justify the quashing of a complaint or charge sheet. Some of them are akin to the illustrative examples given in the above referred case of **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736.** The cases where the allegations made against the accused or the evidence collected by the Investigating Officer do not constitute any offence or where the allegations are absurd or extremely improbable impossible to believe or where prosecution is legally barred or where criminal proceeding is malicious and malafide instituted with ulterior motive of grudge and vengeance alone may be the fit cases for the High Court in which the criminal proceedings may be quashed. Hon'ble Apex Court in Bhajan Lal's case has recognized certain categories in which Section-482 of Cr.P.C. or Article-226 of the Constitution may be successfully invoked.

8. Illumined by the case law referred to herein above, this Court has adverted to the entire record of the case.

9. Perusal of the F.I.R. shows that it has been lodged by the opposite party no.2 Arvind Kumar with the allegations that his father late Bijendra Singh, who was working with the U.P. Police as S.C.P. 37 C.P., was posted as a Court Muharrir in the court of S.D.M., Sadar, Muzaffar Nagar. It was further alleged that on account of the missing of a file of a challani report u/s 151 Cr.P.C. the applicant Ram Avtar Gupta, posted as S.D.M., badly humiliated the father of the first informant and on account of the same his father committed suicide. A suicide note was also found near the body. It was further stated in the F.I.R. that when his father came back from the office he was in a depressed state of sombre dejection. The father thereafter went out on a stroll but did not return back. A missing report was thereafter lodged and during the said period, a body was found hanging at the Kazipur cremation ground.

10. So far as the contention raised by the applicant's counsel about the absence of direct evidence is concerned, any fact can be proved both by direct evidence as well as indirect circumstantial evidence. Abetment is also an offence which is provable by circumstantial evidence. There may be cases where somebody's misbehaviour may be such that the other person who has been misbehaved with should not be expected to take the extreme step of committing suicide. But there may be cases where the nature of ill-treatment meted out to a person, the constancy of humiliation to which the other person has been subjected to, and the continuation of ill-treatment towards that person may be so extreme that even a normal self-respecting person having normal levels of sensitivity may be driven to commit suicide. If in a given case we find material to indicate that it is not a case where taking of the extreme step by the deceased may be attributed to any ultra sensitivity of mind and where taking the extreme step

may not be said to be unexpectedly disproportionate overreaction of the deceased, the Court may find reason to hold that such kind of incessant misbehaviour would be tantamount to instigation and abetment. The court finds substance in the contention raised by learned A.G.A. when he submitted that in the definition of Section 498A I.P.C. such kind of ill-treatment finds its mention in so many words and the same has been made punishable. The reading of the definition would indicate that there may be such ill-treatment or cruelty committed against a person which may likely lead or drive that man to commit suicide. The act of abement may be direct and it can also be indirect in a particular case. So far as the allegations of the present case are concerned, we find in the material collected through investigation that there has been a history of continuation of misbehaviour on the part of the accused against the deceased. We find in the material the instances where the deceased was deflated and humiliated in public gaze for no fault of him. We also find in the material allegations which indicate that the accused himself would create a situation where the files would become untraceable and yet he would put the entire blame on the deceased and would flay him for no fault committed by him. The accused is said to have been in the habit of indulging in such kind of conduct often for reasons best known to him when he would target the deceased and would make false accusations against him despite all his innocence. The accused was a much higher officer and it was well naïve impossible for the deceased to have resisted or protested against him. He was a poor constable and there was hardly any other option for him than to keep on swallowing the bitter punches of such frequent deriding slights and put up with this harassment helplessly. There is nothing on record to indicate that the deceased was an insane person or was having any abnormal psyche. We have no reason to attribute any such abnormalities to him. A person may be placed higher in the executive hierarchy and the other person may be an humble employee but everybody has his own dignity and has also a right to preserve the same. The dignity of a poor man is just as honorable as the dignity of the powerfull and the mighty. The unbridled arrogance on the part of the accused-applicant and his reckless misbehaviour with his subordinate appears to have continued in such a manner that the poor deceased felt driven to eliminate his life.

11. Attention of the Court has been drawn on the suicide note along with the report of forensic expert which confirms the fact that the said suicide note has been written in his own handwriting. The attention of the court has also been drawn on the statements of the first informant Arvind Kumar as well as Shubham who are the sons of the deceased recorded u/s 161 Cr.P.C. In their statements there is a detailed narrative of expressions which have been communicated by the deceased which shows that the deceased was being badly humiliated by the applicant. Attention has also been drawn to the statement of other witnesses who are the lawyers of the court practising in the court of S.D.M., who have categorically stated that they have seen the highhanded humiliation which had been inflicted by the applicant. From the statements it is also apparent that the deceased had already provided the file to the accused-applicant but since the accused was not inclined to grant bail and therefore asked the deceased

to provide for the file. When the deceased stated the truth then the applicant started badly humiliating the deceased which was the cause of his depression and for taking such extreme step. Allegations are to the effect that the accused used to act in a very calculative manner and is said to have indulged in insalubrious activity of displacing the file himself deliberately in order to deprive certain accused of a given case from obtaining bail. But in order to keep his image clean he would make the deceased an scapegoat putting the entire blame on him for misplacing the file. We also find from the record allegations indicating that the misconduct of the accused was deliberate and intensely pungent showing no concern for his subordinate's dignity which became too much for the deceased to endure. On the fateful day the sting of humiliation appear to have proved to be the last straw on the camel's back and the deceased buckled under its pressure and put an end to his life. From the material which has been brought on record, it cannot be said that no case is made out against the applicant. However, argument on the point of charge can be more elaborately addressed at the time of framing of charge when it arrives.

12. The submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. I do not find any justification to quash the charge sheet or the proceedings against the applicant arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

13. The prayer for quashing the same is refused as I do not see any abuse of the court's process either.

14. The application therefore cannot be allowed and stands dismissed.

(2020)1ILR 478

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Application U/S 482 Cr. P.C. No. 37082 of 2019

Dileep & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Rakesh Kumar Shukla

Counsel for the Opposite Parties:
A.G.A., Sri Rajendra Prasad

A. Application u/s 482 Cr.P.C. - Quashing of entire proceedings on the basis of

compromise between the parties -Since the allegation made against the accused-applicant no. 1 is that of committing rape upon the victim as she being a minor and any physical relationship with the victim would fall in the category of rape in view of law cited above in *Independent thought* case- At this stage, it cannot be said that no prima- facie offence is made out against the accused-applicant no. 1- Role of other co-accused was also to the extent of having cooperated in the commission of the said offence. No interference under inherent jurisdiction to quash the proceedings.

Criminal Misc. Application u/s 482 Cr.P.C. rejected. (E-3)

List of cases cited: -

1. Ashiq Vs. St. of Kerala 2019 2 KLT 1130

2. Freddy @ Antony Francis & ors Vs. St. of Ker. rep. by the Public Prosecutor & ors, 2018 1 KLD 558

3. Independent Thought Vs. UOI & anr, (2017) 10 SCC 800

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Rakesh Kumar Shukla, learned counsel for the applicants, Sri Rajendra Prasad, learned counsel for opposite party no.2, Sri G.P. Singh learned A.G.A. appearing for the State and perused the record.

2. This application under Section 482 Cr.P.C has been moved with a prayer to quash the entire proceedings of Special Case No. 85 of 2017 (State vs. Sitaram and others) arising out of Case Crime No. 347 of 2016, under section 363, 366, 376 IPC and section 3/4 of POCSO Act, P.S. Samther, District Jhansi on the basis of compromise arrived at between the parties and also a prayer is made to stay the proceedings in this case till the disposal of this application.

3. From the side of the learned counsel for the applicant it is mentioned in the affidavit filed in support of the application that the accused-applicant no. 1 and opposite party no. 3 were in love with each other. The opposite party no. 3 is an illiterate lady and has never studied in any school, however, as per her personal knowledge, she was major in the year 2016. The accused-applicant no.1 and opposite party no. 3 would to solemnize their marriage with each other after consent of the family members but the family members of opposite party no. 3 were not ready to solemnize the marriage, hence the opposite party no. 3 left her parents' house of her own free will, where-after the opposite party no. 2 had lodged FIR against the applicants on 21.10.2016 which has been registered as Case Crime No. 347 of 2016 under section 363, 376, 506 IPC and section 8 of POCSO Act, P.S. Samther, District Jhansi. Pursuant to the said FIR, police recovered the opposite party no. 3 on 26.10.2016 and was given in custody of her parents and due to being in custody of her parents, under coercion of her parents, she has given statement under section 164 Cr.P.C. against the applicants but even in that statement she has not made any allegation of rape against the applicant. But despite that the police has filed charge-sheet against the applicant no.1 on 24.01.2017 and against the accused applicant nos. 2 and 3 on 31.03.2017 under sections 363, 376 IPC and section 8 POCSO Act. Later on in the year 2018, the family members of the applicants as well as the family members of the opposite party nos. 2 and 3 were ready to solemnize the marriage of the

opposite party no. 3 with the applicant no.1 and accordingly, the same was solemnized in Shiva Adarsh Vivah Samiti, Rani Luxmi Bai Nagar on 12.4.2018, regarding which marriage certificate has been issued by the said institution on the same day, which is annexed as Annexure-4.Thereafter, the opposite party nos. 2 and 3 and the applicants entered into a compromise on 09.07.2019 to the effect that the opposite party nos. 2 and 3 do not want to pursue the criminal case against the applicants and would withdraw the said case, a compromise deed dated 09.07.2019 is annexed as Annexure-6. The trial court has taken cognizance over the charge-sheet because offence has been committed and bears Special Case No.85 of 2017 State vs. Sita Ram and others and till date no witness has been examined, which is revealed from the order sheet, copy of which is annexed as Annexure-7. Due to the compromise, there is no need to proceed further in this case as the applicant no. 1 and opposite party no. 3 are living happily as husband and wife and both the opposite party nos. 2 and 3 did not want to contest this case and therefore it was prayed that the proceedings of the case should be quashed.

4. From the side of opposite party no. 2, short counter affidavit has been filed on 14.10.2019, in paragraph no. 6 of the said affidavit, it has been mentioned by her that keeping the wishes of her daughter i.e. the opposite party no.3, the opposite party no. 2 later on became ready to solemnize the marriage of opposite party no. 3 with the accused-applicant no. 1 and with the interference of some respective family members of both the sides, marriage was performed on 12.04.2018 and further it is mentioned that she does not want to press the Special Case No. 85 of 2017 which is proceeding before the trial court under the abovementioned sections. The opposite party no. 3 has also filed short counter affidavit dated 14.10.2019 in which she has stated that the opposite party no. 3 is her mother and that due to being in love with the accused-applicant no. 1, she wanted to solemnize the marriage with him but the same was being opposed by the opposite party no. 2. Thereafter, opposite party no. 3 left her parental house by which opposite party no. 2 became annoyed and got the FIR registered against the accused-applicant on 21.10.2016. Both she as well as her mother have given wrong statement before the court below under section 164 Cr.P.C. Subsequently, the opposite party no. 2 became ready to solemnize her marriage with the accused-applicant no.1. Pursuant to which their marriage was performed on 12.04.2018 and now they are residing happily as husband and wife. She as well as opposite party no. 2 have entered into a compromise with the applicants on 09.07.2019, which is annexed as Annexure-1 to the short counter affidavit and that she does not want to press the Special Case No. 85 of 2017.

5. Learned counsel for the applicant has relied upon the judgment of Keral High Court passed in the case of **Ashiq vs. State of Kerala 2019 2 KLT 1130,** paragraph nos. 4 and 5 of this judgment which are as follows:

"4. It is by now well settled that grave and serious offences as the one under Sec.376 (rape) of the I.P.C. cannot be the subject matter of quashment of the impugned criminal proceedings on the ground of settlement between the accused and the victim. (see Shimbhu v. State of Haryana, [(2014) 13 SCC

318],Parbatbhai Aahir v. State of Gujarat, [(2017) 9 SCC 641], Anita Maria Dias v.State of Maharashtra, [(2018) 3 SCC 290], Sebastian @ Solly v. State of Kerala, [(2015) 1 KLJ 384). However, this Court has held in various decisions including the one as inFreddy @ Antony Francis v. State of Kerala, [2017 KHC 344 = 2018 (1) KLD 558) that the exception to the above approach could be in cases where the accused has married the defacto complainant and they have decided to settle all the disputes and for the predominant purpose of the welfare of the defacto complainant/victim, to ensure her better future life, it is only just and proper that this Court in exercise of the extra ordinary inherent powers under Sec.482 of the Cr.P.C. could quash the impugned criminal proceedings on the ground of settlement between the parties in cases where the accused has married the defacto complainant and the defacto complainant is insisting for quashment of the impugned criminal proceedings, etc."

"5. In the light of the abovesaid aspects, more particularly in the light of the submission made by the 2ndrespondent, this Court is inclined to consider the plea for quashment of impugned criminal proceedings as otherwise it will detrimentally affect the family life of 2ndrespondent (victim), and even the balance and harmony that could be achieved by them in the resolution of disputes that again be irrecoverably lost . It is in the light of these aspects that all further proceedings in the impugned Anx.A-1 final report/charge sheet filed in Crime No. 734/2014 of Binanipuram Police Station, which has now led to the institution of S.C. No. 533/2015 on the file of the Addl. Sessions Court (For the trial of cases relating to atrocities and sexual violation against women and children), Ernakulam, and all further proceedings taken in pursuance thereof against the petitioner (accused) will stand quashed. The petitioner will produce a certified copy of this order before the Sessions Court concerned and before the Investigating Officer concerned for necessary information."

6. Further, reliance has been placed by the learned counsel for the applicants on the judgment of Kerala High Court in the case of **Freddy @ Antony Francis and others vs. State of Kerala, represented by the Public Prosecutor and others, 2018 1 KLD 558,** paragraph nos. 7, 8 and 9 of which are as follows:

"7.The legal position with regard to quashing of proceedings on the basis of compromise between the parties is by now well settled. It has been held that the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal Court for compounding the offences under S.320 of the Code. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the Court will have to give due regard to the nature and gravity of the crime. It is also settled that heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc., cannot quashed even though the victim or victim's family and the offender have settled the dispute. Such offenses are not private in nature and have serious impact on society. The directions of the Apex Court in Gian

Singh v. State of Punjab [(2012) 10 SCC 303] and inNarinder Singh v. State of Punjab[(2014) 6 SCC 466] serve as guiding lights."

8. In so far as the offence of rape is concerned, there cannot be any doubt that the same cannot be settled on the strength of a compromise arrived at between the victim and the accused. The Apex Court inState of M.P.v.Madan Lal((2015) 7 SCC 681), relying on the decision inShimbhuv.State of Haryana((2014) 13 SCC 318) has clearly reminded the Courts that rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. This was because of the fact that the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent. There is every chance that the victim might have been pressurised by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In such cases, the accused may use all his influence to pressurise the victim for a compromise. It was taking note of this aspect that it was held that it would not be safe in considering the compromise arrived at between the parties in rape cases. InMadan Lal(supra) the Apex Court was hearing an appeal filed by the State against the Judgement of the High Court by which the conviction arrived at by the Trial Court was set aside on the basis of a compromise arrived at between the victim and the accused."

"9.It is borne out from the statement recorded by the Sub Inspector of Police of the 2ndpetitioner that the parties were in love and the Crime was registered when the 2ndpetitioner was under the impression that the 1stpetitioner would resile from his earlier promise. However, in view of the subsequent turn of events, she has realized that her apprehension was baseless. The parties are living together as husband and wife. There is no case for anyone that the dignity of the 2ndpetitioner was violated by a wanton act of the 1stpetitioner. This is not one of those cases wherein the allegations reek of extreme depravity, perversity or cruelty. It cannot be said that the offence in the instant case would fall in the category of offences that have a serious impact on society. In the peculiar facts of the instant case, grave hardship and inconvenience will be caused to the 2ndpetitioner, if the prosecution is permitted to continue. When the 2ndpetitioner has asserted that she is not desirous of prosecuting her husband any further, the prospects of an ultimate conviction is remote and bleak. Further more, the 2ndpetitioner can continue with her life with dignity and respect. Having considered all the relevant circumstances, I am of the considered view that this is a fit case in which this Court will be well justified in invoking its extra ordinary powers under Section 482 of the Code to quash the proceedings."

7. On the other hand, learned A.G.A. has vehemently opposed the prayer for quashing of the proceedings and has also drawn the attention of the Court to the judgment of Apex Court rendered in **Independent Thought vs. Union of India and another, (2017) 10 SCC 800,** paragraph nos. 1 and 107 of which are as under:

"1.The issue before us is a limited but one of considerable public importance ? whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape?

Exception 2 to Section 375 of the Penal Code, 1860 (IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The Exception carved out in IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil."

"107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is? This does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the IPC? in the present case W.P. (C) No. 382 of 2013 Page 68 this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years ? this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of the IPC ? this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 of the IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus."

8. It is also argued by the learned A.G.A. that as per FIR, the victim is below 18 years of age and hence she would be treated a child and therefore, the offence under section ¾ POCSO Act would stand made out apart from offence under section 376 IPC in view of position of law.

9. It is further argued by the learned A.G.A. that in the statement under section 164 Cr.P.C., which is annexed at page 28 of the paper book, she herself has stated her age to be 16 years, hence admittedly she was minor on the date of occurrence and she has further stated therein that in the night of 14.10.2016 at about 1.00-2.00 A.M. accused-applicant nos. 1, 2 and 3 came to her house and had forcibly taken her away after shutting her sister in a room

and thereafter all of them had taken her to the house of Nata where she was kept in a room and she lived there for about 12 days. On 26.10.2016 the family members of the accused-applicant no. 1 had taken her away to Sharda temple, Moth and when they all were standing near the said temple, the police came there and took her away along with her family members to Police Station. Drawing the attention of the said statement made under section 164 Cr.P.C., it is argued by the learned A.G.A. that she has supported the prosecution version as given in the FIR and subsequently it is admitted by the applicants that she has married the accused-applicant no. 1 which is not permissible under law the victim being minor.

10. As regards compromise for offence under section 376 IPC, law laid-down by Supreme Court in Gian Singh vs. State of Punjab and another, 2012(10) SCC 303 specifically bars any compromise even if the parties have settled the matter, which is quoted herein below.

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other

words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

11. The benefit of **Ashiq's** case (Supra), **Freddy @ Antony Francis's case (Supra)** may not be given due to the provisions of law cited above in **Gian Singh's case (Supra)** and **Independent thought's case (Supra),** which are the judgments of Hon'ble Supreme Court.

12. In the present case, since the allegation made against the accused-applicant no. 1 is that of committing rape upon the victim as she being a minor and any physical relationship with the victim would fall in the category of rape in view of law cited above in **Independent thought** case. At this stage, it cannot be said that the offence alleged against the accused-applicant no. 1 is not made out prima-facie. The role of the other co-accused was also to the extent of having cooperated in the commission of the said offence. This Court does not deem it proper to make any interference in this case under inherent jurisdiction to quash the proceedings.

13. In view of the above, the application deserves to be dismissed and is accordingly **dismissed.**

14. However, the applicant may approach the trial court to seek discharge at appropriate stage, if so advised, and before the said forum, he may raise all the pleas which have been taken by him here. If such an application is moved, the same shall be disposed of without being influenced by the observation made by this Court.

15. The applicant shall appear before the court below within 30 days from today and may move an application for bail. If such an application is moved within the said time limit, the same would be disposed of in accordance with law. For a period of 30 days, no coercive action shall be taken against the accused-applicant in the aforesaid case. But if the accused does not appear before the court below, the court below shall take coercive steps to procure his attendance.

(2020)1ILR 485

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.11.2019

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 Cr. P.C. No. 39546 of 2019

Anil @ Anil Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vijay Kumar Dwivedi, Sri Surendra Tiwari

Counsel for the Opposite Parties:
A.G.A., Sri Akhilesh Srivastava, Sri Saksham Srivastava

A. Code of Criminal Procedure - Section 319 - Summoning order-The Investigating Officer found the accused –applicant not present at the place of

occurrence at the time of incident- Ignored by the trial court while summoning the accused-The trial court went by the depositions of the complainant and some other persons which was nothing more than reiteration of the statements made under Section 161 Cr.P.C. - The trial court was at least duty bound to look into the material collected during investigation while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of the applicant's complicity has come on record- No satisfaction of this nature has been recorded by the trial court while disposing of the application moved under Section 319 Cr.P.C.

Application u/s 482 Cr.P.C allowed. (E-7)

List of cases cited: -

1. Hardeep Singh Vs. St. of Punj. & Ors., (2014) 3 SCC 92

2. Brijendra Singh & ors. Vs. St. of Raj.,(2017) 7 SCC 706

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

1. Heard Counsel for the applicant and learned A.G.A. for the State.

2. The applicant by means of this application under Section 482 Cr.P.C. has invoked the inherent jurisdiction of this Court with a prayer to quash the order dated 25.9.2019 passed by the Addl. Sessions Judge Court no. 6, Aligarh in S.T. No. 191 of 2018 (State vs. Bhupendra and others), arising out of Case Crime no. 618 of 2017, under Sections 302 and 120B I.P.C., P.S. Khair, district-Aligarh, pending in the Court of Addl. sessions Judge Court no. 6, Aligarh.

3. The report of the incident was lodged by the opposite party no. 2, who is father of the deceased Sumit, alleging therein that on 19.10.2017 at about 6:00 p.m. when he was sitting with his family in his house, Govinda son of Jaipal Singh came to his house and asked his son to go to the field of Sukhbir near the canal. Thereafter he went away along with Sumit. Anil son of Jagdish Singh, Bhupendra son of Omvir Singh and Rupendra son of Rishi Om and two other persons were present at the occurrence site. Some hot talks were exchanged between them as there was previous enmity between them regarding litigations. between them. It is also mentioned in the FIR that when Sumit did not return to his house, then opposite party no. 2 went towards the field of Sukhbir along with Shailesh son of Ravendra Singh and Hariom son of Yogendra and when they reached near the field of Sukhbir, they heard noise of 'Bachao-Bachao' after hearing the noise they reached at the place of occurrence where accused persons were beating Sumit. When the complainant tried to save his son then accused persons fired at the complainant. It was also alleged that Anil caught hold his son Sumit and Bhupendra fired at Sumit. It was also mentioned in the FIR that after being hit from the gun shot his son was saying that Bhupendr, Anil along with Rupendra, Govinda and others had fired at him with firearm and when they were carrying the injured to Aligarh for treatment, in the way injured Sumit succumbed to injuries.

4. The police investigated the matter and after completion of investigation, the Investigating Officer has submitted chargesheet against co-accused Bhupendra, Rupendra and Govinda and present applicant along with two other were exonerated. It was mentioned int the chargesheet that Anil alias Anil Kumar

and two other persons were not found at the place of occurrence at the time of incident.

5. The prosecution has moved an application under Section 193 Cr.P.C. with a prayer that cognizance of the offence against the applicant also be taken, which was rejected by the trial court vide order dated 27.7.2019. The evidence of the prosecution was commenced in the session trial and the evidence of PW1 Autesh Kumar and PW2 Shailesh @ Shilendra were recorded. Both the prosecution witnesses in their statements recorded during trial have stated that the complicity of the present accused Anil @ Anil Kumar in the murder of his son is apparent then an application under Section 319 Cr.P.C. was moved, in which it has been stated that the present accused was named in the first information report and there was sufficient evidence against him but he was not chargesheeted during trial.

6. The trial court after hearing both the parties summoned the present accused along with other co-accused to face the trial vide impugned order dated 25.9.2019. Aggrieved from the impugned orde, the present application under Section 482 Cr.P.C. has been filed.

7. The contention of the counsel for the applicant is that the incident is alleged to have taken place on 19.10.2017 at about 6 p.m. and the FIR of the incident was lodged on 20.10.2017 at about 11:45 a.m. He next contended that there is no mention the crime number and the name of the accused persons in the panchayatnama. The injured was admitted to the hospital by driver Abdul Jabbar and it was mentioned that he died due to gun shot injuries. It is a blind murder, which was not seen by anybody and the chargesheeted accused persons have been falsely implicated. The applicant has been summoned on the basis of false evidence. The trial court has not considered the evidence which was collected by the police during investigation and on the basis of which the present applicant was exonerated and by not considering the evidence recorded by the police as ought to have been considered by the trial court. The manifest illegality and abuse of process has been committed by the trial court in summoning the accused under Section 319 Cr.P.C.

8. The further contention is that the evidence including the statements given before the court and the evidence collected by the Investigating Officer during investigation and while summoning the accused under Section 319 Cr.P.C., the evidence which has been collected during investigation also be considered.

9. On the other hand learned A.G.A. has submitted that the accused was summoned on the basis of the evidence recorded by the trial court during trial and the other material which is available before the trial court.

The Hon'ble Apex Court has observed that "The powers of the Court to proceed under Section 319 Cr.P.C. even against those persons who are not arraigned as accused, cannot be disputed. This provision is meant to achieve the objective that real culprit should not get away unpunished. A Constitution Bench of this Court in Hardeep Singh v. State of Punjab & Ors., (2014) 3 SCC 92, explained the aforesaid purpose behind this provision in the following manner:

"8.The constitutional mandate under Articles 20 and 21 of the

Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

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12.Section 319 CrPC springs out of the doctrinejudex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.

13.It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?

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19.The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence." It also goes without saying that Section 319 Cr.P.C., which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Section 207/208 Cr.P.C., the committal etc., which is only a pre-trial stage intended to put the process into motion."

In **Hardeep Singh's** case, the Constitution Bench has also settled the controversy on the issue as to whether the word 'evidence' used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and indicates the evidence collected during investigation or the word 'evidence' is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the Court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court. The word 'evidence' has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed

against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the Court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that 'evidence' under Section 319 Cr.P.C. could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as it is the satisfaction of the Court which can be gathered from the reasons recorded by the Court in respect of complicity of some other person(s) not facing trial in the offence.

The moot question, however, is the degree of satisfaction that is required for invoking the powers under Section 319 Cr.P.C. and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted. These two aspects were also specifically dealt with by the Constitution Bench in Hardeep Singh's case and answered in the following manner:

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court inVikasv.State of Rajasthan[(2014) 3 SCC 321] , held that on theobjective satisfactionof the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

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105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106.Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross- examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

In para 14 and 15 of ***Brijendra Singh and others v. State of Rajasthan*** reported in **(2017) 7 SCC 706,** the Hon'ble Apex Court has held that when we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 Cr.P.C. to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of alibi was correct.

Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether

'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

10. In this case the Investigating Officer has found that the accused Anil @ Anil Kumar was not present at the place of occurrence at the time of incident and that evidence has been ignored by the trial court while summoning the present accused and the trial court went by the depositions of the complainant and some other persons and the evidence recorded during trial was nothing more than the statements which were already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. No satisfaction of this nature has been recorded by the trial court while disposing of the application moved under Section 319 Cr.P.C.

11. The application is **allowed** and the order of summoning of applicant under Section 319 Cr.P.C. is set aside and in the interest of justice it is directed that the trial court shall pass order on the application moved under Section 319 Cr.P.C. after considering the evidence recorded by the trial court and considering the evidence which was collected by the Investigating Officer during investigation afresh.

(2020)1ILR 491

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 39796 of 2017

Amitabh Kumar Das ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ayush Khanna

Counsel for the Opposite Parties:
A.G.A., Sri Ankur Singh Kushwaha

A. Inherent Jurisdiction - Section 482 - Cr.P.C. - Scope - the Trial Court and not the High Court is expected to analytically analyze the facts and factual matrix of case.

Application u/s 482 rejected. (E-10)

List of cases cited: -

1. G. Sagar Suri and anr Vs. State of U.P. and ors (2000) 2 SCC 636

2. Sunil Kumar Vs. Excorts Yamaha Motors Ltd. and ors (1999) 8 SCC 468

3. Sangeetaben Mahendrabhai Patel Vs. State of Gujrat and anr 2012 LawSuit (SC) 236

4. Sau. Kamal Sivaji Pokarnekar Vs. The State of Maharashtra and ors Criminal Appeal No. 255 of 2019 (Arising out of SLP (Crl.) No. 7513 of 2014)

5. State of Andhra Praesh Vs. Gaurishetty Mahesh JT 2010(6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

6. Hamida Vs. Rashid (2008) 1 SCC 474

7. Monica Kumar Vs. State of Uttar Pradesh (2008) 8 SCC 781

8. Popular Muthiah Vs. State, Represented by Inspector of Police, (2006) 7 SCC 296

9. Dhanlakshmi Vs. R.Prasana Kumar (1990) Cr. LJ 320 (DB): AIR 1990 SC 494

10. State of Bihar vs. Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicant Amitabh Kumar Das, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of the Court with prayer to quash the entire proceeding of Case No. 4026 of 2017, based on cahrge-sheet dated 16.8.2016, arising out of case crime No. 551 of 2017, for an offence unde Sections 420, 406 IPC, P.S. Nai Mandi, District Muzaffar Nagar, pending in the curt of Special Chief Judicial Magistrate, Muzaffar Nagar.

2. Heard learned counsel for the applicant and learned A.G.A. for the State.

3. Learned counsel for the applicant argued that no ingredients of offence required to constitute offence punishable under Section 420 and 406 of IPC, were made out. Even then, charge-sheet has been filed whereas it was a transaction based on the basis of mutual understanding, by way of memorandum of understanding, wherein terms and conditions were mentioned. Subsequently, informant-complainant withdrew from above business by way of mutual settlement and due amount of Rs 52 lacs were paid by applicant. But under coercion amount was raised 1.24 crores and cheques were taken in blank for rest of amount and for this a case for offence punishable under Section 138 of N.I. Act has been filed and is pending whereas much before this alleged report as well as filing of complaint, the applicant started making payment back for the amount and he paid back Rs. 52 lacs. Hence, there was no mensrea or aim of deceit since the beginning of business or criminal breach of trust. Moreso, Apex Court in **G. Sagar Suri and another Vs. State of U.P. and others, (2000) 2 SCC 636 and Sunil Kumar Vs. Excorts Yamaha Motors Ltd. and others, (1999) 8 SCC 468,** has propounded that once a complaint case has been filed for offence punishable under Section 138 of N.I. Act, subsequently, for the same transaction, if case is being filed for offences punishable under Sections 420, 406 I.P.C., then certainly, this is a misuse of process of law because it is to coerce for ensuring payment in a case under N.I. Act. Hence, High Court is well within jurisdiction to quash this proceeding.

4. Learned counsel for the opposite party No. 2 argued that it was a case wherein deceit was since the beginning. Amitabh Kumar Das entered in friendship with son of complainant-informant i.e. Devendra Kumar. He came Muzaffar Nagar, he showed his business plan with deceitful assurance for return under his persuasion, complainant, who is retired

Professor and Member of U.P. Higher Education Commission and his son Devendra Kumar invested huge amount under trust of return of same by accused but he proved to be non performer of his promise. Then informant's son withdrew himself with a request for making his settlement clear. Applicant entered in settlement whereupon 1.24 crores liability existed but he made payment of Rs. 52 lacs only, for rest amount he has deposited 15 cheques and he made conversation for making payment by way of depositing the same as per his request. Cheques were deposited but dishonoured. This too, was conspiracy and deceitful act, for which subsequent offence punishable under Section 138 of N.I. Act was made out and complaint for same was filed and is still pending but the offence which was committed since the beginning by inducing for payment of such a huge amount under deceitful assurance punishable under Section 420 of IPC, was since the beginning of transaction and as money paid under the trust of its return, was not paid back deliberately with malice. Hence, it was criminal breach of trust punishable under Section 406 of IPC, for which a police report under Section 173 of Cr.P.C. has been filed and cognizance for it taken. There is judgement of Apex Court in **2012 LawSuit (SC) 236 Sangeetaben Mahendrabhai Patel Vs. State of Gujrat and another** as well as a judgment in **Criminal Appeal No. 255 of 2019 (Arising out of SLP (Crl.) No. 7513 of 2014) Sau. Kamal Sivaji Pokarnekar Vs. The State of Maharashra** and others, wherein Apex Court has propounded that civil liability and offence punishable regarding it under Section 420 and 406 of I.P.C. may run concurrently beside being a proceeding pending. Hence, dishonour of cheque and this under conspiracy was there, for which specific offence of Section 138 of N.I. Act made out, for which cognizance have been taken and case is pending but the offence of deceit and cheating since the beginning of this transaction under fraudulent assurance for investing money and getting return in a business plan, which was deceitful since the beginning and thereby invested such huge amount and then after breach of trust under Section 420 and 406 of IPC, was offence, which was other than offence punishable under Section 138 of N.I. Act. Hence, both proceeding were for those two offences. Moreso, this Court in exercise of inherent power power under Section 482 of Cr.P.C., is not expected to make analytical analysis of evidence and fact of the case because the same is within the domain of trial Court and is question of trial, to be seen during trial. Hence, this proceeding be dismissed.

5. Learned AGA has vehemently opposed the above prayer.

6. Having heard learned counsel for both sides and gone through the material placed on record, it is apparent that First Information Report of Case Crime No. 551 of 2017, for offence punishable under Sections 406 and 420 of I.P.C. was filed by Dr. Dharampal Singh against Amitabh Kumar Das. Subsequently, it became a business with no assurance, when Devendra Kumar along with and demanded back his money, which was said to be of 1.24 crores, then a cash of Rs. 52 lacs were paid back to Devendra Kumar and it was said that for remaining amount 15 cheques were delivered but those cheques were dishonoured, for which criminal case for offence punishable under Section 138 of N.I. Act, is pending. But,

for the offence of deceit and cheating punishable under Section 420 of I.P.C. and criminal breach of trust under section 406 of I.P.C. is there. This investigation resulted in submission of charge-sheet, over which cognizance was taken by Magistrate concerned. For this Criminal case the accusation is of deceit since the beginning of transaction i.e. under fraudulent plan, this was acted upon by Amitabh Kumar Das and investigation has resulted in submission of charge-sheet. Payment of Rs. 52 lacs has been accepted by learned counsel for the applicant. Rest of amount is disputed but dues of Rs. 52 lacs were said to be there and this amount was paid since 2015 to 2017, whereas communication in between both sides, has been appended as a part of affidavit, from which it is apparent that rest of amount were also assured to be paid on deposit of cheque. Though, it is a question of fact to be seen and analysed by trial Court and this Court in exercise of inherent power power under Section 482 of Cr.P.C., is not expected to analyse analytically the facts and factual matrix of case because the same is to be seen by trial Court. At the stage of summoning or taking cognizance over a police report, Magistrate has gone through evidence collected by I.O. and on the basis of it, cognizance has been taken. Accused has been summoned for offence punishable under Sections 406 and 420 I.P.C. Those facts is not to be interfered by this Court in exercise of above inherent jurisdiction rather it is Magistrate to see through the course of trial.

7. This Court in exercise of inherent , as the same is the question before trial court. has held as under:-

8. Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474,*** *hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,*** *the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in* ***Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** *has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** *has propounded "To prevent abuse of the*

process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1****, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above. The impugned order was well based on evidence and facts collected by Magistrate in its enquiry. There seems to be no misuse of process of law. Hence, this proceeding merits its dismissal.

10. **Dismissed**, accordingly.

(2020)1ILR 495

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

Application U/S 482 Cr. P.C. No. 41533 of 2019

Ajay Katara ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vimlendu Tripathi, Sri Ajay Kumar Srivastava, Sri Andleeb Naqvi, Sri Bhavya Sahai, Sri Brajesh Sahai

Counsel for the Opposite Parties:
G.A., Sri Santosh Kumar Yadav, Sri Pradeep Kumar, Sri Anoop Trivedi

A. Code of Criminal Procedure - Section 482 - Malicious Prosecution-Absence of corroborative evidence-Except for the statements of the victim, her husband (accused/witness) no other corroborative evidence against applicant and co-accused-No date, time, parentage and residence of the accused, whose names were introduced by the prosecutrix with an ulterior motive after two months of kidnapping by accused/witness regarding commission of gang-rape as alleged has been disclosed by the victim-No response/counter affidavit whatsoever filed by the informant/opposite party no.2 to the averments made in the application-Hence averments made in the application assumed to be correct-No test identification-Fit case where the Court in exercise of its inherent power under Section 482 Cr.P.C. should quash the entire proceedings against the applicant as the same squarely falls within the para 3 & 7 of Bhajan Lal's case. (Para 20, 21, 22 & 24)

Criminal Misc. Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Ram Dayal & ors. Vs. St. of U.P. & ors. [2019 (4) ADJ 404]

2. Kaleem & 04 ors. Vs. St. of U.P. & anr. 2019 LawSuit(All) 1513

3. Parbatbhai Aahir Vs. St. of Guj. 2017 SCC OnLine SC 1189

4. St. of Bih. Vs. Rajendra Agrawal 1996 LawSuit (SC) 143

5. Mushtaq Ahmad Vs. Mohd. Habibur Rehman Faizi 1996 LawSuit (SC) 230

6. St. of U.P. Vs. O.P. Sharma 1996 LawSuit (SC) 276

7. St. of H.P Vs. Pirthi Chand 1995 LawSuit (SC) 1177

8. Herrignton Vs. British Railways Board (1972 (2) WLR)

9. St. of Har. Vs. Bhajan Lal 1992 SCC (Crl) 426

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Sri Brajesh Sahai, learned Senior Advocate assisted by Sri Vimlendu Tripathi, Sri Andleeb Naqvi, Sri Bhavya Sahai, learned counsels for the applicant, Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Santosh Kumar Yadav, Sri Pradeep Kumar, counsel for opposite party no. 2 and Sri Vinod Kant, learned Additional Advocate General as well as learned A.G.A. for the State and perused the material available on record.

2. The present application under Section 482 Cr.P.C. has been filed for quashing the summoning and cognizance order dated 3.1.2019 passed by learned A.C.J.M.-II, Budaun and supplementary Charge-sheet No.163A dated 5.12.2018 in Case No.410 of 2014, arising out of Case Crime No.443 of 2013, under Sections 363, 366, 376 I.P.C., Police Station-Sehaswan, District- Budaun, pending in the court of Additional Chief Judicial Magistrate-II, Budaun as well as all consequential proceedings.

3. Be it noted, at this juncture as is observed in the order dated 21.11.2019 that since the learned Senior counsel appearing for opposite party no.2, learned Additional Advocate General and learned Additional Government Advocate have categorically stated that they do not intend to file any response/counter affidavit in the present application and therefore, the averments made in the application stands unrebutted and the Court is left with no other option but to accept the averments made in the application as it is to be correct on its face value.

4. The brief facts leading to the present application are that the opposite party no.2, Bhagwan Singh, who is Yadav by caste lodged a first information report on 28.6.2013 at 4:45 P.M. with the allegations that his daughter/victim R (name not being disclosed) aged about 12 years and student of class 6th had come home from her paternal grandfather's house to spend summer holidays. On 23.6.2013 at about 6 P.M. his daughter went to attend call of nature where from she was enticed away by her cousin brother, Sukhpal, real sister of Sukhpal namley Smt. Chetaniya, Jaiwahan husband of Chetaniya, Shyam Singh brother of Sukhpal after enticing and terrorising her kidnapped her. When she did not return home for long, a frantic search was made and the first informant was told by persons of his village namely Durgesh and Chote that aforesaid five named accused have been seen taking his daughter along with them. Subsequently, victim R and four others filed a Criminal Misc. Writ Petition No.15345 of 2013 (Smt. Rinki and 4 others vs. State of U.P. And 2 others) before this Court and vide order dated 31.7.2013 the Court stayed the arrest of named accused. The said writ peition was however dismissed as infructuous vide order dated 1.5.2014 as the charge-sheet was laid against Sukhpal for kidnapping a minor girl. Be it noted that the other named accused who are closely related to Sukhpal were exonerated during investigation.

5. It is pertinent to mention here that the applicant and other co-accused are neither named in the first information report nor any suspicion was laid on them, however, pursuant to the orders of the Court in the aforesaid writ petition the statement of the victim was recorded under Section 161 Cr.P.C. On 22.8.2013 wherein she has stated that she loved Sukhpal and

had gone with him and got married in a temple at Ghaziabad where they started leading a married life as husband and wife. There she met one Ajay Katara and he took both of them to Ashok Vatika Sahibabad where he raped her. She has also stated that Sukhpal had made physical relations with her consent. It is also pertinent to note here that the victim did not disclose any date and time of the alleged rape by Ajay Katara and besides him she did not state that anyone else had also raped her. The parentage and residence of Ajay Katara was also not disclosed. She and Sukhpal somehow escaped from there.

6. The victim was produced before the C.J.M. for recording her statement under Section 164 Cr.P.C. On the same day in which she has made several improvements and has stated that she has left her studies about 5-6 years back and was staying at her Nanihal and has come to her village (no date disclosed). Then she called co-accused Sukhpal to Sahaswan and on the pretext of attending call of nature, she came to Sahaswan and from there she went to Ghaziabad and when she got down at the bus stand she met three persons in a white car who asked them as to why they are roaming about. Then they told them that in fact they have run away from their house on being annoyed by the family members then these three persons said that they will help her though they do not know them, out of which one of them said "ये अजय कटारा बैठे हैं, ये सभी की मदद करते हैं तभी उन लोगों ने मुझे व सुखपाल को अपने साथ गाड़ी में बिठा लिया और चल दिये तथा सुखपाल को रास्ते में गाड़ी से उतार दिया तथा मुझे लेकर साहिबाबाद अशोक वाटिका में एक मकान में ले गये वहाँ पर अजय कटारा व उनके दो साथी मेरे साथ शराब पीकर मेरे साथ बुरा काम करते थे व आपस में नाम जयवीर और जोगेन्द्र लेते थे उन्होने मुझे आठ दिन तक रखा और मुझे जान से मारने की धमकी देकर गाजियाबाद अड्डे पर छोड़ गये वहीं सुखपाल मिला और हम दोनों इलाहाबाद चले गये तथा वहाँ पर पेश हुए। यही मेरा बयान है।" Based on the statement of the victim the case was converted under Section 376 I.P.C. at P.S. Sahaswan, district Budaun, be it noted that no F.I.R. was lodged at P.S. Sahibabad, district Ghaziabad either by the victim or Sukhpal. However, on 6.10.2013 the Investigating Officer finding that the victim is minor filed charge-sheet no.163 of 2013 against Sukhpal under Sections 363, 366 I.P.C. while exonerating remaining four named accused persons that their complicity has been found false and it is noted in the said charge-sheet that the investigation against the accused whose names were disclosed by the victim is going on.

7. At this juncture, it is significant to mention here that as the parentage and residence of the accused were not disclosed by the victim and Sukhpal who though has now been made a witness in the impugned charge-sheet. After thorough investigation vide SCD No.1 dated 20.12.2013 the investigation against Ajay Katara and two other persons was closed due to incomplete details of the accused named by the victim and they could also not be found in the area where the victim was allegedly raped and the Investigating Officer has also noted that there does not appear any possibility of being traced in near future and thus closed the investigation. The said Parcha of the case diary has been appended as Annexure-11 to the affidavit. On the charge-sheet against Sukhpal under Sections 363, 366 I.P.C. cognizance was taken by A.C.J.M.,

2nd on 29.3.2014. The certified copy of the charge-sheet has been annexed as Annexure-9 to the affidavit.

8. It is interesting to note that the aforesaid charge-sheet was challenged by Sukhpal in Criminal Misc. Application (U/s 482 Cr.P.C.) No.24560 of 2014 and the Court stayed further proceedings of Case Crime No.410 of 2014 (State vs. Sukhpal and others) until further orders vide order dated 11.7.2014. The said application is still *sub judice* before the Court.

9. Be it noted, that after the closure of investigation against the accused whose names were introduced with some ulterior purpose in the year 2013 itself, no protest petition or any objection was filed by opposite party no.2 or victim. However, after a gap of five years i.e. on 20.6.2018 the victim personally moved an application before A.J.C.M-IInd, Badaun in Case No.410 of 2014, under Sections 363, 366 I.P.C. that she has disclosed the names of accused persons in her statement under Sections 161 and 164 Cr.P.C. but the police has not taken any steps to arrest them and therefore S.H.O. Sahaswan be directed to arrest the accused and put them to trial. In this respect a report was called and the court was apprised that further proceedings of Case No.410 of 2014 have been stayed until further orders in Criminal Misc. Application (U/s 482 Cr.P.C.) No.24560 of 2014 and thus vide order dated 10.7.2018 the application of the victim was rejected in view of the stay orders of the Court. The victim being aggrieved preferred a Criminal Misc. Application (482 Cr.P.C.) No.25888 of 2018 (Smt. Rinki vs. State of U.P. and another) before this Court wherein the order of the Magistrate dated 10.7.2018 was set-aside and a direction for investigation to be carried out by the police in this regard was given and the matter was remitted to the learned court to decide the application of the victim afresh and directed the Magistrate to ensure that the investigation against those accused for offence under Section 376 I.P.C. is taken to its logical end strictly in accordance with law within a time bound manner. Thus, the application was disposed of vide order dated 1.8.2018.

10. Pursuant to the aforesaid order, the investigation was reopened after more than five years on 3.9.2018 and the Investigating Officer claims to have visited the place of victim in District Badaun and took her statement under Section 161 Cr.P.C. and also of her husband, Sukhpal. For ready reference it is germane to reproduce the statement of the victim recorded under Section 161 Cr.P.C. and in this behalf affidavits were also filed by the victim and her husband, Sukhpal. The relevant part of the statement is quoted as under:-

''मैंने अपने गॉव से सुखपाल को फोन किया कि तुम सहसवान आ जाओ तब मैं घर से शौच के बहाने घर से निकल कर सहसवान आयी और वहॉ से रोडवेज में बैठकर गाजियाबाद पहुॅची। वहॉ पर बस अड्डे पर उतरकर बाहर आये तो एक सफेद गाडी में तीन आदमी मिले उन्होंने हम लोगों को देखकर कहा कि कहॉ से आये हो और यहॉ कैसे घूम रहे हो तब हम लोगों ने उनसे कहा कि हम लोग घर से नाराज होकर आये है। तब इन तीनों ने हम लोगों से कहा कि हम लोग तुम्हारी मदद करेंगे। ***उनमें से एक ने कहा कि मेरा नाम अजय कटारा है। मैं सबकी मदद करते हैं। तब हम दोनों विश्वास में आ गये।*** *और हम दोनों को गाडी में बैठा लिया और चल दिये तब रास्ते में* ***सुखपाल को गाडी से उतार दिया तथा मुझे साहिबाबाद अशोक वाटिका में एक मकान में रखा वहॉ अजय कटारा व उसके साथियों ने मेरे साथ***

शराब पीकर बुरा काम किया करते थे। *मुझे वहॉ आठ दिन रखा मुझे जान से मारने की धमकी देते थे।* ***और आपस में एक दूसरे जयवीर, योगेन्द्र नाम लेते थे।*** *उसके बाद मुझे गाजियाबाद बस अड्डे पर छोड गये साहब वहॉ मुझे सुखपाल मिला तब हम दोनों इलाहाबाद चले गये। साहब हम दोनों ने अपनी मर्जी के शादी कर ली और पति पत्नी के रूप में रह रहे हैं। साहब हम दोनों से 02 बच्चे भी हैं।* ***साहब मेरे पति ने गाजियाबाद जाकर जिन्होंने मेरे साथ गलत काम किया है। उनका नाम पता सब जानकारी कर ली है। इस सम्बन्ध में ैच बदायूँ को शपथ पत्र दिये है।*** *जो डाक से थाने में पहुॅच गये होंगे। साहब यही मेरा बयान है।''*

11. Even in this statement, the victim has not stated as to how and from whom she came to know the parentage and residence of the applicant and other accused. Even in the subsequent statement, neither any date nor time has been disclosed by her. It is quite vague in itself. The relevant part of the statement of Sukhpal recorded on 8.10.2018 is quoted as under:-

"सुखपाल पुत्र रिषीपाल निवासी गूदरागंज थाना उझानी जिला बदायूँ हाल पता रैसी का नगला थाना कादर चौक जिला बदायूँ ने पूछने पर बताया कि साहब मेरे गांव से रिंकी पुत्र भगवान सिंह अपने नाना विजय सिंह के यहॉ रहती थी। मुझे उससे प्यार हो गया। हम लोग छुप छुप के मिलते रहते थे। उसके बाद रिंकी अपने गॉव मुडारी सिधारपुर चली गयी। वहॉ से मुझे फोन करती थी। एक दिन फोन करके मुझे सहसवान बुलाया और कहा कि मैं सहसवान आती हूँ। और यहॉ से भाग चलते हैं। तब साहब मैं सहसवान आया जहॉ मुझे रिंकी मिली तब हम दोनों रोडवेज में बैठकर गाजियाबाद पहुॅचे वहॉ बस से उतरकर बैठे थे तभी तीन लोग एक सफेद गाडी से आये और हम दोनों से पूछा कहॉ से आये हो तब हम दोनों ने कहा कि हम दोनों घर से नाराज होकर आये है। ***तब एक व्यक्ति ने अपना नाम अजय कटारा बताया कि हम लोग तुम्हारी मदद करते हैं।*** *और गाडी में बैठाकर चल दिये उसके बाद रास्ते में मुझे गाडी से उतार दिया और रिंकी को लेकर चले गये। मुझे साहिबाबाद में पेट्रोल पम्प के पास एक मकान में बन्द कर दिया। उसके बाद 8 दिन बाद मुझे बस अड्डे पर छोडा। वहॉ मुझे रिंकी मिली तब रिंकी ने मुझे बताया कि तीनों ने मेरे साथ शराब पीकर बुरा काम किया। तब हम दोनों इलाहाबाद चले गये वहॉ मैंने कार्यवाही की। साहब हम दोनों ने शादी कर ली है। 2 बच्चे भी हैं। साहब गाजियाबाद में जिन लोगों ने मेरी पत्नी के साथ शराब पीकर बुरा काम किया उसकी मैंने पूरी जानकारी कर ली है। और ैच साहब से मैंने अपना व अपनी पत्नी का शपथ पत्र दिया है। साहब यही मेरी बयान है।"*

12. Solely on the basis of statements of the victim, her husband (though facing charge of kidnapping) and their affidavits, the applicant and other co-accused have been charge-sheeted vide impugned charge-sheet dated 5.12.2018. The Investigating Officer has noted as under:-

"श्रीमान जी निवेदन है कि वादी श्री भगवान सिंह पुत्र उलफत सिंह निवासी मुडारी सिधारपुर थाना सहसवान जिला बदायूँ की तहरीर पर दिनांक 28.06.13 को मुकदमा उपरोक्त पंजीकृत होकर पूर्व विवेचक द्वारा विवेचना की गयी। दौराने विवेचना अभियुक्त सुखपाल पुत्र रिषीपाल निवासी बडेरिया थाना सहसवान जिला बदायूँ के विरूद्ध दिनांक 06.10.13 को आरोप पत्र सं0–163/13 माननीय न्यायालय प्रेषित किया जा चुका है। अन्य तीन नामजद व्यक्तिओं चेतनिया, जयवाहन व श्याम सिंह की नामजदगी गलत पायी गयी। इसके बाद माननीय हाईकोर्ट इलाहाबाद से उक्त अभियोग की पुनः विवेचना का आदेश हुआ। जिसकी विवेचना उ0नि0 अवधेश सिंह द्वारा की गयी। उनके स्थानान्तरण हो जाने पर दिनांक 27.11.18 को मुझ विवेचक के सुपुर्द की गयी। विवेचना ग्रहण कर वाद अवलोकन उक्त अभियोग की पुनः विवेचना की गयी तो विवेचना से पीड़िता के 161 सीआरपीसी0 व 164 सीआरपीसी0 के बयानों व सुखपाल के 161 सीआरपीसी0 के बयानों व शपथ पत्रों से अभियुक्तगण 1–अजय कटारा पुत्र मनमोहन 2–जयवीर पुत्र नत्थू 3–जोगेन्द्र पुत्र रामसिंह निवासीगण अशोक वाटिका कालोनी मकान नं0–2 थ थाना साहिबाबाद जिला

गाजियाबाद के नाम प्रकाश में आये। मुझ विवेचक द्वारा प्रकाश में आये अभियुक्तगण के पते पर गाजियाबाद थाना साहिबाबाद क्षेत्र में अशोक वाटिका कालोनी आया तलाश करने पर अभियुक्तगण नहीं मिले। अब तक की तमामी विवेचना बयान पीड़िता 164 सीआरपीसी0 व 161 सीआरपीसी0 तथा बयान सुखपाल के अतिरिक्त अन्य कोई साक्ष्य नहीं है। ***पीड़िता के बयान 164/161 सीआरपीसी0 व सुखपाल के बयानों के आधार पर अभियुक्तगण का चालान जरिये आरोप पत्र सं0–163 /18 माननीय न्यायालय किया जाता है।*** *माननीय न्यायालय से अनुरोध है कि वाद परीक्षण अभि0गण अजय कटारा आदि 03 को तलब कर उचित दण्ड से दण्डित करने की कृपा करें। विवेचना समाप्त की जाती है। चूंकि बयान पीड़िता 161/164 सीआरपीसी0 व बयान सुखपाल से अभि0गण के विरूद्ध धारा 363/366/376 आईपीसी0 का जुर्म बखूबी साबित है।"*

13. I may record once again at the cost of repetition that aforesaid facts have not been disputed either by the learned Senior Advocate appearing for opposite party no.2 or by the State.

14. Sri Vimlendu Tripathi, learned counsel appearing on behalf of applicant has argued that it is a classic case of false implication and of no evidence against the applicant as the applicant was a star witness in famous Nitish Katara murder case in which the known criminal and politician of Uttar Pradesh and sons of Sri D.P. Yadav namely Vikas Yadav and his nephew Vihsal Yadav were involved and were ultimately convicted for murder of Nitish Katara and sentenced to life imprisonment by the trial court. Their conviction was upheld by the High Court of Delhi by awarding fixed terms of 30 years without remission, which was upheld in an appeal before the Hon'ble Supreme Court. It has been argued that in fact the applicant is paying the price for speaking the truth in the court of law and helping in administration of justice by deposing truthful substantive evidence against the accused in the aforesaid murder case and the applicant was a star witness as all other witnesses of fact had turned hostile on account of threat, intimidation and coercion of Sri D.P. Yadav and his henchmen. Thereafter, the applicant was falsely implicated in several cases at the instance of Sri D.P. Yadav which have been detailed in Para 4 of the affidavit and the same stands unrebutted as on date. The applicant apprehending serious danger to his life was even provided four police armed guards since 25.4.2002 on account of increased threat perceptions.

15. Sri Tripathi has further argued that the present case is a classic example of abuse of process of court and miscarriage of justice as is apparent on the face of record and the following undisputed facts establishing falsehood of allegation and the ground for quashing the proceedings may be taken into account by the court while exercising the inherent power conferred under Section 482 Cr.P.C. and the same are quoted as under:-

a) The case relates to district Budaun regarding incident of elopement of alleged victim R with her boyfriend on 23.6.2013, wherein the name of applicant does not come into picture for next two months and was introduced for the first time in the statement of victim R under Section 161 Cr.P.C. On 22.8.2013 by introducing an improbable incident of District Ghaziabad.

b) The allegations about the alleged incident of district Ghaziabad could not be included into the Case Crime No.443 of 2013 (criminal case in question) registered for alleged incident of district Budaun, in view of the fact that both

alleged incidents/offences are neither continuing offences nor relate to each other so as to make a series of same transaction and investigation about the alleged incident of district Ghaziabad is absolutely illegal.

c) The story relating to Ghaziabad incident is highly improbable, as there was no occasion for the alleged victim R and her boy friend to accompany a stranger in an entirely new city of Ghaziabad on mere asking for help by such stranger without disclosing time, date and exact place of gang-rape upon the victim.

d) Despite allegation of kidnapping of alleged victim R in district Ghaziabad in presence of her boyfriend and despite allegation of retaining the girl for a long period of eight days, no separate report was lodged in district Ghaziabad or any information was given to any authority.

e) Had the allegation of kidnapping of alleged victim R in district Ghaziabad been true to any sense, her boy friend who allegedly did not know the applicant personally would have certainly run pillar to post to save his girl friend in natural course of events under the situation/script played framed by the alleged victim R regarding the incident of Ghaziabad.

f) There is no investigation as to how a person having 24x7 police security would commit such a crime.

g) There is no investigation as to how an allegation for offence under section 363/366 I.P.C. against Sukhpal and his family members connected with district Budaun can have any nexus with the allegation of rape by the applicant in district Ghaziabad.

h) The entire investigation in the case in hand, which relates to the applicant, is perfunctory and is a sham process, in which the I.O. didn't bother to verify any of the allegations levelled against the applicant by collecting any corroborative material/evidence.

i) There is no reason shown as to why Victim R personally moved an application on 20.06.18 i.e., after a gap of five years, for arrest of applicant and two other persons.

j) The applicant does not know the alleged co-accused Jaiveer son of Naththu and Jogendra son of Ram Singh, who have also been charge-sheeted along with him in the impugned charge-sheet. The address of applicant has been shown as address of these two persons also. The I.O. didn 't bother to collect any information about identity of co-accused Jaiveer and Jogendra when none of the added accused were put up for identification in order to fix their identity.

k) lt appears to the applicant that these two persons are non-existent and are fake persons and these two persons have been introduced in the case in hand just to give strength to the false allegations of rape levelled against the applicant. The applicant was, however, not put up for identification to fix his identity by the victim or her alleged husband throughout the investigation.

l) The malafide behind the allegations against the applicant is writ large in view of factual backdrop of the status of applicant, his admitted enmity with Vikas Yadav and Vishal Yadav (the son and nephew respectively of D.P. Yadav), the history of his false implication in as many as twenty four (24) criminal cases, wherein either final report was submitted by the local police in favour of applicant or the case resulted into acquittal, or the proceedings have been stayed by the High Court.

16. Before dealing with present application, I would, in fact, like to record settled proposition of law of the land in respect of exercise of inherent powers of the Court.

17. Most importantly as noted by the Court, against the averments made by the applicant in the application, no response/counter affidavit whatsoever has been filed by the informant/opposite party no.2 inasmuch as learned Senior Advocate appearing for opposite party no.2, Sri Anoop Trivedi and Sri Vinod Kant Srivastava, learned Additional Advocate General flatly refused to file any response/counter affidavit to the averments made in the application, despite being repeatedly apprised by this Court to file response in rebuttal of the averments, otherwise the Court would be constrained to assume averments in the application as correct. Even during lengthy hearing, material relied upon by the applicant has not been refuted by the learned senior counsel appearing for the opposite party no.2 and the State.

18. Learned counsels appearing on behalf of opposite party no.2 have, however, placed reliance on the judgements rendered by this Court in ***Ram Dayal and others vs. State of U.P. And others*** [2019 (4) ADJ 404] and have submitted that the said judgment contains the entire law on the subject i.e. the powers of High Court to quash the proceedings in exercise of inherent power conferred under Section 482 Cr.P.C. I may record that the said judgment is compendium of most of the important judgments rendered by different High Courts and Apex Court and the ratios laid down therein as to under what facts and circumstances in exercise of inherent power under Section 482 Cr.P.C. the proceedings arising out of the Charge-sheet or the complaint case can be quashed at the very threshold without affording an opportunity to the prosecution to lead evidence. It would be germane to quote Para 74 of the aforesaid judgment which is essentially the crux of the ratios laid down by the Apex Court in the judgments cited therein. The Paragraph 74 is quoted as under:-

"74. Thus, the only question which survives for consideration is whether this Court in exercise of its jurisdiction, under section 482 Cr.P.C. can weigh the testimony of a witness even when a full fledged trial is yet to take place. The issue so involved is no longer res-integra and stands considered by the Apex Court in the case of State of Orissa and Another Vs. Saroj Kumar Sahoo, reported in 2005 (13) SCC 540, wherein the following has been observed in paragraphs 10 and 11:-

"10. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Cr.P.C., the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all

relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Cr.P.C. and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal, (1992) Supp 1 335. A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Cr.P.C. except under an order of a Magistrate within the purview of Section 155(2) of the Cr.P.C.

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

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

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

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

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

"11. As noted above, the powers possessed by the High Court under Section 482 of the Cr.P.C. are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether

factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: Janata Dal v. H. S. Chowdhary, [1992] 4 SCC 305, and Raghubir Saran (Dr.) v. State of Bihar, AIR (1964) SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi v. R. Prasanna Kumar, [1990] Supp SCC 686, State of Bihar v. P. P. Sharma, AIR (1996) SC 309, Rupan Deol Bajaj v. Kanwar Pal Singh Gill, [1995] 6 SCC 194, State of Kerala v. O.C. Kuttan, AIR (1999) SC 1044, State of U.P. v. O.P. Sharma, [1996] 7 SCC 705, Rashmi Kumar v. Mahesh Kumar Bhada, [1997] 2 SCC 397, Satvinder Kaur v. State (Govt. of NCT of Delhi, AIR (1996) SC 2983 and Rajesh Bajaj v. State NCT of Delhil, [1999] 3 SCC 259)."

This Court while disposing of the application of the applicant for quashing the proceedings had observed in Para 75 that the Court is handicapped to examine the veracity of the statement of the prosecutrix as recorded under Section 202 Cr.P.C. There is no such other impeccable evidence on the record on the basis of which this Court may discard the statement of the prosecutrix. It is for the trial court to weigh the statement of the prosecutrix in the light of the attending circumstances referred to above, and then arrive at its own conclusion as to whether the applicants are guilty or not.

19. Besides it, learned counsels for opposite party no.2 have relied on ***Kaleem and 04 others vs. State of U.P. And another*** 2019 LawSuit(All) 1513, ***Parbatbhai Aahir vs. State of Gujarat*** 2017 SCC OnLine SC 1189, ***State of Bihar vs. Rajendra Agrawal*** 1996 LawSuit (SC) 143, ***Mushtaq Ahmad vs. Mohd. Habibur Rehman Faizi*** 1996 LawSuit (SC) 230, ***State of U.P. vs. O.P. Sharma*** 1996 LawSuit (SC) 276, ***State of Himachal Pradesh vs. Pirthi Chand*** 1995 LawSuit (SC) 1177. The essence of arguments of learned counsels for opposite party no.2 is that the Court is not justified to embark upon an inquiry into reliability/genuineness of allegations made in the F.I.R. Or complaint and the extraordinary and inherent power did not confer an arbitrary jurisdiction to the Court to act according to its capricious way. There is absolutely no quarrel with the proposition of the law laid down by the Apex Court in the judgments cited from the other side, however, we cannot loose sight of the law in respect of precedent, is well settled that a little difference in facts or additional facts may make lot of difference in the precedential value of a decision. ***In Herrignton vs. British Railways Board (1972 (2) WLR)*** Lord Morris said:

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

20. Keeping in view the well established law in respect of exercise of inherent power under Section 482 Cr.P.C. and after considering the rival submissions made by learned counsels for the applicants and opposite party no.2 and perusing the entire material on record which stands unrebutted, I propose to deal with the question as to whether the proceedings against the applicant which are claimed to be an abuse of process of law, inasmuch as, even if the entire material collected during evidence is assumed to be true on its face value, whether any commission of cognizable offence under Section 376 I.P.C. is made out or not or by the evidence collected during investigation his complicity is established by any evidence accepted to be true on its face value.

21. This Court further noticed that Investigating Officer while submitting supplementary charge-sheet no. 163 of 2018 dated 5.12.2018 has acknowledged that during entire investigation except the statements of the victim recorded under Sections 161 and 164 Cr.P.C. and the statement of Sukhpal (who had been charge-sheeted in the present case), there is no other evidence collected by him. It is noted:-

"अब तक कि तमामी विवेचना बयान पीड़िता १६४ सी.आर.पी.सी. व १६१ सी.आर.पी.सी. तथा बयान सुखपाल के अतिरिक्त कोई साक्ष्य नहीं है।"

22. Parentage and residence of the charge-sheeted accused, Ajai Katara (applicant) and co-accused (non-applicants, Jaivir and Jogendra) have been disclosed in the affidavits filed by the victim and Sukhpal. I may record that even in the impugned supplementary charge-sheet dated 5.12.2018 witnesses cited are: First informant, Bhagwan Singh, Serial No.1, Smt. R. and Sukhpal at serial no.3, though admittedly Sukhpal has been made accused in the F.I.R. and is charge-sheeted accused whose proceedings though have been stayed by this Court in Criminal Misc. Application under Section 482 Cr.P.C. (Sukhpal vs. State of U.P.) which is still pending consideration.

23. The Court cannot permit the prosecution to go on if the case falls in any one of the categories as illustrated and enumerated by the Apex Court in ***State of Haryana Versus Bhajan Lal 1992 SCC(Crl) 426*** (Para 102) supra.

24. The Court, therefore, has no hesitation, whatsoever, in concluding that judicial conscience of the Court on the basis of material before it has persuaded to quash the criminal proceedings pending against the applicant in exercise of its inherent powers as vested in it under Section 482 Cr.P.C. The Court is quite conscious of the fact that the victim has named the applicant in her statement under Section 164 Cr.P.C., but the names of accused were disclosed to her by themselves and during investigation they were not put up for identification in order to fix their identity which would have clinched the issue and applicant and other co-accused, could not have escaped from the clutches of law. Therefore, in my considered opinion, it is a fit case where the Court in exercise of its inherent power under Section 482 Cr.P.C. should quash the entire proceedings against the applicant as the same squarely falls within the para 3 & 7 of Bhajan Lal's case. Admittedly, it is not disputed by opposite party no.2 that the applicant and other co-accused whose names were introduced during investigation were not known to them from before, as admittedly the applicant is a resident of district Ghaziabad and no first information report was lodged either by opposite party no.2 or her alleged husband who himself is facing trial under Sections 363, 366 I.P.C. at Ghaziabad in the year 2013 itself or moved any application for the alleged incident be investigated thoroughly by the police station within whose local jurisdiction the alleged offence of gang-rape had allegedly taken place. Though, as noted time and again that no date, time, parentage and residence of the accused whose names were introduced by the prosecutrix with an ulterior motive after two months of kidnapping by accused/witness Sukhpal regarding commission of gang-rape as alleged at Sahibabad, district Ghaziabad has been disclosed by the victim and co-accused Sukhpal in the statements recorded under Sections 161 and 164 Cr.P.C.

25. Therefore, in view of above, the supplementary charge-sheet and the entire proceedings arising out of it in the aforesaid case are hereby quashed so far as the applicant is concerned.

26. The present Criminal Misc. Application (U/s 482 Cr.P.C.), accordingly, stands **allowed.**

27. A copy of this order be certified to the lower court forthwith.

(2020)1ILR 506

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 43722 of 2019

Ram Bharose Lal & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Ashish Kumar, Sri Neeraj Kumar

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

A. Code of Criminal Procedure - Section 482- Counterblast case- Previous registration of a case crime number may be a motive or a cause for the present occurrence-are questions of fact to be seen by the Trial court, during course of trial. Contention made in the complaint has been reiterated by the complainant under Section 200 of Cr.P.C and by witnesses under Section 202 of Cr.P.C.- At the time of summoning, under Section 204 of Cr.P.C. the Magistrate has found that all ingredients required for passing order of summoning for the offences are present in the statements recorded by the learned Trial court- In exercise of inherent power, under Section 482 of Cr.P.C., High Court is not expected to make meticulous analysis of factual aspect because the same is a question, to be gone into, during course of trial, by the Trial court. (Para 7 & 8)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. M/S. Pepsi Food Ltd. & anr. Vs. Spl. Judicial Magistrate & ors, 1998, UPCr.R 118

2. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767

3. Hamida Vs. Rashid, (2008) 1 SCC 474

4. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

5. Popular Muthiah Vs. St., Rep. by Inspector of Police, (2006) 7 SCC 296

6. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

7. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants, Ram Bharose Lal, Jai Singh and Kallu, against State of U.P. and Smt. Meena, with a prayer for quashing of entire criminal proceeding as well as setting aside summoning order, dated 30.7.2019, passed by III Additional Sessions Judge/Special Judge (Dacoity Affected Area), Budaun, in SST No.1478 of 2019 (Complaint Case No.49 of 2018), Meena vs. Ram Bharose Lal and others, under Sections 392 and 354 of IPC, Police Station-Bisauli, District-Budaun.

2. Learned counsel for the applicants argued that it was a false and malicious accusation, filed by way of an application, under Section 156 (3) of Cr.P.C. and was treated as a complaint case, as a counter-blast of case crime no.675 of 2017, for offences, punishable, under Sections 392 and 354 of IPC of Police Station-Bisauli, District Budaun, for which a report was lodged by Ram Bharose Lal against Hira Lal, when Hira Lal outraged modesty of victim, daughter of informant on 7.10.2017, wherein a chargesheet has been filed and as a counter-blast case, wife of Hira Lal, has filed this case against applicants, wherein, applicant no.1, is father, whereas, applicant nos. 1 and 2 are his sons, with false accusation and III Additional Sessions Judge/Special Judge (DAA), Budaun, acting as the Magistrate, has failed to appreciate facts and law placed before it and passed impugned summoning order without application of judicial mind, with above prayer.

3. To bolden his submission, learned counsel for applicants has placed reliance on an order, dated 29.8.2016, of another coordinate Bench of this Court, passed in Application, U/S No.25387 of 2016, Brijveer Singh and another vs. State

of U.P. and another, wherein, law laid down by Apex Court, in the case of **M/S. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, 1998, UPCr.R 118,** has been discussed.

4. Learned AGA, representing State of U.P., has vehemently opposed this Application.

5. From very perusal of the Application, moved, under Section 156 of Cr.P.C., it is apparent that it was filed by the applicant-complainant, Meena, wife of Hira Lal, resident of Mohammadpur, Mai, Police Station-Bisauli, District Budaun, against Ram Bharose, son of Mohan Lal, Jai Singh and Kallu, both sons of Ram Bharose, for offences, punishable, under Sections 392 and 354 of IPC, with this contention that on 2.11.2017, at about 9.00 PM, while, applicant, alongwith her kids, was all alone at her home, and her husband was at field, Ram Bharose, Jai Singh and Kallu, armed with weapons, did criminal trespass in the house of the complainant. They hurled abuse, assaulted her and threatened of dire consequences. They also outraged her modesty by obscene act and took away Rs.5,000/-, in cash, and ornaments as well. Upon hue and cry, many persons rushed on the spot, then, they ran away. Incident was reported at the concerned Police Station as well as to the Senior Superintendent of Police, but to no avail. Hence, a complaint, for registration of a case crime number, under above offences and for its investigation by the Police Station, concerned.

6. Learned Additional Sessions Judge/Special Judge (DAA), Budaun, acting as the Magistrate, took cognizance over it and decided to proceed, treating it to be a complaint case, wherein, complainant was examined, under Section 202 of Cr.P.C. and her two witnesses, Puran and Chatrapal, under Section 202 of Cr.P.C. Learned Additional Sessions Judge/Special Judge (DAA), Budaun, acting as the Magistrate, on the basis of those evidences, collected by him, in his enquiry, passed impugned order for summoning of accused persons, for offences, punishable, under Sections 392 and 354 of IPC.

7. Previous registration of a case crime number, upon a report of applicant no.1, Ram Bharose, against Hira Lal, is being said to be a motive for this counter-blast case, but, this may be a motive for this occurrence or this may be a cause for the present occurrence. All these are questions of fact to be seen by the Trial court, during course of trial. But the contention made in the complaint has been reiterated by the complainant in its enquiry, made, under Section 200 of Cr.P.C., as well as, by witnesses, while, being examined, under Section 202 of of Cr.P.C., at the time of summoning, under Section 204 of Cr.P.C. In all those laws cited by the applicants, it is well settled that only prima facie case and its existence is to be seen by the Magistrate, at the stage of summoning, though, it should be by application of judicial mind and not in a routine, but, in the present case, by application of judicial mind, Additional Sessions Judge/Spcial Judge (DAA), acting as the Magistrate, ha found hat all such ingredients, which are required to be attracted for passing order of summoning, under above offences, are present, in the statements recorded by the learned Trial court, hence, passed impugned summoning order, as above.

8. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of

Cr.P.C., is not expected to make meticulous analysis of factual aspect because the same is a question, to be gone into, during course of trial, by the Trial court.

9. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844,** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296**, has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

10. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

11. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

12. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the

settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

13. For a period of 30 days from today, no coercive action shall be taken against the applicants.

14. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)1ILR 510

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 44378 of 2019

Nahar Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Vipin Chandra Pandey

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

A. Code of Criminal Procedure - Section 482-In exercise of inherent power, under Section 482 of Cr.P.C., High Court is not expected to make a meticulous analysis of factual aspect because the same is a question to be gone into, during course of trial, by the Trial court. (Para 5)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants, Nahar Singh, Manmohan @ Teetu, Deepu @ Devendra and Manoj, with a prayer for setting aside summoning order, dated 19.9.2019, passed by the Judicial Magistrate, Sadabad, Hathras, and, thereby, entire criminal proceeding, in Complaint Case No. 164 of 2018, Shashi Prabha vs. Nahar Singh and others, under Sections-452, 323 and 354 of IPC, Police Station-Sahpau, District-Hathras

2. Learned counsel for applicants argued that a civil suit was filed for cancellation of sale deed, which was got executed by the complainant and as a result of the same this malicious prosecution, in misuse of process of law, wherein, there is no medico legal report of any injury, but, even this, summoning order has been passed. Hence, for avoiding abuse of process of law, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From perusal of the complaint, it is apparent that the reason for lodging this complaint has been said in it, i.e., alleged sale deed, which was got executed on 25.5.2017 from Ranvir Singh, whereupon, accused persons did encroach over the land, claiming it to be of theirs, for which some proceeding before Sub Divisional Magistrate, concerned, was taken, thenafter, this assault was made on 11.4.2018, with occurrence, reported, was committed by those accused persons, by way of committing criminal trespass in the house of the complainant. This fact has been narrated and reiterated, in the statement, recorded, under Section 200 of Cr.P.C., as well as under Section 202 of Cr.P.C., in the enquiry made by the Magistrate and the impugned summoning order has been passed, on the basis of above evidence, collected by the Magistrate, which was perfectly well, in accordance with law.

5. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make a meticulous analysis of factual aspect because the same is a question, to be gone into, during course of trial, by the Trial court.

6. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844,** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296**, has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

7. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in*

exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

8. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

9. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

10. For a period of 30 days from today, no coercive action shall be taken against the applicants.

11. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)1ILR 512

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 44711 of 2019

Pradeep @ Pradeep Kumar & Anr.
...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ram Babu Sharma, Sri Ardhendu Shekhar

Counsel for the Respondents:
A.G.A.

A. Inherent Jurisdiction - Section 482 - Cr.P.C. - Scope - the Trial Court and not the High Court is expected to analytically analyze the facts and factual matrix of case.

Application u/s 482 rejected. (E-10)

List of cases cited: -

1. State of Andhra Pradesh vs. Gaurishetty Mahesh JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamid vs. Rashid (2008) 1 SCC 474

3. Monica Kumar Vs. State of Uttar Pradesh (2008) 8 SCC 781

4. Popular Muthiah Vs. State Represented by Inspector of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs. R. Prasana Kumar (1990) Cr. LJ 320 (DB): AIR 1990 SC 494

6. State of Bihar vs. Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati and anr Vs State of U.P. 2004 (57) ALR290

8. Lal Kamlendra Pratap Singh Vs State of U.P.

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicants and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicants Pradeep @ Pradeep Kumar and Amar Pal against State of U.P. and Munna Lal with prayer to quash summoning order dated 11.9.2019 as well as entire proceedings of Complaint Case No. 2041 of 2017, Munna Lal Vs. Hari Bhagwan and others, under Sections 147, 148, 149, 323, 325, 504, 506 I.P.C., P.S. Ujhani, district Budaun, pending in court of J.M., Budaun.

3. Supplementary affidavit filed today by learned counsel for the applicants is taken on record. Learned counsel for applicants argued that in this very case, Case Crime No. 0333 of 2016 was got lodged at P.S. Ujhani, District Budaun, on 17.5.2016 at 14.45 hours upon report of Munna Lal, Advocate, and this was investigated, wherein final report was submitted. Thereafter protest petition was filed and it was treated as complaint, wherein impugned summoning order has been passed. Whereas provisions of amended section 202(1) was not complied with because accused persons are resident of Delhi and not within the territorial jurisdiction of Court at Budaun. Hence this order was vitiated. Hence this application with above prayer.

4. Learned A.G.A. has vehemently opposed the above argument.

5. From the very perusal of impugned order, it is apparent that an application dated 5.5.2016 u/s 156(3) Cr.P.C. was filed by Munna Lal with contention that owing to family dispute regarding partition Bhagwan Das Rajak, Hari Bhagwan Das Rajak and Dharmendra resident of Jaipur, who are in-laws of complainant's brother Virendra Pal, entered into a quarrel, wherein threat was extended by those accused and owing to this on 27.2.2016 at about 6.00 P.M. while complainant was on his way to his home from Ujhani by his motorcycle and reached near Santosh Kumari School an Alto Car with registration No. DL 8CNB 0789, which was being driven by Pradeep Kumar and boarded by Amarpal, Dharmendra, Bhagwan Das Rajak and Hari Bhagwan Rajak firstly dashed his motorcycle, then after all those accused persons came out from the car, they did abuse and assaulted him with kicks and fists, danda and iron rod and threatened him with dire consequences. Upon rescue call many persons rushed there then the accused persons ran from the spot. Case Crime No. 333 of 2016 for offences 147, 148, 149, 323, 504, 506, 325, 307 I.P.C. was got registered wherein investigation resulted in submission of final report. Protest petition was filed against this final report. It was treated as a complaint case and in this complaint, complainant was examined u/s 200 Cr.P.C. and his witnesses Bhagwan Singh and Satyadev were examined u/s 202 Cr.P.C. Dr. Saurabh Goyal was also examined as CW1. Thereafter impugned summoning order was passed. The very contention of learned counsel for the applicants that under amended provisions of section 202(1) Cr.P.C. the enquiry was not to be conducted by the Magistrate, is not maintainable. There is an enquiry made by the Magistrate in this proceeding. The impugned summoning order is on the basis

of evidence collected in its enquiry made by the Magistrate. The Magistrate at the stage of section 204 Cr.P.C. is not required to make meticulous analysis of evidence. Rather only prima-facie case is to be seen for making summoning and it was very well there.

6. This court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. is not expected to meticulously analyse the facts and evidence as it is matter of trial to be seen during trial.

7. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent ***Hamida v. Rashid, (2008) 1 SCC 474,*** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again another subsequent ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,*** the Apex Court has propounded *"Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself."* While interpreting this jurisdiction of High Court Apex Court in ***Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

8. Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in ***State of Bihar v. Murad Ali Khan, (1989)***

Cr LJ 1005: AIR 1989 SC 1, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. Accordingly, there remains nothing for any indulgence in this proceeding. The prayer for quashing summoning order as well as proceeding of the aforesaid complaint case is refused and the application u/s 482 Cr.P.C. is hereby dismissed.

11. However, in the interest of justice, it is provided that if the applicants appear and surrender before the court below within thirty days from today and apply for bail, then the bail application of the applicants be considered and decided in view of the settled law laid by this Court in the case of ***Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290*** as well as judgment passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.***

12. For a period of thirty days from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants.

13. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)1ILR 515

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 45708 of 2019

Guru Bachan Singh @ Bhangadi & Ors.
...Applicants

Versus

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

Counsel for the Applicants:
Sri Sarvesh Kumar Dubey, Sri Abhishek Narayan Pandey, Sri Rajiv Lochan Shukla

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

A. Code of Criminal Procedure - Section 340, Section 343(2), Section 482 - Complaint by a superior court to Magistrate-Inquiry, under Section 340 of Cr.P.C.-Exemption of public servant from requirement u/s 200/202 Cr.P.C-Complaint accordingly registered-Pendency of appeal against decision of the judicial proceeding-Section 343(2) of Cr.P.C.-Judicial discretion to the Magistrate-No mention by applicants to adjourn the hearing of the case until the appeal is decided-Circulars Letters of High Court, on its administrative side-Unless specifically proceeding is stayed by superior courts, including High Court, proceedings at Trial court are not to be stayed. (Para 6, 8, 9 & 13)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-8)

List of cases cited: -

1. S.R. Sukumar v. S. Sunaad Raghuram, AIR 2015 SC 2757

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This proceeding, under Section 482 of Criminal Procedure Code, 1973 (hereinafter, in short, referred to as 'Cr.P.C.'), by Guru Bachan Singh @ Bhangadi, Guru Dev Singh @ Dadua and Durvijay Singh @ Natiya, with a prayer for quashing of the impugned summoning order, dated 16.9.2019, passed by the Chief Judicial Magistrate, Farrukkhabad, in Case No. 316 of 2018, under Section 419, 465, 466, 468, 471 and 120B of Indian Penal Code (In short, hereinafter, referred to as 'IPC'), Police Station-Kotwali Fatehgarh, District-Farrukkhabad, and, thereby, quashing of entire proceeding of aforesaid case.

2. Learned counsel for applicants argued that the impugned order was passed on the basis of report and its registration, in an enquiry, under Section 370 of Cr.P.C., and this was with no reason, fact or appreciation of enquiry made by the learned Special Judge. Applicants have been summoned, for offences, punishable, under Sections 419, 465, 466, 468, 471 and 120B of IPC for alleged deceit and fabrication of surety bond for which a previous enquiry was pending before the court. Moreso, an Appeal, before this Court, under Setion 343 of Cr.P.C., being Criminal Appeal No.1555 of 2018, Guru Bachan Singh and others vs. State of U.P. and another, has been filed, wherein, this Court, vide order, dated 21.3.2018, had admitted Appeal for hearing, while, calling for a counter affidavit, to be filed, and the said Appeal has yet not been decided. Hence, as per sub-section (2) of Section 343 of Cr.P.C., it was incumbent upon the Magistrate to wait till out-come of the Appeal and till then, above proceeding ought to have been stayed, but, straightaway, impugned order has been passed by taking cognizance in it. Thus, it was misuse of process of law and irregularity, apparent on the record. Hence, this Application, under Section 482 of Cr.P.C., with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. Before delving into points pressed by the learned counsel for applicants, it would be appropriate that firstly have a glance of Section 340 of Cr.P.C.

5. Section 340 of Cr.P.C. provides a procedure regarding cases mentioned in Section 195 of Cr.P.C. and as per section 340 of Cr.P.C., when upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence, referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first Class having jurisdiction;

(d) take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

.....

6. Thus, in an inquiry, under Section 340 of Cr.P.C., a complaint is to be filed by the court, concerned, and when a complaint is being filed and order for its registration is made, meaning, thereby cognizance has been taken at that very moment for an offence for which instant complaint has been registered. Hence, impugned complaint was registered prior to impugned order, dated 16.9.2019. Hence, very argument pressed by learned counsel for applicants that the Magistrate took cognizance, without mentioning reason, is not tenable. The complaint was filed and it was registered. Hence, cognizance, at that stage, was taken by the Magistrate.

7. Apex Court, in the case of ***S.R. Sukumar v. S. Sunaad Raghuram, reported in AIR 2015 SC 2757,*** has propounded that it is neither practicable nor desirable to define as to what meant by taking cognizance. Whether the Magistrate has taken cognizance of the offene or not will depend upon facts and circumstances of a particular case. By way of recording of complainant's statement, under Section 200 of Cr.P.C. the Magistrate cannot be said to have ipso facto taken cognizance. After proceeding, under Section 200 of Cr.PC., either to summon, under Section 204 of Cr.P.C. or to make further inquiry, under Section 202 of Cr.P.C. or to reject the complaint, under Section 203 of Cr.P.C., are three stages, and those three stages are said to be a part of taking cognizance, i.e., depending upon facts and circumstances of every case.

8. In the present case, complaint was filed by a superior court to a Magistrate. After making its inquiry, under Section 340 of Cr.P.C., this complaint was registered. There was an exemption for a public servant, who filed a complaint, in exercise of its official duty from further statement, under Sections 200 Cr.P.C. and 202 of Cr.P.C. Hence, the Magistrate took cognizance in that case, at that very stage, when it was got registered. Hence, this formal order of summoning is only, after taking cognizance, which was previously taken.

9. Sub-Section (2), of Section 343 of Cr.P.C., provides that where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage, adjourn the hearing of the case until such appeal is decided.

10. Thus, Legislature, has given a judicial discretion to the Magistrate, concerned, that after having notice of pendency of an Appeal against the order and decision made, under Section 340 of Cr.P.C., the Magistrate may, at any stage, may adjourn the proceeding till judgment in Appeal and there is no material on record, which may show that this was mentioned before the Magistrate, concerned, and without making a mention to this effect, applicants have, straightaway, invoked jurisdiction, under Section 482 of Cr.P.C., of this Court.

11. Under above facts and circumstances, this direct invoking of jurisdiction, under Section 482 of Cr.P.C., of this Court, is neither was required nor desirable.

12. Learned counsel for the applicants argued that once the Appeal is

pending, then, it is obvious that the sub-ordinate court must restrain from proceeding further.

13. This Court, in present scenario of pendency of cases at Trial court level, has issued Circulars Letters, on its administrative side that unless specifically proceeding is being stayed by superior courts, including, High Court, proceedings at Trial court, are not to be stayed. Hence, this argument of learned counsel for applicants is also not tenable.

14. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., being devoid of merits, deserves dismissal and it stands dismissed accordingly.

(2020)1ILR 518

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Matters Under Article 227 No. 2359 of 2015

Banke Lal Agrawal ...Petitioner
Versus
Smt. Dr. Mithilesh Bansal & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agarwal, Sri Dinesh Kumar, Sri Nirvikar Gupta

Counsel for the Respondents:
Sri Abu Bakht, Sri Abhitab Agarwal, Sri P.K. Jain

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (Act No. 13 of 1972) - Eviction - S. 20(2)(f) - Ingredients of denial of title by a tenant – there must be clear denial of title of the landlord by the tenant – tenant's bona fide calling upon his/ her landlord/landlady to prove his/ her ownership or putting the landlord/ landlady to prove his/ her title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by Rent Control Law but without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of his/ her landlord/ landlady or disclaimed the tenancy. (Para 16 & 17)

B. Rent Control Law - Eviction - *Principle of forfeiture by disclaimer* - where the tenant denies the landlord's title to recover rent from him bona-fide on the ground of seeking information of such title or having such title established in Court in order to protect himself – tenant is not to be charged with disclaiming the landlord's title - But where the disclaimer is done with an express repudiation of the tenancy under the landlord, it would operate as forfeiture - Where after creation of the tenancy if the title of landlord is transferred or devolves upon a third person, the tenant is not estopped from denying such title - However, if the tenant having been apprised of the transfer, assignment or devolution of rights acknowledges the title of transferee either expressly or by paying rent to him, the rule of estoppel once again comes into operation. (Para 18)

Held - Defendant-petitioner/tenant has not denied the title of the landlady & deposited entire rent on the first date of hearing and continued to deposit/ pay rent to the plaintiff-respondent/ landlady - Finding of the court below on the ground of denial of title of the plaintiff respondent as a ground for eviction from the disputed shop, set aside. (Para 21)

Matter Under Article 227 allowed. (E-5)
List of cases cited: -

1. Keshar Bai Vs Chhunulal (2014) 11 SCC 438

2. Sheela Vs Firm Prhlad Rai Prem Prakash (2002) 3 SCC 375

3. J.J. Lal Pvt Ltd. & ors Vs M.R. Murli & Anr AIR 2002 SC 1061

4. Sheikh Abdulla Vs Mohammad Muslim 1926 AIR (Cal.) 1205

5. Sugga Bai Vs Hiralal, 1969 AIR (MP) 32

6. 1937 AIR (PC) 251

7. Arif Vs IVth Additional District Judge, Aligarh & Ors 1984 (2) ARC 255 (All)

8. Dr. A.S. Raj Vs District Judge, Lucknow & ors 1982 ARC 515 (All)

9. Ram Autar Goel Vs Jagannath Gupta & Anr 1998 (2) AWC 828

10. Pradeep Gautam & anr Vs VIIIth Add District Judge (Judge, SCC) Alld & anr 1993 (1) ARC 44

11. Brij Bhushan Mishra Vs Surita Sarbabdhikari 2009 (74) All.LR 266

12. Jalsabh Shaikh Vs State of Goa AIR 2000 (SC) 568

13. Sahaj Ram Vs Rajednra Prasad 2016 (6) ADJ 626

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

"Ingredients of denial of title by a tenant so as to attract Section 20(2)(f) of U.P. Act XIII of 1972, is the main question involved in the present petition."

FACTS:-

1. Heard Sri Nirvikar Gupta, learned counsel for the defendant-tenant/ petitioner and Sri P.K. Jain, learned senior advocate assisted by Sri Abhitab Agarwal, learned counsel for the plaintiff-respondents.

2. Briefly stated facts of the present case are that the disputed house situate at Azad Chowk, Main Bazar, Qasba Jevar, District Gautam Budh Nagar was originally owned by Sri Mahesh Chand father of the plaintiff-respondent No.1 Smt. Dr. Mithilesh Bansal resident of Qasba Palwal, District Faridabad (Haryana), which was purchased by Sri Mahesh Chand by a registered sale deed dated 04.08.1966 from one Sri Babu Ram and another. According to the plaintiff-respondent No.1, the purchase of the house was *benami.* That apart, in her marriage on 03.02.1981, her father Mahesh Chand had gifted the house to her which she accepted. But despite this fact, her father Mahesh Chand entered into some rent deed in his own name. Therefore, she filed declaratory Suit No.28 of 1984 (Smt. Mithilesh Bansal vs. Mahesh Chand and another) which was decreed by judgment dated 09.04.1984 and decree dated 21.05.1984 under Order VIII Rule 10, C.P.C. on the basis of compromise. Thus, the plaintiff-respondent No.1 became owner and landlord of the disputed shop.

3. The defendant-petitioner was a tenant of the disputed shop. According to the plaintiff-respondent No.1, the defendant-tenant sent a notice dated 28.01.1985 through counsel Mohd. Iqbal Khan to the plaintiff's father Mahesh Chand by registered post stating that the rent from 01.04.1983 is not being accepted so as to cause harassment and, therefore, notice is being given to accept the rent and issue a rent receipt. According to the plaintiff, this notice was replied by her father Mahesh Chand to the defendant-tenant by reply dated 12.03.1985 followed by letter dated 12.03.1985 by registered post whereby Mahesh Chand stated that it was earlier notified and made clear to the defendant-tenant that the shop is now owned by the plaintiff-respondent No.1,

Smt. Mithilesh Bansal in view of the judgment and decree passed by the Munsif Khurja in O.S. No.28 of 1984 and, therefore, the previous and future rent be paid to the owner and landlady Smt. Mithilesh Bansal.

4. According to the plaintiff-respondent No.1, despite intimation of the shop in question to be owned by her, the defendant-tenant has not paid any rent. Subsequently, he filed an Injunction Suit No.267 of 2006 (Banke Lal Agarwal vs. Mahesh Chand). In paragraph-1 of the plaint of O.S. No.267 of 2006, the defendant-tenant/ petitioner stated, as under:-

''1. यह कि वादी निम्न वर्णित दुकान जिसे नक्शा वाद पत्र में शब्द अ ब स द से दिखाया गया है, का किरायेदार प्रतिवादी की ओर से **पिछले 50 वर्ष से अधिक से चला आ रहा है।''**

5. The averments of paragraph-1 of the plaint of O.S. No.267 of 2006 were denied by Mahesh Chand (father of the plaintiff-respondent No.1 No.1) in paragraph-1 of his written statement. Thereafter, in paragraphs-11 and 22 of the written statement in O.S. No.267 of 2006, the aforesaid Mahesh Chand has stated, as under:-

''11. यह कि वाद पत्र की धारा 1 का कथन गलत है अस्वीकार है। **वादी वर्णित समपत्ति का प्रतिवादी का किरायेदार नहीं है। वरन दिनांक 01.04.1983 से प्रश्नगत समपत्ति की मालिक श्रीमति मिथलेश बंसल है।** दिनांक 31.03.1983 तक वादी प्रश्नगत दुकान का स्वामी था तब तक का किराया वादी से प्रतिवादी ने प्राप्त किया था। उसके बाद प्रश्नगत समपत्ति की मालिक श्रीमति मिथलेश बंसल हो गयी। इसलिये प्रतिवादी द्वारा दिनांक 31.03.1983 के बाद न तो वादी से कोई किराया प्राप्त किया गया और न ही कोई रसीद ही प्राप्त की गयी। और न ही प्रतिवादी को किराया वादी द्वारा प्रदान किया गया।''

''22. यह कि वादी द्वारा दिनांक 28.01.1985 को अपने अधिवक्ता श्री इकबाल अहमद एडवोकेट से प्रतिवादी को नोटिस किराया लिये जाने हेतु भिजवाया गया था। जिसका उत्तर प्रतिवादी ने वादी के अधिवक्ता श्री इकबाल अहमद एडवोकेट को दिनांक 12.03.1985 को प्राप्त कराया जिसमें स्पष्ट बताया गया था कि प्रश्नगत समपत्ति की मालिक प्रतिवादी नहीं रहा बल्कि वाद सं0 28 सन 1984 न्यायालय मुंसिफ खुर्जा के निर्णय एवं डिक्री आदेश दिनांक 09.04.1984 के अनुसार श्रीमति मिथलेश बंसल हो गयी। उत्तर में यह भी स्पष्ट रूप से लिखा गया था कि पिछला किराया एवं भविष्य में किराया श्रीमति मिथलेश बंसल को अदा करें। प्रतिवादी दिनांक 31.03.2003 के बाद से बादहु निर्णय एवं डिक्री दिनांक 09.04.1984 के बाद से प्रश्नगत दुकान समपत्ति का मालिक नहीं है। ऐसी स्थिति में वादी द्वारा प्रतिवादी को आर्थिक, मानसिक, सामाजिक क्षति कारित करने के उद्देश्य से तथा अपने किसी छिपे हुए स्वार्थ से वादी ने प्रतिवादी के विरूद्ध उक्त वाद योजित किया है जिसका उसे कोई अधिकार नहीं है।''

6. According to the plaintiff-respondent No.1, since the rent was not being paid and the defendant-tenant/ petitioner has denied her title as per afore-quoted paragraph-1 of the plaint of O.S. No.267 of 2006, therefore, after notice, she filed S.C.C. Suit No.5 of 2007 (Dr. Mithilesh Bansal vs. Banke Lal Agarwal). In paragraphs-8 and 11 of the plaint of S.C.C. Suit No.5 of 2007, the plaintiff-respondent No.1 has stated, as under:

''8. यह कि प्रतिवादी किराया अदा करने में सख्त नादेहिन्द है और **साथ ही उसने उक्त वर्णित दुकान से वादिनी के स्वामित्व से भी इंकार किया है** इसलिये वादिनी नालिसी है।''

''11. यह कि वाद का कारण सर्वप्रथम दिनांक 9.4.84 को जबकि वादिनी उक्त वर्णित दुकान की भवन स्वामी न्यायालय मुंसिफ खुर्जा द्वारा वाद संख्या 28/1984 में घोषित हुई, बादहू प्रत्येक अंग्रेजी महीना की पहली तारीख को जब कि प्रतिवादी पर उक्त वर्णित दुकान का किराया वाजिब हुआ तथा बादहू **जबकि प्रतिवादी ने**

मूलवाद संख्या 267/06 में उक्त वर्णित दुकान से वादिनी के स्वामित्व को इंकार किया तथा दुकान में वादिनी को अपना भवन स्वामी नहीं कहा तथा अन्तिम रूप से नोटिस दिनांक 21.3.2007 की 30 दिन की अवधि समाप्त हो जाने के पश्चात इस न्यायालय की सीमा के अन्तर्गत उत्पन्न हुआ एवं न्यायालय को वाद को सुनने व उसे निर्णीत करने का हक हासिल है।''

7. Contents of afore-quoted paragraph-8 of the plaint of S.C.C. Suit No.05 of 2007 were denied by the defendant-tenant/ petitioner in paragraphs-8 and 11 of his written statement, as under:-

'' 8. यह कि वाद पत्र की धारा 8 का कथन गलत है, अतः अस्वीकार है। प्रतिवादी किराया अदा करने में हर्गिज भी नादेहिन्द नहीं है। प्रतिवादी से विवादित दुकान का किराया महेश चन्द पुत्र रामजी लाल द्वारा 31.03.2006 तक का दस्ती प्राप्त कर लिया गया है। **प्रतिवादी द्वारा वादनी के विवादित दुकान के स्वामित्व से कभी भी इन्कार नहीं किया गया।''**

11. **यह कि वाद पत्र की धारा 11 का कथन गलत है, अतः अस्वीकार है।** वादनी को कभी कोई वाद का कारण प्रतिवादी के विरूद्ध वाद दायर करने का पैदा नहीं हुआ।''

8. The plaintiff-respondent No.1 has also alleged in her plaint that rent has not been paid by the defendant-tenant/ petitioner. She waived her right for earlier rent and claimed the rent of only three years amounting to Rs.4,809/-.

9. On the first date of hearing, the defendant-tenant/ petitioner deposited the entire demanded rent and claimed the benefit of Section 20(4) of U.P. Act XIII of 1972.

10. The aforesaid S.C.C. Suit No.5 of 2007 was decreed by the impugned judgment and decree dated 04.01.2013 passed by Civil Judge (S.D.)/ Small Cause Court, Gautam Budh Nagar on the finding that the defendant-tenant/ petitioner has denied the title of the plaintiff-landlady/ respondent No.1 and thus, provisions of Section 20(2)(f) of U.P. Act XIII of 1972 stood attracted. So far as questions of payment of rent and the benefit of Section 20(4) of U.P. Act XIII of 1972 are concerned, they were decided in favour of the defendant-tenant/ petitioner and against the plaintiff-respondent No.1. The aforesaid judgment was challenged by the defendant-tenant/ petitioner in S.C.C. Revision No.01 of 2013 (Banke Lal Agarwal vs. Smt. Dr. Mithilesh Bansal), which has been dismissed by the impugned judgment dated 30.03.2015 passed by the Additional District Judge - IInd, Gautam Budh Nagar. Aggrieved with the aforesaid two judgments, the defendant-tenant/ petitioner has filed the present petition under Article 227 of the Constitution of India.

SUBMISSIONS:-

11. **Learned counsel for the defendant-tenant/ petitioner submits** as under:

(i) Both the courts below have held that there was no default. Both the courts below have found that the defendant-tenant/ petitioner is entitled for the benefit of Section 20(4) of U.P. Act XIII of 1972 inasmuch as he unconditionally deposited the entire demanded amount of rent etc. and interest on the first date of hearing.

(ii) The defendant-tenant/ petitioner has never denied the title of the plaintiff-landlady/ respondent No.1.

(iii) The finding of the courts below in the impugned judgments on the

point of denial of title of the plaintiff-landlady/ respondent No.1 is perverse and grossly illegal inasmuch as neither in the written statement filed in S.C.C. Suit nor in the plaint of the Injunction Suit No.267 of 2006 nor at any point of time, the defendant-tenant/ petitioner has denied the title of the plaintiff-landlady/ respondent No.1. In the absence of any denial of title by the defendant, the provisions of Section 20(2)(f) were not attracted and yet the impugned judgments have been passed baselessly by the courts below.

(iv) Question of denial of title is a serious matter and, therefore, in the absence of clear denial of title, no decree can be passed in terms of the provisions of Section 20(2)(f) of the Act. Mere seeking information of ownership is not denial of title.

12. Sri P.K. Jain, learned senior advocate for the plaintiff-respondent submits, as under:-

(i) The defendant-tenant/ petitioner was well aware of the ownership of the plaintiff-landlady/ respondent No.1 of the building in question. This fact becomes further evident from the reply dated 12.03.1985 given by her father Mahesh Chand to the defendant-tenant/ petitioner in reply to their notice dated 28.01.1985 given through counsel Mohd. Iqbal Khan. Averments made in paragraph-1 of the plaint of O.S. No.267 of 2006 filed by the defendant-tenant/ petitioner also amounts to denial of title of the plaintiff-landlady/ respondent No.1. Thus, the defendant-tenant/ petitioner has denied that the title of the plaintiff-landlady with respect to the house in question and renounced his character as tenant. Therefore, the impugned judgments have been lawfully passed holding denial of title by the defendant-tenant/ petitioner.

DISCUSSION AND FINDINGS:-

13. I have carefully considered the submissions of learned counsels for the parties and perused the impugned judgments.

14. Section 20(2) of the U.P. Act XIII of 1972, enables a landlord to institute a suit for eviction of a tenant from a building after determination of his tenancy of one or more of the grounds mentioned in clauses (a) to (g). In the present case, the controversy relates to clause (f) of Section 20(2), which is reproduced below:-

"That the tenant has renounced his character as such or denied the title of the landlord and the latter has not waived his right of re-entry or condoned the conduct of the tenant."

15. Section 116 of the Indian Evidence Act, 1872 creates an estoppel for a tenant to deny the title of his/ her landlord, which is reproduced below:

"Section 116. Estoppel of tenant; and of licensee of person in possession.--*No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given."*

16. The aforesaid provision of **Section 20(2)(f) of the U.P. Act XIII of 1972** is, thus, a provision for determination of tenancy by forfeiture on denial of the landlord's title by the tenant. It is a statutory ground of eviction, which has been incorporated in the Act which becomes invokable by a landlord when a tenant has renounced his character as such or denied the title of his landlord and the landlord has not waived his right of re-entry or condoned the conduct of the tenant.

17. A tenant's bona fide calling upon his/ her landlord/landlady to prove his/ her ownership or putting the landlord/ landlady to prove his/ her title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by Rent Control Law but without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of his/ her landlord/ landlady or disclaimed the tenancy. The denial or disclaimer to be relevant for the purposes of Section 22(2)(f) of the U.P. Act XIII of 1972, should take colour from Section 116 of the Indian Evidence Act.

17. **Section 116** of the Indian Evidence Act, is a **rule of estoppel,** which prohibits a tenant of immovable property or person claiming through him to deny title of his/her landlord/landlady during continuance of the tenancy. This estoppel, so long as it binds the tenant, excludes the tenant from raising a plea disputing the title of his/ her landlord/ landlady. The rule of estoppel applies so long as the tenancy is not terminated and the rule estops the tenant from laying challenge to the ownership of the landlord at the commencement of the tenancy. This contemplates the following fact situations which entail the lessee having renounced his character as such. These are:- (i) when the lessee sets up a title in a third person, or (ii) when he claims title in himself, or (iii) If the tenant assists a stranger to set up an adverse title or delivers the premises to him in order to enable him to set up a title. Thus, in either case situation, the tenant could be said to have disputed or denied the title of his landlord because a title in third person or title in himself cannot co-exist with the title in the landlord.

18. The **principle of forfeiture** by disclaimer is that where the tenant denies the landlord's title to recover rent from him bona-fide on the ground of seeking information of such title or having such title established in a Court of law in order to protect himself, he is not to be charged with disclaiming the landlord's title. **But** where the disclaimer is done not with this object but with an express repudiation of the tenancy under the landlord, it would operate as forfeiture. Where after creation of the tenancy if the title of landlord is transferred or devolves upon a third person, the tenant is not estopped from denying such title. However, if the tenant having been apprised of the transfer, assignment or devolution of rights acknowledges the title of transferee either expressly or by paying rent to him, the rule of estoppel once again comes into operation for it is unjust to allow tenant to approbate and reprobate and so long as the tenant enjoys everything which his lease purports to grant, how does it concern him what the title of the landlord is.

19. To answer a question where an assertion of denial of landlord's title by the tenant was bona fide, all surrounding circumstances under which the assertion was made, have to be seen. To invoke the

ground of eviction under Section 20(2)(f) of the U.P. Act XIII of 1972, there should not only be a clear denial of title of the landlord by the tenant but the landlord should also allege and prove that he had not waived right of re-entry, or condoned the conduct of the tenant.

20. The principle as stated above also finds support from the law laid down in **Keshar Bai vs. Chhunulal, (2014) 11 SCC 438, Sheela vs. Firm Prhlad Rai Prem Prakash, (2002) 3 SCC 375 (paras-11 to 17), J.J. Lal Pvt Ltd. and others vs. M.R. Murli and another, AIR 2002 SC 1061 (Para-18), Sheikh Abdulla vs. Mohammad Muslim, 1926 AIR (Cal.) 1205, Sugga Bai vs. Hiralal, 1969 AIR (MP) 32, 1937 AIR (PC) 251 (para-10), Mohd. Arif vs. IVth Additional District Judge, Aligarh and others, 1984 (2) ARC 255 (All.) (Para-8), Dr. A.S. Raj vs. District Judge, Lucknow and others, 1982 ARC 515 (All.) (Para-26), Ram Autar Goel vs. Jagannath Gupta and another, 1998 (2) AWC 828 (paras-13 and 14), Pradeep Gautam and another vs. VIIIth Additional District Judge (Judge, SCC) Allahabad and another, 1993 (1) ARC 44, Brij Bhushan Mishra vs. Surita Sarbabdhikari, 2009 (74) All.LR 266 (paras-7 and 8), Jalsabh Shaikh vs. State of Goa, AIR 2000 (SC) 568 and Sahaj Ram vs. Rajednra Prasad, 2016 (6) ADJ 626.**

21. Perusal of the undisputed facts as noted above in paragraphs 3 to 6 leaves no manner of doubt that the defendant-petitioner/ tenant has not denied the title of the plaintiff-respondent/ landlady. The tenant has specifically stated that he has never denied the title of the respondent-landlady with respect to the disputed shop. The tenant has also deposited entire rent on the first date of hearing and continued to deposit/ pay rent to the plaintiff-respondent/ landlady. Under the circumstances, the finding of the courts below in the impugned judgment dated 04.01.2013 in SCC Suit No.05 of 2007 (Smt. Dr. Mithilesh Bansal vs. Banke Lal Agrawal passed by Civil Judge (S.D.)/ Small Cause Court, Gautam Budh Nagar and the judgment and decree dated 30.03.2015 in SCC Revision No.01 of 2013 (Banke Lal Agarwal vs. Smt. Dr. Mithilesh Bansal) passed by the Additional District Judge, Court No.2, Gautam Buddh Nagar with respect to the finding on the ground of denial of title of the plaintiff respondent as a ground for eviction from the disputed shop, is hereby set aside. The impugned judgments and decree are accordingly modified. Consequently, the eviction of the defendant-tenant/ petitioner under the impugned judgments, also stands set aside.

22. In view of the aforesaid, the **petition is allowed** to the extent indicated above.

(2020)1ILR 524

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Matters Under Article 227 No. 8040 of 2019

Irshad Fatma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shahabuddin

Counsel for the Respondents:

C.S.C., Sri Syed Ahmed Faizan

A. Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994 - Election dispute - Pradhan - when there was no allegation with regard to outside votes being included by the counting authorities and the only allegation was with regard to wrong counting of votes cast in favour of the petitioner then a re-count was the only method by which the Prescribed Authority could have found out as to whether the counting was done properly. (Para 17)

Election for the post of Pradhan – Election petition dismissed – Revisional court remanded the matter with a direction that a re-count be done & findings be returned on two issue whether 2238 or 2228 votes were cast & whether the election petitioner had got 985 votes or more - Recount was done , petitioner in the recount obtained 988 votes as against 981 votes which the respondent no. 1, the earlier elected candidate had got - ***Held*** - when the recounting had been done & it was found that 988 votes were cast in favour of the petitioner, which number was greater than the votes which were cast in favour of the respondent no. 4 then no further findings with regard to the other issues were required as were desired in the order of remand of the Revisional Court.

Matter Under Article 227 allowed. (E-5)

List of cases cited: -

1. A. Neelalohithadasan Nadar vs. George Mascrene & ors 1994 Supp (2) SCC 619

2. T.A. Ahammed Kabeer vs. A.A. Azeez & ors 2003 (6) AIC 601(S.C.)

3. Michael B. Fernandes vs. C.K. Jaffer Sharief & ors 2002 (3) SCC 521

4. Jyoti Basu & ors v. Debi Ghosal & ors AIR 1982 SC 983

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

1. Upon the declaration of the result on 13.12.2015 of an election which was held on 9.12.2015 for the post of Pradhan, an Election Petition was filed by the petitioner Irshad Fatma.

2. The Election Petition was initially dismissed on 5.2.2018 and the Revision thereafter filed by the petitioner was allowed on 31.5.2018. The matter was remanded with a direction that the Election Petition be decided afresh. When the remand was made a direction was issued by the Revisional Court itself that a re-count be done and also findings regarding two issues were asked to be returned. They were:-

I. whether 2238 or 2228 votes were cast?

II. And whether the election petitioner had got 985 votes or more?

3. Before the Election Tribunal, even before the order dated 5.2.2018 was passed, another candidate who had contested the election, namely, Sakeena had filed an application for rejecting the Election Petition filed by the petitioner stating that the same was not maintainable as Assistant Election Officer and the Election Officer were not made a party in the petition. This application of Sakeena was rejected by the Election Tribunal on 27.1.2016. The Revision filed thereafter was dismissed on 10.8.2017 and Sakeena thereafter had filed a writ petition being Writ-C No. 3430 of 2018 in which the proceedings of the Election Petition was initially stayed on 7.2.2018. But upon coming to know that the Election Petition itself had been decided on 5.2.2018 the writ petition was dismissed as having become infructuous on 20.12.2018.

4. Upon coming to know that on 31.5.2018, the Revisional Court had remanded the matter, Smt. Sakina who had

got just one vote in the election once again filed a Writ Petition in this Court being a Matter Under Article 227 and was numbered as Petition No. 292 of 2019. This writ petition was disposed of on 24.1.2019 without much of interference as the order impugned was an order by which a remand had been ordered and the election petitioner's counsel had stated that he would implead the necessary parties in the Election Petition as the petitioner in the writ petition had desired.

5. A direction was further issued that the Prescribed Authority/Election Tribunal had to decide the Election Petition within a period of six months from the date of presentation of a certified copy of the order dated 24.1.2019. On 6.2.2019, the Prescribed Authority passed an order that the recounting of votes as per the Revisional Court's order dated 31.5.2018 had to be done on 12.2.2019. However, the recount was done on 18.2.2019. Against the order dated 6.2.2019 by which the recount was ordered, the respondent no. 4 Smt. Zeenat Fatima filed a writ petition being Writ C No. 5738 of 2019 wherein it was ordered that the recount would go on but the result would be kept in sealed cover and shall not be declared. The order dated 18.02.2019 passed by the learned Single Judge in Writ-C No.5738 of 2019 was put to challenge in a Special Appeal being Special Appeal No. 422 of 2019. This Special Appeal was, however, dismissed on 5.4.2019. In the meantime, the recount had been done and, therefore, the Writ C No. 5738 of 2019 was dismissed on 26.3.2019. On the basis of the recounting which was done on 18.2.2019, the Prescribed Authority on 24.4.2019 decided the Election Petition and allowed the same in favour of the petitioner. The petitioner had in the recount obtained 988 votes as against 981 votes which the respondent no. 1, the earlier elected candidate had got.

6. This order 24.4.2019 was challenged by the respondent no. 4 Zeenat Fatma in Revision No. 1 of 2019. When this revision was allowed on 23.10.2019, the instant writ petition was filed.

7. The respondent no. 4 was represented by Sri Syed Ahmed Faizan and Sri S.F.A. Naqvi. Since for the decision of the present petition under Article 227 of the Constitution of India, the requirement of counter affidavits from the other private respondents was not required, the instant writ petition was heard finally.

8. Learned counsel for the petitioner has submitted that the grounds on the basis of which the Revision was allowed were not tenable. Learned counsel for the petitioner has submitted that when the recount was done on 18.2.2019 on the basis of the remand order of the Revisional Court dated 31.5.2018 then no further findings were required as were desired in the order of remand dated 31.5.2018 of the Revisional Court.

9. Learned counsel for the petitioner submits that it mattered little as to whether 2238 or 2228 votes were cast. Also learned counsel for the petitioner submitted that a decision as to whether the earlier counting had gone wrong as four votes were mixed in other bundles also lost its importance as a complete re-count was done and, therefore, nothing further was required to be done.

10. Learned counsel for the petitioner relying upon a decision of the Supreme Court reported in ***1994 Supp (2) SCC 619***

(A. Neelalohithadasan Nadar vs. George Mascrene and Others) submitted that principles of secrecy of ballot box must yield to the principle of purity of an Election in larger public interest. Since learned counsel for the petitioner read out paragraphs no. 10, 11, 12, 13 and 14 of the judgement, they are being reproduced here as under:-

"10. The existence of the principle of "secrecy of ballot" cannot be denied. It undoubtedly is an indispensable adjunct of free and fair elections. The Act statutorily assures a voter that he would not be compelled by any authority to disclose as to for whom he has voted, so that he may vote without fear or favour and free from any apprehension of its disclosure against his will from his own lips. See in this connection Raghbir Singh Gill v. Gurcharan Singh Tohral. But this right of the voter is not absolute. It must yield to the principle of "purity of election" in larger public interest. The exercise of extrication of void votes under Section 62(4) of the Act would not in any manner impinge on the secrecy of ballot especially when void votes are those which have to be treated as no votes at all. "Secrecy of ballot" principle presupposes a validly cast vote, the sanctity and sacrosanctity of which must in all events be preserved. When it is talked of ensuring free and fair elections it is meant elections held on the fundamental foundation of purity and the "secrecy of ballot" as an allied vital principle. It was observed by this Court in Raghbir Singh case' as follows (SCR p. 1320: SCC p. 68, para 23)

"Secrecy of ballot though undoubtedly a vital principle for ensuring free and fair elections, it was enshrined in law to subserve the larger public interest, namely, purity of election for ensuring free and fair election. The principle of secrecy of ballot cannot stand aloof or in isolation and in confrontation to the foundation of free and fair elections, viz., purity of election. They can coexist but as stated earlier, where one is used to destroy the other, the first one must yield to principle of purity of election in larger public interest. In fact secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country to ensure free and fair election and to unravel foul play."

11. In view of the above it is the settled position that out of the two competing principles, the purity of election principle must have its way. Section 94 of the Act cannot be pressed into service to suppress a wrong coming to light and to protect a fraud on the election process.

12. That both the election petition and recrimination petition were dealt with on the principle of "purity of election" is not in dispute. The approach of the High Court on the subject on the commonality of the attack also cannot be questioned. But what was questioned by Mr Prashant Bhushan, as reiterated in his written submissions of 14-9- 1993, was that the High Court was not correct in allowing examination of marked copies of electoral rolls and counterfoils without any evidence or material in support of the plea for inspection and that the High Court allowed the inspection casually without inviting a written application or even by a written order. It was submitted that except for pleadings in the election petition regarding void voting, there was no cause pleaded to permit the election papers to be thrown open for inspection and this exercise was termed by learned counsel as 'fishing or roving'. Rule 93 of the Conduct of Election Rules, 1961, provides for documents which shall not be 1 1980 Supp

SCC 53 :(1980) 3 SCR 1302 opened and their Contents inspected by, or produced before, any person or authority except under the orders of a competent court. On the basis thereof it was maintained that by a string of judgments of this Court it has been ruled that inspection could only be allowed when two conditions are satisfied:

1. The material facts on the basis of which inspection of documents is sought, must be clearly and specifically pleaded; and

2. The Court must be satisfied on evidence, even if in the form of Support for these principles was sought from Ram Sewak Yadav v. Hussain Kamil Kidwai1, Hariram v. Hira Singh2, R. Narayanan v. S. Semmalai3, Jagjit Singh v. Giani Kartar Singh4, Jitendra Bahadur Singh v. Krishna Behari5 and other decisions of the like.

13. But by and large these are cases where there was a claim for recount. In contrast the instant case is of double voting which has specifically been pleaded in the election petition filed on 29-7-1991 supported by affidavit and the names of the voters have been supplied in the lists annexed thereto. The appellant had filed recrimination petition pleading that there were several other cases of double voting and reception of invalid votes in favour of the election petitioner. This written statement-cum- recrimination petition was filed on 10-9-1991. Issues were framed on 20-9-1991. The election petitioner on 26-9-1991 was allowed to amend the Election Petition so as to include 10 more cases of double voting. The corresponding amendment application filed by the appellant for taking into account details of double voting having taken place in another neighbouring constituency was rejected by the High Court for it was based on a new charge. The second amendment application of the election petitioner was allowed on 7-10- 1991 so as to include 23 more cases of alleged double voting. It is at that stage that is on 7-10-1991 that the Court permitted inspection of the counterfoils since several double voters had been summoned for the following day to appear on 8-10-1991 and subsequent days, on the oral prayer/application of both the election petitioner and the appellant. The court apparently took into account that since witnesses were to be examined on the question of their double voting and were expected to take a positive stand, it would become necessary to corroborate or confront them with the counterfoils of the ballot papers issued to them which purported to have been signed or not by them, in order to save time lest examination of the witnesses be time consuming. The Court allowed inspection of the roll and counterfoils in order to facilitate evidence of the witnesses on the date of their appearance, which was the following day. The suggestion no doubt was oral but the Court seemed to agree with the suggestion and inspection was permitted to both parties in the presence of the Registrar. The commonality of the approach of the parties on the question of double voting must have clearly goaded the Court to adopt such measure to facilitate quick trial. It is the case of the election petitioner that the counsel for both the parties inspected the counterfoils on 7-10-1991 in the Registrar's room as also on subsequent days, even though there was no written application made and there was no formal written order of the Court. Yet the inspection was open to both the parties without any objection having ever been raised by the appellant. In the facts and circumstances, we fail to see how the principle of secrecy of ballot can be imported to question the power of the Court to orally allow inspection in its

endeavour to eliminate the impurity in elections, the opportunity provided having been availed of without demur by both parties. In this situation, it is difficult for us to digest the argument that here the High Court proceeded to allow inspection without being satisfied on evidence, even in the form of affidavit, that it was necessary to allow inspection in the interest of justice. Since the names of the voters who were alleged to have double voted, had specifically been pleaded in the election petition (as amended from time to time) and the recrimination petition, it was necessary to correlate their names with the electoral rolls and the counterfoils of the ballot papers so that in case of double voting or impersonated voting, the impure element in the election process could be identified and retrieved from the election package. The primary purpose thus was to purify the electoral process and not to hunt or hound the voter's choice, when exercised validly and freely. It is for that purpose that the Court, in the interest of justice, to facilitate a quick trial permitted the parties to inspect beforehand the records but after the framing of the requisite issues arising from the pleadings of the parties and not earlier. This approach could not be termed as permitting a 'roving or fishing' enquiry, as it is sometimes described in cases of a claim for re-count. We are thus of the view that the High Court committed no error in permitting such inspection in the facts and circumstances. We must, however, hasten to clarify that we should not be understood to approve of the High Court giving oral directions in such serious matters without insisting on a formal application setting out how a prima facie foundation was laid for the grant of such relief.

14. Another argument put forth by Mr Prashant Bhushan was that the pleadings in the election petition were insufficient to justify inspection inasmuch as except for mentioning that there had been double voting by 19 persons nothing else was stated about the basis on which the election petitioner came to the conclusion that these names, which apparently had appeared twice in the electoral roll, belonged to one and the same person and that those persons had in fact voted twice. It was also commented that no material facts, in the form of affidavits by single persons or polling agents alleging that they had seen and heard about those persons having voted twice. was filed in support of the petition. It is maintained that in the absence of evidence of these particulars being pleaded as to the source of knowledge of double voting it was dangerous to allow enquiring into such an allegation on the bare allegation of double registration of votes and possible double voting. We have pondered over this matter but regretfully do not accept the argument of the learned counsel. If a name has been registered twice enabling a person to take the advantage of voting in two different polling stations, Section 62 mandates that if he polls both these votes then both votes are void. A void vote cast is a vote void ab initio. In the nature of things the void taint in the election would have to be traced to the election papers for without that bare oral evidence would be of no use, and at best would be word against word, making application of Section 62(4) welling impossible. If the election petitioner on some information, material or otherwise is able to entertain the belief that a particular voter, double registered, is known to have voted twice, he can certainly plead to that fact on his own entertained belief and need not ordinarily resort to giving details of the sources of his information or knowledge or

the entertainment of his belief because registration of double vote is by itself the starting point; the exercise of both votes being the second. The election petitioner had specifically mentioned and in clear-cut terms that 19 persons had double voted. The question was not resoluble merely on oral evidence, whether they had or had not, except to put those persons into the witness box, hear their version and confront them with the election papers. The sphere of enquiry at that stage is to the voting and not for discovering the name of the person to whom the vote was cast. That inevitably has to be found out after double voting or impersonated voting has been found out leading to the new step to trace them and nullify them. On the pleading of the parties as such, on both sides, a case for inspection at the stage when it was done had been made out. We thus find no error committed in the approach of the High Court. "

11. Learned counsel for the petitioner also relied upon ***T.A. Ahammed Kabeer vs. A.A. Azeez and Others reported in 2003 (6) AIC 601(S.C.)*** and since he specially referred to the paragraphs no. 26, 27, 28 and 29 of the judgement, they are being reproduced here as under:-

"26. The task before an Election Judge is ticklish. It is often urged and also held that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. On account of a rigid following of these principles the election courts are inclined to lean in favour of the returned candidates and place the onus of proof on the person challenging the result of election, insisting on strict compliance with the rules of pleadings and excluding such evidence from consideration as is in divergence with the pleadings. However, what has so developed as a rule of practice should not be unduly stretched; for the purity of the election process needs to be preserved unpolluted so as to achieve the predominant goal of democracy that only be should represent the constituency who has been chosen by the majority of the electors. This is the purpose and object of the election law.

27. Though the inspection of ballot papers is to be allowed sparingly and the Court may refuse the prayer of the defeated candidate for inspection if, in the garb of seeking inspection, he was indulging into a roving enquiry in order to fish out materials to set aside the election, or the allegations made in support of such prayer were vague or too generalized to deserve any cognizance. Nevertheless, the power to direct inspection of ballot papers is there and ought to be exercised if, based on precise allegations of material facts, also substantiated, a case for permitting inspection is made out as is necessary to determine the issue arising for decision in the case and in the interest of justice. As held by the Constitution Bench in Ram Sewak Yadav v. Hussain Kamil Kidwai and Ors., , an Election Tribunal has undoubtedly the power to direct discovery and inspection of documents within the narrow limits of Order XI of Code of Civil Procedure. Inspection of documents under Rule 15 of Order XI of Code of Civil Procedure may be ordered of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party, and under Rule 18(2) of other documents in the possession or power of the other party. The returning officer is not a party to an election petition and an order for production of the ballot papers cannot be made under Order XI of Code of Civil

Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the returning officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers which power is clearly implicit in Sections 100(1)(d)(iii), 101, 102 and Rule 93 of the Conduct of Election Rules 1961. This power to order inspection of the ballot papers which is apart from Order XI Code of Civil Procedure may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by Sections 94 and 128(1). However, the Constitution Bench has cautioned, by the mere production of the sealed boxes of ballot papers before the Election Tribunal pursuant to its order the ballot papers do not become part of the record and they are not liable to be inspected unless the Tribunal is satisfied that such inspection is in the circumstances of the case necessary in the interests of justice.

28. It is true that a recount is not be ordered merely for the asking or merely because the Court is inclined to hold a recount. In order to protect the secrecy of ballots the Court would permit a recount only upon a clear case in that regard having been made out. To permit or not to permit a recount is a question involving jurisdiction of the Court. Once a recount has been allowed the Court cannot shut its eyes on the result of recount on the ground that the result of recount as found is at variance with the pleadings. Once the Court has permitted recount within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the recount which has to be given effect to.

29. So also, once the Court exercise its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of any vote which is void by reference to the election result of the returned candidate under Section 100(1)(d)(iii), as also as to the result of the election of any other candidate by reference to Section 97 of the Act and enters into scrutiny of the votes polled, followed by recount, consistently with its findings on the validity or invalidity of the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out true result of recount though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount have relevant for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to."

12. He, therefore, submitted that when there was recounting done and that too on the basis of a valid order of the Revisional Court which had never been put to challenge by the respondent no.4, then the result of the recount alone should prevail and no further findings on other issues were required.

13. Learned counsel for the petitioner further submitted that it mattered little that as per the order dated 24.1.2019 of the High Court, the Election Officer had not been made a party as in Rule 3(2) of the *Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994 (hereinafter referred to as 'the 1994 Rules')* only such persons whose election

had been questioned were to be impleaded as parties. The unsuccessful candidates had also to be arrayed as respondents in the election petition. As learned counsel for the petitioner heavily relied upon Rule 3(2) of the 1994 Rules, the same is being reproduced here as under:-

3. Election Petition. - (2) The person whose election is questioned and where the petition claims that the petitioner or any other candidates shall be declared elected in place of such person, every unsuccessful candidate shall be made a respondent to the application.

14. Learned counsel further relied upon 2 decisions of the Supreme Court reported in **2002 (3) SCC 521 (Michael B. Fernandes vs. C.K. Jaffer Sharief and Others)** and **AIR 1982 SC 983 (Jyoti Basu and others v. Debi Ghosal and others)** and submitted that only relevant parties had to be arrayed in the election petition. Learned counsel for the petitioner submitted that even though the non-impleadment, despite an assurance in the High Court, was something which had to be decried, but on that basis the Revisional Court could not have allowed the Revision.

15. Learned counsel appearing for the respondent no. 4, however, submitted that when there was a specific remand made by the Revisional Court by its order dated 31.5.2018 then the grounds on the basis of which the remand was made ought to have been addressed and the Prescribed Authority could not have traveled beyond the remand order.

16. Learned Standing Counsel adopted the arguments made by the counsel for the respondent no.4.

17. Having heard the learned counsel for the petitioner, the learned counsel for the respondent no. 4 and the learned Standing Counsel, I am of the view that when there was no allegation with regard to outside votes being included by the counting authorities and the only allegation was with regard to wrong counting of votes cast in favour of the petitioner then a re-count was the only method by which the Prescribed Authority could have found out as to whether the counting was done properly.

18. In the instance case, when the recounting had been done and it was found that 988 votes were cast in favour of the petitioner, which number was greater than the votes which were cast in favour of the respondent no. 4 then no further findings with regard to the other issues were required. Finding with regard to votes which had been cast in favour of the petitioner had put to rest the controversy and returning of findings with regard to other controversies would have been an exercise in futility.

19. So far as the question of impleading the Election Officer was concerned I hold that when the requirement of Rule 3(2) of the 1994 Rules was not there then it was not essential to implead the Election Officer at all. However, the petitioner in the writ petition ought to have been more cautious in giving statements before the High Court. The practice of giving statements before the High Court and not following them is decried.

20. Under such circumstances, I find that the Revisional Courts order dated 23.10.2019 passed by the Additional District Judge Room No. 4, Amroha,

District - Amroha in Panchayat Raj Revision No. 1 of 2019 (Zeenat Fatma vs. Irshad Fatma and others) cannot be sustained in the eyes of law and thus is set aside. The writ petition is allowed.

21. The petitioner shall now, in view of the order dated 24.4.2019 passed by the Prescribed Authority in the Election Petition, shall be treated as a Pradhan of Gram Panchayat Fanderi, Tehsil Dhanaura, District- Amroha.

(2020)1ILR 533

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 8303 of 2019

Smt. Rajani Bala Rastogi ...Petitioner
Versus
Sanjay Kumar Gupta ...Respondent

Counsel for the Petitioner:
Sri Bhanu Bhushan Jauhari, Sri Rishi Bhushan Jauhari

Counsel for the Respondent:
Sri Lallan Verma

A. Civil Procedure Code (5 of 1908), O.41, R.27 - Additional evidence in Revision - application under Order 41 Rule 27 for bringing additional evidence should be decided at the time of final hearing of Revision - taking a view on the application before hearing of the Revision, inappropriate.

Petitioner-revisionist filed Application under Order 41 Rule 27 of CPC for producing additional evidence, which was decided prior to finally deciding the Revision - ***Held*** - it should have been heard and decided at the time of final hearing of Revision (Para 10 & 11)

Matter Under Article 227 allowed. (E-5)

List of cases cited: -

1. St. of Raj Vs T.N. Sahani & Ors (2001) 10 SCC 619

2. Smt. Sandal (Deceased) & anr Vs. Smt. Hamida & Ors 2018 (3) ADJ 415

3. Basayya I. Mathad Vs Rudrayya S. Mathad & ors 2008 (71) ALR 178

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

1. Heard learned counsel for the petitioner and Sri Lallan Verma, learned counsel for the respondent.

2. By way of present petition, petitioner is assailing the order dated 11.09.2019 passed in S.C.C. Revision No. 1 of 2018 (Smt. Rajani Bala Rastogi Vs. Sanjay Kumar Gupta).

3. Learned counsel for the petitioner submitted that petitioner has filed an application under Order 41 Rule 27 of CPC for production of additional evidence in Appellate Court which was rejected by the Revisional Court vide order dated 11.09.2019. Apart from many other grounds, he has submitted that this application can only be decided at the time of final hearing of the Revision and not before that by a separate order. In support of his contention, he has placed reliance upon the judgment of Apex Court passed in the matter of State of **Rajasthan Vs. T.N. Sahani and others, (2001) 10 SCC 619** decided on 12.10.2000 and also judgment of this Court passed in the matter of **Smt. Sandal (Deceased) and another Vs. Smt. Hamida and others, 2018 (3) ADJ 415** decided on 04.09.2017 and submitted that in the light of

provisions of Order 41 Rule 27 of CPC as well as judgment given by the Apex Court in the matter of **State of Rajasthan (Supra)** and by this Court in the matter of **Smt. Sandal (Deceased) (Supra),** impugned order is bad in law and is liable to be set aside.

4. Sri Lallan Verma, learned counsel for the respondent has vehemently opposed the argument of counsel for the petitioner and submitted that it is not open for the revisionist to file additional evidence at any time. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the matter **Basayya I. Mathad Vs. Rudrayya S. Mathad and others, 2008 (71) ALR 178** decided on 24.01.2008.

5. I have considered the rival submissions made by learned counsel for the parties as well as judgments relied upon and perused the record.

6. There is no factual dispute in the argument of counsel for the petitioner, therefore, I have proceeded to consider the legal submissions made by counsel for the petitioner and judgments relied upon them.

7. The Apex Court in the matter of **State of Rajasthan (Supra)** has clearly stated that the application for additional evidence can only be decided at the time of final hearing of the Revision and not before final hearing of the Revision by a separate order. Relevant paragraph No. 4 of the judgment is quoted below:-

"4. It may be pointed out that this Court as long back as in 1963 in K. Venkataramiah v. Seetharama Reddy pointed out the scope of unamended provision of Order 41 Rule 27(c) that though there might well be cases where even though the court found that it was able to pronounce the judgment on the state of the record as it was, and so, additinla evidence could not be required to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. This is entirely for the court to consider at the time of hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the court to look into the documents and for that purpose amended provision of Order 41 Rule 27 (b) CPC can be invoked. So the application under Order 41 Rule 27 should have been decided along with the appeal. Had the Court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner it would have allowed the same; if not, the same would have been dismissed at that stage. But taking a view on the application before hearing of the appeal, in our view, would be inappropriate. Further the reason given for the dismissal of the application is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh in accordance with law."

8. The same view was also taken by this Court in the matter of **Smt. Sandal (Deceased) (Supra)**. Relevant paragraph Nos. 13, 14 & 15 of the said judgment is quoted below:-

"13. As to the stage of consideration it has been held that even if an application for additional evidence under Order 41 Rule 27 CPC is filed during the pendency of the appeal, it has to be heard at the time of final hearing of the appeal i.e. at the stage when it is possible for the court to reach at its conclusion, after appreciating the evidence already on record that the additional evidence was required to be admitted on record in order to pronounce the judgment or for any other substantial cause.

14. The reason behind is that in case such an application is considered and allowed at a prior stage, the order would be a product of total and complete non application of mind to the question as to whether such evidence is required to be taken on record to pronounce the judgment or not.

15. Thus from a careful reading of the above noted judgement, the principles laid down therein as noted above, the law relating to admission of additional evidence under Order 41 Rule 27 CPC is crystal clear. The Court for taking such evidence on record has to exercise its judicial discretion circumscribed by the limitations provided under the statutory provision and that such a consideration can only be made at the time of final hearing of the appeal as it would not be possible for the first appellate court to appreciate the evidence already on record and to record reasons for doing so, at a prior stage."

9. The judgment of Apex Court in the matter of **Basayya I. Mathad (Supra)** is not contrary to the judgments of the Apex Court passed in the matter of **State of Rajasthan (Supra)** and in fact the judgment of **Basayya I. Mathad (Supra)** is only saying that parties to the lis are not entitled to produce additional evidence as of course or routine but must satisfy the conditions stated in Sub-Clause (a) & (aa) of Order 41 Rule 27 of CPC. Relevant paragraph of the judgment of **Basayya I. Mathad (Supra)** is quoted below:-

"8. .....

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission. It is clear that parties to the lis are not entitled to produce additional evidence as of course or routine but must satisfy the conditions stated in sub-clauses (a)&(aa). Admittedly, such recourse has not been resorted to neither by the party concerned nor adhered those principles by the High Court. Paragraph 3 of his order shows that the learned Judge verified the document produced on his direction without complying the mandate as provided under Rule 27 of Order XLI. Hence, we are of the view that the finding of the learned Judge based on a document produced at the time of argument de hors to Rule 27 referred above cannot be sustained in the eye of law. In such circumstances, his ultimate conclusion treating the suit property as a family property partible among the members of the family is also liable to be set aside. In fact, sub-clause (2) of Rule 27 mandates that wherever additional evidence is allowed to be produced by an Appellate Court, it shall record the reason for its admission. It is needless to mention that the High Court neither followed those conditions for production of additional evidence nor recorded the reason for basing reliance on the same."

10. Law laid down by the Apex Court in the matter of **Basayya I. Mathad**

(Supra) can be very well raised by the respondent-plaintiff at the time of final hearing objecting the application filed under Order 41 Rule 27 of CPC, but so far as law laid down by the Apex Court in the matter of **State of Rajasthan (Supra),** it is very much clear that the application filed under Order 41 Rule 27 of CPC can be decided at the time of final hearing of Revision.

11. In the present case, there is no dispute on the point that the application of petitioner-revisionist has been filed under Order 41 Rule 27 of CPC for producing additional evidence which was decided prior to finally deciding the Revision whereas in the light of law laid down by this Court, it should have been heard and decided at the time of final hearing of Revision i.e. at the stage when it is possible for the Court concerned to consider this fact that whether additional evidence is required to be taken on record to decide the case or for substantial justice, therefore, impugned order is bad in law and is liable to be set aside.

12. With the aforesaid observations, impugned order is hereby set aside and petition is **allowed.**

13. No order as to costs.

14. Revisional Court is directed to decide the application of the Revisionist filed under Order 41 Rule 27 of CPC in the light of law laid down by the Apex Court as well by this Court.

(2020)1ILR 536

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Matters Under Article 227 No. 8804 of 2019

Makkhan Singh & Anr. ...Petitioners
Versus
Shyam Singh & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manish Dev Singh

Counsel for the Respondents:
Sri Sukesh Kumar

A. Civil Procedure Code (5 of 1908), Order 39 Rule 2A - *'wilful disobedience'* - to attract the provisions of O. 39 R. 2A - it has to be proved to satisfaction of Court that disobedience was not mere 'disobedience' but a *'wilful disobedience'* , by *cogent evidence,* by the party which complains of the breach - There must be clear proof that the injunction order was *within full knowledge* of the person who is alleged to have disobeyed the same - A person cannot be held to be guilty merely on the basis of a *constructive notice* or *presumption with regard to service of notice* – Court cannot proceed on surmises, suspicion or inferences.

Ad-interim injunction directing parties to maintain status quo - notice sent by registered post to the defendants - defendants harvested the wheat crop - *Held* - no material on record to show that injunction order served on the defendants - a case of willful disobedience had not been made out so as to attract the provisions of Order XXXIX Rule 2A. (Para 14, 15, 16 & 18)

Matter Under Article 227 dismissed. (E-5)
List of cases cited: -

1. C.C. Alavi Haji Vs. Palapetty Muhammed and another (2007) 6 SCC 555

2. U.C. Surendranath Vs. Mambally's Bakery AIR 2019 SC 3799

3.FoodCorporation of India Vs. Sukh Deo Prasad (2009) 5 SCC 665

4.Shalini Shyam Shetty & Anr.Vs Rajendra Shankar Patil (2010) 8 SCC 329

5. Radhey Shyam & Anr. Vs. Chhabi Nath & Ors (2015) 5 SCC 423

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

1. Heard Sri Manish Dev Singh, learned counsel for the petitioner and Sri Sukesh Kumar, learned counsel appearing for the respondents.

2. The present petition seeks to assail the order dated 25.10.2019 passed by the Additional District Judge, Court No. 2, Aligarh in Misc. Civil Appeal No. 40 of 2019 (Shyam Singh and another vs. Makkhan Singh).

3. In terms of the aforesaid order, an appeal preferred by the defendant respondents under Order XLIII Rule 1 (r) C.P.C. has been allowed and the order dated 10.04.2019 passed by the Civil Judge (Senior Division) Aligarh in Misc. Case No. 3800015 of 2016 (Sri Makhhan Singh and another Vs. Sri Shyam Singh and others), whereby the defendants had been held to be guilty and the trial court had sentenced them to undergo civil imprisonment for a period of three months, has been set aside.

4. Contention of learned counsel appearing for the plaintiff/petitioners is that the order of ad-interim injunction granted in favour of the plaintiffs on 28.11.2016 directing the parties to maintain status quo regarding the disputed property till the next date was sent by registered post dated 29.11.2016 and inspite of that the defendants harvested the wheat crop standing on the disputed land which was a clear breach of the ad-interim injunction and accordingly the trial court had rightly passed the order under Order XXXIX Rule 2A and the appellate court erred in setting aside the same. Reliance has been placed on the judgment in the case of **C.C.Alavi Haji Vs. Palapetty Muhammed and another1** for the proposition with regard to the presumption of service of notice in a case of a notice sent by registered post.

5. Per contra, learned counsel appearing for the defendant respondents has supported the order passed in the Misc. Civil Appeal by submitting that the injunction order having never been served, the defendants could not be held to be guilty of breach of the said order and the finding recorded by the trial court with regard to sufficiency of service was erroneous. It is further submitted that there was no material to prove the exclusive ownership and possession of the disputed land by the plaintiffs or that the crops had been sown by them. Further, it is submitted that the defendants having been duly recorded as co-sharers in the revenue records the trial court could not have overlooked the same. Reliance has been placed on the judgment in **U.C.Surendranath Vs. Mambally's Bakery2** to contend that in order to attract the provisions under Order XXXIX Rule 2A it should not be a mere case of 'disobedience' but the same should be demonstrated to be a case of 'willful disobedience'.

6. The question which was under consideration in the Misc. Civil Appeal was as to whether the defendants could be held to be guilty of disobedience or breach

of injunction so as to attract the provisions contained under Order XXXIX Rule 2A.

7. The Court hearing the Appeal in order to decide the aforesaid question framed the following points of determination.

"1.Whether there was some injunction order passed by the Court ?

2. Whether the injunction order was conveyed to or served upon the appellants/contemnors?

3. Whether the appellants/contemnors had time and means to obey the order?

4. Whether the disobedience or breach was deliberate and willful?"

8. The point no. 1 with regard to the existence of the injunction order was answered in the affirmative. As regards the point no. 2, which was as to whether the injunction order had been served upon the defendants the appellate court upon considering the material on record has drawn a conclusion that it was not clear as to when and on which date the notices were served on the defendants and has accordingly held that there was no clinching evidence regarding service of notice. It has taken note of the fact that the trial court had not given any cogent reason to arrive at a conclusion that service of notice on the defendants was sufficient. Having held the service of notice of the ad-interim injunction order on the defendants to be not sufficient, the appellate court held that nothing further was required to be looked into. Further, taking notice of the fact that the disputed property was a joint property and no partition having taken place the order of status quo would not have the effect of dispossessing either of the parties and also taking into consideration that there was nothing to suggest that the status quo order was also intended to restrain the continuance of the agricultural activity, the alleged act of breach was held to be not deliberate or willful and accordingly the order of civil incarceration passed by the trial court has been set aside.

9. The issue which thus falls for consideration by this Court is as to whether an allegation of disobedience merely on the basis of a constructive notice or a presumption with regard to service of notice would be sufficient to attract the provisions under Order XXXIX Rule 2A or as to whether the said powers can be invoked only in a case of 'willful disobedience' where the injunction order the breach of which is alleged was in the knowledge of the person against whom the application has been made.

10. In order to appreciate the controversy Rule 2A under Order XXXIX C.P.C. as inserted by The Code of Civil Procedure (Amendment) Act 1976 [Act 104 of 1976], may be adverted to. For ease of reference the aforementioned provision is being extracted below:-

"2A.Consequence of disobedience or breach of injunction.- (1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, of the court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding

three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto."

11. The scope of the powers exercised by a court under Order XXXIX Rule 2A came up for consideration in the case of **Food Corporation of India Vs. Sukh Deo Prasad3** and it was held that these powers are punitive in nature akin to the powers to punish for civil contempt in the Contempt of Courts Act, 1971 and therefore the person who complains of disobedience or breach has to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or breach of such order. The Court exercising powers under Order XXXIX Rule 2A cannot proceed on surmises, suspicion or inferences. The observations made in the judgment are as follows:-

"38. The power exercised by a court under order 39, Rule 2-A of the Code is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. The person who complains of disobedience or breach has to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or breach of such order. While considering an application under order 39 Rule 2-A, the court cannot construe the order in regard to which disobedience/breach is alleged, as creating an obligation to do something which is not mentioned in the "order", on surmises, suspicions and inferences. The power under Rule 2-A should be exercised with great caution and responsibility.

39. It is shocking that the trial court had entertained an application under Order 39 Rule 2-A from a person who was not entitled to file the application, has accepted an interpretation of the order which does not flow from the order, and has created a liability where none existed, resulting in attachment of the assets of FCI to an extent of more than Rs.1.12 crores. The order dated 15.12.2004 cannot be supported or sustained under any circumstances."

12. The provisions contained under Order XXXIX Rule 2A came up for consideration in a recent judgment in the case of **U.C. Surendranath Vs. Mambally's Bakery2** wherein it has been stated that for holding a person guilty of willful disobedience under Order XXXIX Rule 2A there has to be not mere 'disobedience' but it should be a 'willful disobedience' and that the allegation of willful disobedience being in the nature of criminal liability the same has to be proved to the satisfaction of the court that the disobedience was not mere 'disobedience' but a 'willful disobedience'. The observations made in this regard in the judgment are as follows:-

"7. For finding a person guilty of willful disobedience of the order under XXXIX Rule 2A C.P.C. there has to be not mere "disobedience" but it should be a

"willful disobedience". The allegation of willful disobedience being in the nature of criminal liability, the same has to be proved to the satisfaction of the court that the disobedience was not mere "disobedience" but a "willful disobedience". As pointed out earlier, during the second visit of the Commissioner to the appellant's shop, tea cakes and masala cakes were being sold without any wrappers/labels. The only thing which the Commissioner has noted is that "non removal of the hoarding" displayed in front of the appellant's shop for which the appellant has offered an explanation which, in our considered view, is acceptable one."

13. It therefore follows that the powers of Rule 2A of Order XXXIX can be invoked only in a case of a willful disobedience and in a case where the defendant had no knowledge of the injunction order of which breach was alleged, a case of willful disobedience cannot be made out so as to invite the wrath of the penal action as envisaged in the said provision.

14. The proceedings under Rule 2A of Order XXXIX are of a serious nature and in terms thereof the Court is empowered to take away the liberty of an individual and order detention of the person who violates the order. The power being of a penal nature the burden lies heavily on the person who alleges disobedience to prove the offence beyond reasonable doubt.

15. The powers under Rule 2A therefore cannot be exercised on a mere apprehension or as a matter of course in the absence of clear proof that the order which was to be obeyed was clear, unambiguous and within full knowledge of the person who is alleged to have disobeyed the same. There is no room for inferring an intention to disobey an order unless the person charged had knowledge of the order.

16. Before punishment can be imposed for breach of injunction the party which complains of the breach would be required to establish that the order of injunction is not open to two interpretations and the same is unambiguous and the act complained is not in good faith.

17. Rule 2A under Order XXXIX C.P.C. as inserted by the Amendment Act, 1976 deals with punitive consequences for the disobedience or breach of an order of injunction granted by the civil court. It provides for attachment of the property of the person in breach and also for detention in civil prison. The power under this provision is somewhat identical to the civil contempt jurisdiction and enables the civil courts which are not courts of record to effectively implement their orders.

18. In the facts of the present case the Appellate Court having recorded a conclusion that there was no material to show that the injunction order had been served on the defendants, a case of willful disobedience had not been made out so as to attract the provisions of Order XXXIX Rule 2A.

19. The order passed by the Appellate Court setting aside the order of the Trial Court, in the said circumstances cannot be faulted with.

20. As regards the contention raised on behalf of the plaintiff/petitioners with

regard to presumption of service of notice in a case of a notice sent by registered post there can be no quarrel with the aforesaid proposition. However, in order to attract the provisions under Order XXXIX Rule 2A there has to be not mere 'disobedience' but it should be a 'willful disobedience' and the act of willful disobedience is required to be proved by cogent evidence and a person cannot be held to be guilty of the disobedience merely on the basis of a constructive notice or a presumption with regard to service of notice. In this regard, reference may be had to the observations made in the case of **Rajendra Sharma Vs. Satish Chandra Garg & others4.**

"13. We have perused these and we find that in the affidavit the appellant in para 3 has stated that respondent nos. 1 to 3 were bound by the order dated 23rd February, 2004 being successor in interest of the third party. This statement is not a statement of fact but it is a legal principle which may amount to constructive notice of the injunction order dated 23.2.2004 but for constituting willful disobedience of the injunction order the disobedience must be willful and both should be proved by cogent evidence. A person cannot be held guilty of such disobedience merely on the basis of constructive notice or surmises."

21. This Court may also take notice of the fact that the power of superintendence conferred under Article 227 is discretionary and is to be exercised very sparingly on equitable principles. The power of interference under Article 227 by exercising this reserve and exceptional power is to be kept to the minimum and the Court exercising this power cannot act as a Court of appeal over the orders of the Court or tribunal subordinate to it. The parameters of interference by High Courts in exercise of its power of superintendence are to be guided by the principles laid down in the case of **Waryam Singh and another Vs. Amarnath and another5** and reiterated in **Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil6** and also in **Radhey Shyam & Anr. Vs. Chhabi Nath & Ors.7**

22. Counsel for the petitioner has not been able to point out any material error or illegality in the orders passed by the court below so as to warrant interference in exercise of power under Article 227 of the Constitution of India.

23. The petition lacks merit and is accordingly dismissed.

(2020)1ILR 540

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Matters Under Article 227(Crl.) No. 9699 of 2019

Smt. Munni Devi & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Shivajee Singh Sisodiya

Counsel for the Respondents:
G.A., Sri Kunwar Tejandra Bahadur

A. Criminal Procedure Code, 1973 - Section 197 - Summoning of Area Lekhpal - If Area Lekhpal, in performance of his official duty, has got some act done, under conspiracy, then, that is an act or offence, committed by a public servant, in performance of his official duty - for taking cognizance, for such offence, sanction of the competent

authority, under Section 197 of Cr.P.C., is to be taken - No recital in the impugned order as to whether any sanction of competent authority was taken for taking cognizance against Area Lekhpal – Impugned order set aside.

B. Criminal Procedure Code, 1973 - summoning order - Allegation that accused by committing fraud got her name mutated with respect to Arazi no. 472 and took possession - *Held* - no document regarding mutation for Arazi No.472 was placed before court below - name of complainant shown in Khatauni for Arazi No. 472 - so far as illegally taking of possession and raising construction over Arazi No.472 - there can be no summoning unless this fact is being adjudicated upon by the civil/revenue court which is competent to dispossess an encroacher.

Matter Under Article 227 allowed. (E-5)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This proceeding, under Article 227 of the Constitution of India, has been filed by Munni Devi and three others, with a prayer for setting aside order, dated 23.11.2019, passed by the Additional Sessions Judge, Court No.15, Bareilly, in Criminal Revision No. 140 of 2019/C.N.R. No. UPBRO 1-004303-2019 (Munni Devi & others vs. State of U.P. and another) as well as order, dated 26.2.2019, passed by Additional Chief Judicial Magistrate, Court No.6, Bareilly, in Complaint Case No. 3207 of 2018 (Chheda Lal Vs. Munni Devi & others), under Sections 420, 467, 468, 471 and 506 of Indian Penal Code, Police Station-Fatehganj Paschimi, District Bareilly.

2. Learned counsel for applicants argued that a case crime number was got registered upon a report of Chheda Lal, after lapse of 22 years, as Case Crime No. 482 of 2012, under Sections 420, 467, 468, 471 and 506 of Indian Penal Code, Police Station-Fatehganj Paschimi, District-Bareilly, wherein, investigation resulted in submission of final report. Thenafter, a protest petition was filed, wherein, Magistrate took cognizance, examined complainant and his two witnesses, under Sections 200 and 202 of Cr.P.C. Thereafter, complaint was dismissed, under Section 203 of Cr.P.C.

3. Against this order of the Magistrate, a criminal revision was filed, wherein, revisional court set aside order, dated 9.11.2017 of the Magistrate, thereby, allowed criminal revision and remanded back matter for fresh adjudication over protest petition.

4. In compliance whereof, Magistrate passed impugned order of summoning, wherein, applicants, Munni Devi, Ram Murti, Shiv Mangal, Indresh and Naqi Raza Khan, have been summoned for offences, punishable, under Section 420, 467, 468, 471 and 506 of IPC. Both of these courts have failed to appreciate facts and law placed before them and have committed misuse of process of law. Hence, invoking jurisdiction of this Court of general superintendence over subordinate courts, as conferred upon it by Article 227 of the Constitution of India, this Application has been filed, with above prayer.

5. On the other hand, learned counsel, appearing on behalf of Opposite party no.2, argued that sale of Arazi No. 489 was made by way of a registered deed, in favour of Munni Devi, but, under connivance with Area Lekhpal, Naki Raza Khan, mutation was got made, with respect of Arazi No.472, which was adjacent to road and possession was taken

over it. On protest being made, accused-persons, abused and extended threat of dire consequences. Hence, an application was moved and a civil suit was also filed, wherein, there is an order in favour of Opposite parties and learned Additiional Sessions Judge has rightly appreciated facts and law, thereby, allowed criminal revision, remanded back the matter for consideration by the Magistrate, whereupon, impugned summoning order has been passed. Hence, this Application is liable to be dismissed.

6. Learned AGA, representing State of Uttar Pradesh, has also vehemently opposed this Application.

7. Heard learned counsel for both sides and gone through materials on record.

8. From very perusal of the first information report, complaint, filed by way of protest petition and statements of complainant, recorded, under Sections 200 of Cr.P.C., as well as, under Section 202 of Cr.P.C. of witnesses, it is apparent that the allegations levelled by the complainant was that he had sold land of Gata No. 489 of Village-Tithariya Khetal, by way of a registered deed, dated 22.10.1990, in favour of Munni Devi and it was mutated in the revenue record on 23.1.1996. Arazi No. 489 is away from highway, whereas, Arazi No. 472 is adjacent to highway and complainant was residing at Haldwani. Hence, taking advantage of it, Munni Devi, under connivance of area Lekhpal, Naqi Raza Khan, got mutated her name for Arazi No.472, instead of, Arazi No.489 and, thereby, she got possession over it. Thereafter, construction was raised over it. Hence, it was done by committing fraud and manufacturing forged and fictitious documents, under connivance of area Lekhpal. Firstly, learned Magistrate dismissed complaint, thenafter, on the same evidence, in compliance of order of revisional court, passed impugned summoning order, whereas, no document regarding mutation for Arazi No.472 was placed before both of the courts, rather, mutation for Arazi No. 489 was there. A judgment of civil court, rendered in, Original Suit No. 18 of 2012, Chheda Lal vs. Munni Devi, decided on 5.1.2019, has been filed before this Court, wherein, it is apparent that name of Chheda Lal is there in Khatauni for Arazi No. 472, meaning thereby, basic allegation of mutation for Arazi No. 472 is not substantiated by above factual position. Moreso, civil suit, before civil court, regarding registration, as well as before revenue court, regarding mutation, is admittedly, pending and this has been entered, by Investigating Officer, in submission of final report. Meaning thereby, mutation was there for Arazi No.489, which was admittedly transferred to Munni Devi and no mutation is there regarding Arazi No. 472.

9. Now so far as taking of possession and raising construction over Arazi No.472 for which there was no right is concerned, it is an offence of illegal encroachment and land grabbing, but, no summoning is for it and unless this fact is being adjudicated upon by the civil court in above civil proceeding or by revenue court, in revenue proceeding, which is competent to dispossess an encroacher from the revenue plot, in question, summoning for such an offence cannot be ordered.

10. So far as summoning of Area Lekhpal is concerned, his summoning may not be there. If Area Lekhpal, in

performance of his official duty, has got some act done, under conspiracy, then, that is an act or offence, committed by a public servant, in performance of his official duty and for taking cognizance, for such offence, sanction of the competent authority, under Section 197 of Cr.P.C., is to be taken, but, no such recital is there as to whether any sanction of competent authority was taken for taking cognizance against Area Lekhpal, Naqi Raza Khan or not.

11. Hence, under all above facts and circumstances, it is apparent that both of the courts below failed to appreciate facts and law and passed impugned orders, without there being any basis and as such both the impugned orders are being set aside and matter is being remanded back to the court of Magistrate, where, he will hear complainant and will pass summoning order, if any, afresh, after taking into consideration the materials placed before him and after making an enquiry, and also taking into consideration of relevant Khataunis, for the year concerned, for specifying as to whether mutation was there or not and if it was there and it is found to be, under any conspiracy, then sanction, under Section 197 of Cr.P.C., is there or not against Area Lekhpal, Naqi Raza Khan and the procedure, as per law, is to be adopted.

12. In view of observations made above, this Application stands disposed of accordingly.

(2020)1ILR 544

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 378 Cr. P.C.No. 69 of 2002

Panna Lal Sharma ...Appellant
Versus
State of U.P. & Anr. ...Oposite Parties

Counsel for the Appellant:
Sri Sudhir Dixit

Counsel for the Oposite Parties:
A.G.A., Sri S.P.S. Chuhan, Smt. Meenakshi Chauhan

A. Maxim- Buyer Beware

Under Transfer of Property Act, there is a principle of buyer beware. Meaning thereby, there is a legitimate expectancy about conduct of buyer. He too is expected to make inquiry from public office about the ownership of property going to be purchased or going to be transacted and if buyer is not aware, he cannot say the same to be an offence unless that comes within definition of deception. (Para 8)

B. Code of Criminal Procedure, 1973 - Section 378(4) & Indian Penal Code,1860 - Section 420 -application-grant of leave to file appeal-rejection-no wilful deception could be proved by prosecution-communication of cancellation of transfer deed by public auction before alleged transfer made by accused could not be proved. (Para 7 & 9)

In present case, no wilful deception could be proved by prosecution because complainant himself was not sure as to whether Rewati Prasad was aware of this cancellation of transfer of public property or not. His public witness too was not sure. Rewati Prasad was in possession over plot in question and he executed the same through registered sale deed. (Para 7)

Application U/S 378 Cr. P.C. dismissed. (E-6)

List of cases cited:-

1. Banwarilal v. State, AIR 1956 All 341

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 378(4) Cr.P.C. has been moved by Panna Lal Sharma with a prayer for grant of leave to file appeal against judgment of acquittal dated 02.11.2002, passed by IXth Additional Chief Judicial Magistrate, Aligarh in Complaint Case No. 1996 of 2002 (Panna Lal Sharma Vs. Rewati Prasad), under Section 420 I.P.C., Police Station Tappal, District Aligarh, whereby Rewati Prasad has been acquitted from the charge of offence punishable under Section 420 I.P.C.

2. Learned counsel for applicant argued that it was a complaint case filed against Rewati Prasad by Panna Lal Sharma, wherein he was summoned for offence punishable under Section 420 I.P.C. A sale deed was got executed by Rewati Prasad for plot no. 75 on 17.02.1993. This plot was obtained in a public auction from Sales Tax Department by Rewati Prasad and subsequently this public auction was cancelled by department concerned, of which information was communicated to Rewati Prasad on 28.07.1992. Even after being informed about ownership of plot no. 75, Rewati Prasad executed sale deed for same plot in favour of complainant for a consideration of Rs.8,500/-, which was not under his ownership. It was a deceit with complainant Panna Lal Sharma, hence above complaint was filed, in which summoning was there. This fact was proved by complainant's witness PW-1 and PW-2 by their testimony recorded under Section 444 and 446 Cr.P.C., but trial Court failed to appreciate facts and law placed before it, thereby passed impugned judgment of acquittal, which was result of perversity. Hence, this appeal with a prayer for grant of leave.

3. Learned A.G.A. argued that judgment was in accordance with evidence on record.

4. The admitted fact was that Rewati Prasad was owner in possession of plot no. 75, purchased by public auction from Sales Tax Department in the year 1992. This plot was sold to Panna Lal Sharma on 17.02.1993 by registered sale deed. Panna Lal Sharma being examined as PW-1 admitted that he got possession over above plot and it was got constructed by him. The testimony under Section 244 Cr.P.C. as of Panna Lal Sharma is of this fact that he is not personally aware as to whether communication regarding cancellation of transfer of plot by department concerned was made to Rewati Prasad or not. Rather, it came to his notice after making inquiry at Sales Tax Department in the year 1996.

5. The only question which was basis for judgment of acquittal was that neither Panna Lal Sharma nor his witness nor public witness examined as PW-3 was in position to prove that this communication of cancellation of transfer of plot in public auction was made to Rewati Prasad or not and on the basis of this fact this judgment of acquittal was passed. Moreso, admittedly Rewati Prasad was owner in possession of plot in question. He had made construction over it. He executed deed of transfer by registered sale deed. The transferee complainant got possession over it. He occupied the same and raised construction. It was never protested by anyone. Subsequently, upon inquiry it came to notice that in public office above

deed of public auction was cancelled by department concerned. He was not aware about communication of this cancellation order to Rewati Prasad, then under how and under what circumstances, this inference can be drawn that it was under willful deceit by Rewati Prasad. The public witness could also not explain as to whether communication was made to Rewati Prasad or not.

6. For an offence punishable under Section 420 I.P.C., the essential ingredients is that *"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"*

Explanation-A dishonest concealment of facts is a deception with the meaning of this section."

7. In present case, no willful deception could be proved by prosecution because complainant himself was not sure as to whether Rewati Prasad was aware of this cancellation of transfer of public property or not. His public witness too was not sure. Rewati Prasad was in possession over plot in question and he executed the same through registered sale deed.

8. Under Transfer of Property Act, there is a principle of buyer beware. Meaning thereby, there is a legitimate expectancy about conduct of buyer. He too is expected to make inquiry from public office about the ownership of property going to be purchased or going to be transacted and if buyer is not aware, he cannot say the same to be an offence unless that comes within definition of deception.

9. The word 'dishonest' in this explanation to Section 415 is significant. Not all concealment of material facts but a dishonest concealment of an important fact amounts to deception. No concealment is dishonest within the section unless the person concealing it is legally bound to disclose it. Defects in title being defects in the property under Section 55(1)(a) of the T.P. Act, there is no duty on the seller to disclose them unless the buyer could not with ordinary care finds them out. Therefore omission to disclose by the seller that there is a defect in title which defect buyer can with ordinary care discover does not mount to cheating. There is a difference between mere concealment or non-disclosure and a false representation, and while there is no legal duty placed upon the vendor of immovable property to disclose any charge or encumbrance, yet, if a false representation is made and acted upon, and as a result, money passes, then though the false representation relates to immovable property, the offence of cheating may have been committed, but Allahabad High Court in **Banwarilal v. State, AIR 1956 All 341** has propounded that vendor is to disclose previous mortgage if any, but in present case the communication of cancellation of transfer deed by public auction before alleged transfer made by accused Rewati Prasad could not be proved by prosecution. Hence, learned trial Magistrate by cogent and appropriate appreciation of facts and evidence on record came to conclusion of passing of

judgment of acquittal. There is no perversity, illegality and irregularity in the impugned judgment. There is no ground for grant of leave to appeal.

10. Accordingly, application to grant leave for filing appeal, being devoid of merits, stands **rejected.**

(2020)1ILR 547

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 13 of 2020

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

Counsel for the Petitioner:
Satpal

Counsel for the Respondents:
C.S.C.

A. U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 -Impugned order-rejecting-application for compassionate appointment-on the ground of-petitioner nominated in FIR-in an offence-involving moral turpitude-in the absence of charge sheet-this premise-illegal & non-tenable-presumption of innocence-not to be displaced-rejection based on future happening-flawed.

B. Held, In the considered opinion of this Court, therefore, the premise on which the Superintendent of Police, Deoria has proceeded to decline the petitioner's claim for compassionate appointment, is legally not tenable. The petitioner's claim has to be judged at the time when it is made and the circumstances of the petitioner on that day. It cannot be judged with reference to a conjecture about a mere future happening as indicated in the order of this Court dated 06.01.2020. Moreover, the impugned order also shows that the Superintendent of Police has taken into consideration an opinion of the District Government Counsel (Criminal), Gorakhpur dated 06.09.2019. A legal opinion may be sought by any person in matters legal, who is himself not trained in law or still if he desires better opinion. But an authority charged with jurisdiction to decide upon civil rights of parties has to do so upon an independent application of mind to the facts and evidence on record. He cannot take into consideration, while exercising his jurisdiction to decide valuable rights of parties, such as the right to appointment on compassionate basis under the Rules, a legal opinion; if he does, it would be extraneous and irrelevant material. For this reason, also, the impugned order passed by the Superintendent of Police, Deoria, is found to be flawed.

Writ Petition allowed. (E-8)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against an order dated 11.11.2019 passed by the Superintendent of Police, Deoria whereby the petitioner's application for compassionate appointment made under the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, (for short, 'the Rules') has been rejected.

2. When this matter came up first on 6th January, 2020 the following order was made:

"The petitioner's application for compassionate appointment under the U.P. Dying in Harness Rules, 1974 have

been rejected by the impugned order dated 11.11.2019. The basis for the rejection that is recorded is that the petitioner was nominated in Case Crime No. 3 of 2015, under Sections 147, 452, 323, 504, 427, 354 I.P.C., P.S. Jhagaha, district Gorakhpur. The impugned order records that during investigation, the police have found the petitioner's nomination in the crime to be incorrect and have not charge sheeted him. It is then said in the impugned order that the offence committed by the petitioner is one that involves moral turpitude and there is a possibility that the petitioner may be summoned by the Court. On the aforesaid possibility, the petitioner's claim for compassionate appointment has been rejected. Also, the Superintendent of Police, Deoria while passing the said order has taken into consideration an opinion of the District Counsel (Criminal), Gorakhpur.

The submission of the learned counsel for the petitioner is that the impugned order is manifestly illegal and takes into consideration irrelevant and extraneous material besides drawing perverse conclusions. He submits that the impugned order takes into consideration an opinion submitted by the District Government Counsel (Criminal) which is absolutely extraneous material. It is further submitted that the possibility that the petitioner might be summoned in future is nothing but a perverse conclusion. The petitioner's claim cannot be rejected on the conjecture of a mere future happening. As of day, the petitioner has not been charge sheeted and is not an accused before the Court in any criminal case.

Sri Indramani Kushwaha, learned Standing Counsel appearing on behalf of respondent Nos. 1,2 and 3 will seek instructions in the matter within three days.

Lay this matter as fresh on 10.01.2020."

3. Today, on instructions received from the Superintendent of Police, Deoria the same stand has been reiterated, to wit, that the petitioner being nominated in Case Crime No. 3 of 2015 under Sections 147, 452, 323, 504, 427, 354 I.P.C., P.S. Jhagaha, District Gorakhpur, he cannot be offered compassionate appointment for reason that though his complicity has not been found by the police during investigation, there is a possibility that in future he might be summoned by the Court. In the instructions received from the Superintendent of Police, it has also been said that the view of the Superintendent of Police is based on the advice received from the District Magistrate,Gorakhpur through a memo dated 09.10.2019, where it is said that the crime wherein the petitioner has been nominated involves moral turpitude and the possibility of the petitioner being summoned in future by the Court where other co-accused have been charge-sheeted, cannot be ruled out. The District Magistrate, Gorakhpur has opined that it would not be proper to offer compassionate appointment to the petitioner. The Superintendent of Police has further indicated his mind in the written instructions that he has given to the learned Chief Standing Counsel that he is in agreement with the report (legal opinion of the District Magistrate, Gorakhpur) and after a deep and thoughtful consideration of the matter he is of opinion that in view of registration of a crime against the petitioner he ought not to be offered compassionate appointment.

4. The written instructions received by the learned Standing Counsel are being

retained on record and made part of it. The learned Standing Counsel does not propose to file a counter affidavit.

5. Admit.

6. The writ petition is being heard forthwith.

7. Heard learned counsel for the petitioner and Sri J.S. Bundela, learned Standing Counsel appearing on behalf of all the respondents.

8. It is no doubt true that the petitioner was nominated in Case Crime No. 3 of 2015 under Sections 147, 452, 323, 504, 427, 354 I.P.C. but during investigation the petitioner has not at all been found involved and has not been charge-sheeted. Therefore, on the date when the authority has considered the petitioner's claim for compassionate appointment, the petitioner is not an accused in the case. The possibility that the petitioner may be summoned in future by the Court where other nominated accused would be tried, as they have been charge-sheeted, is a mere conjecture. There is no basis to it. It is not the respondent's case that there is already an application under Section 319 Cr.P.C. made on behalf of the complainant requesting the Court to summon the petitioner who has been exculpated by the police during the investigation. It would be well to remember that there is a presumption of innocence in favour of every citizen and that presumption cannot be displaced on assumptions of the Superintendent of Police for the mere fact that an FIR has been registered nominating the petitioner which the police themselves on investigation have found to be of no worth *vis-a-vis* the petitioner.

9. In the considered opinion of this Court, therefore, the premise on which the Superintendent of Police, Deoria has proceeded to decline the petitioner's claim for compassionate appointment, is legally not tenable. The petitioner's claim has to be judged at the time when it is made and the circumstances of the petitioner on that day. It cannot be judged with reference to a conjecture about a mere future happening as indicated in the order of this Court dated 06.01.2020. Moreover, the impugned order also shows that the Superintendent of Police has taken into consideration an opinion of the District Government Counsel (Criminal), Gorakhpur dated 06.09.2019. A legal opinion may be sought by any person in matters legal, who is himself not trained in law or still if he desires better opinion. But, an authority charged with jurisdiction to decide upon civil rights of parties has to do so upon an independent application of mind to the facts and evidence on record. He cannot take into consideration, while exercising his jurisdiction to decide valuable rights of parties, such as the right to appointment on compassionate basis under the Rules, a legal opinion; if he does, it would be extraneous and irrelevant material. For this reason also, the impugned order passed by the Superintendent of Police, Deoria, is found to be flawed.

10. In the result, this writ petition succeeds and is **allowed**. The impugned order dated 11.11.2019 passed by the Superintendent of Police, Deoria, Annexure 1 to the writ petition, is hereby **quashed.**

11. The Superintendent of Police, Deoria is ordered to decide the petitioner's claim for compassionate appointment

under the Rules, strictly in accordance with law bearing in mind what has been said in this judgment, within a period of one month positively from the date of receipt of a certified copy of this order.

12. Let a copy of this order be communicated to the Superintendent of Police, Deoria by the office within a week.

(2020)1ILR 550

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 53 of 2020

Satya Dev Yadav ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Om Prakash Rai

Counsel for the Respondents:
Sri Ankit Gaur (Standing Counsel), Sri C.B. Tripathi (Standing Counsel)

A. U.P Basic Education Staff Rules, 1973-Rule-5-Challenging-impugned Judgment & order-on the ground of-availability of statutory alternative remedy-of Appeal-against the punishment-stoppage of two increments-no such remedy available-directed to file representation-before the appropriate authority-order stands modified.

B. Held, we are of the view that appellant is at liberty to make a representation before the appropriate authority instead of preferring a statutory appeal, as held by the Learned Single Judge. The impugned order and judgment stand modified accordingly.

Special Appeal disposed of. (E-8)

(Delivered by Hon'ble Biswanath Somadder, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The instant Special Appeal arises in respect of a judgment and order dated 19th December, 2019, passed by a learned Single Judge in Writ-A No. 20402 of 2019 (Satya Deo Yadav versus State of U.P. and 4 others). By the impugned judgement and order, the learned Single Judge was pleased to relegate the writ petitioner before a statutory authority upon taking into consideration the stand taken by the learned standing counsel for the State of Uttar Pradesh to the effect that there is a statutory alternative remedy of appeal under Rule 5 of the Uttar Pradesh Basic Education Staff Rules, 1973, against the order which was impugned before the writ Court.

2. The appellant before us is the writ petitioner.

3. According to the learned advocate for the writ petitioner, the provisions of Rule 5 of the 1973 Rules do not allow the writ petitioner to prefer a statutory appeal in the facts of the present case since the punishment that has been imposed upon the writ petitioner is stoppage of two increments. At this stage, we must notice Rule 5 of the Uttar Pradesh Basic Education Staff Rules, 1973, which reads as follows :-

*"**5. Appeal.** - An appeal shall lie from an order passed by the appointing authority in respect of the posts mentioned*

in column 1 of the Schedule appended to these rules, imposing upon any officer, teacher or other employee of the Board any of the penalties mentioned below, to the appellate authority mentioned in column 3 of the said Schedule :-

(a) reduction to a lower post on time-scale or to a lower stage in a time-scale;

(b) removal from service of the Board which does not disqualify for future employment;

(c) dismissal from the service of the Board, which ordinarily disqualifies from future employment.

(2) In case of other penalties against which no appeal is provided in this rule, the punished officer, teacher or other employee of the Board may make a representation against the imposition of any of these penalties to such officer as the Director of Education (Basic) may by general orders from time to time specify in this behalf.

(3) The procedure laid down in Civil Services (Classification, Control and Appeal) Rules, as applicable to servants of the Uttar Pradesh Government shall, as far as possible, be followed in disciplinary proceedings, appeals and representations under these rules."

4. A plain reading of the aforesaid Rule, particularly, sub-rule (2) clearly indicates that in case of other penalties against which no appeal is provided in Rule 5, the punished officer, teacher or other employee of the Board may make a representation against the imposition of any of such penalties to such officers as the Director of Education (Basic) may, by general orders, from time to time, specify in this behalf.

5. In such circumstances, we are of the view that appellant is at liberty to make a representation before the appropriate authority instead of preferring a statutory appeal, as held by the learned Single Judge. The impugned judgment and order stands modified accordingly.

6. The instant Special Appeal stands disposed of in the manner as indicated above.

(2020)1ILR 551

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal No. 1430 of 2011

C/M Sri Gauri Shanker Sanskrit Maya Vidyalaya & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Ashok Khare, Sri Siddharth Khare, Sri Anshul Bhatnagar

Counsel for the Respondents:
C.S.C., Sri R.A. Akhtar, Sri V.B. Mishra

A. National Council for Teacher's Education Act, 1993 - Regulations of 2005 - special appeal-against judgment and order dated 20.05.2011-grant of recognition denied-on the ground of violation of Regulation 7 (12) - no illegality or legal infirmity committed by respondent-while granting conditional recognition-unconditional recognition-pre-requisite-for admitting students-

Regulation 8 (10)-order for conditional recognition-legal.

B. Held, admittedly, the validity of of the aforesaid Regulation was neither challenged before the Learned single Judge nor before the Special Appellate Court and hence we hold that the respondent did not commit any illegality or legal infirmity in granting conditional recognition to the appellants under Regulation 7 (12) of the Regulations of 2005 and the recognition granted by the NCTE by letter dated 26th May 2007 was a conditional recognition.

Special Appeal dismissed. (E-8)

(Delivered by Hon'ble Bala Krishna Narayana, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Anshul Bhatnagar, learned counsel for the appellant, learned Standing Counsel for respondent nos. 1, 2 and 3, Sri V.B. Mishra, learned counsel for respondent no. 4 and Sri R.A. Akhtar, learned counsel for respondent nos. 5 and 6.

2. This special appeal has been preferred by the appellants against judgment and order dated 20.05.2011 passed by learned Single Judge of this Court dismissing Writ-C No. 64960 of 2009 (C/M Shri Gauri Shanker Sanskrit Maha Vidyalaya and others vs. State of U.P. and others) with cost of Rs.50,000/-.

3. Facts of the case may be stated briefly hereinbelow:-

4. The petitioner had filed the aforesaid writ petition challenging the order dated 12.11.2009 passed by respondent no. 6, Northern Regional Committee, National Council for Teacher Education, Jaipur (hereinafter referred to as "NCTE") according recognition/ permission to the petitioner's institution for running B.Ed Course (Secondary Level) of one year for academic session 2009-10, subject to certain conditions, failing which the recognition would stand effected from academic session 2010-11.

5. According to petitioner Shri Gauri Shanker Sanskrit Mahavidyalaya, Sujanganj, Jaunpur (hereinafter referred to as "the College") is managed by a society registred under the Societies Registration Act, 1860. It was duly affiliated to Sampurnanand Sanskrit Vishwavidyalaya and is imparting instructions of studies of Shastri and Acharya. The College intended to commence Bachelor of Education Shiksha Shastri course, hence applied to NCTE for grant of approval vide application dated 24th July, 2006. A conditional letter of recognition was granted on 26th May, 2007 subject to following conditions:

"(1) Appointment of qualified staff through duly constituted selection committee as per the norms of NCTE/ State Govt. Affiliating University given effect before the commencement of the course.

(2) Send a blue print of the building plan showing clearly demarcated area for B.Ed. (add.) M.Ed. Programme.

(3) Advertisement notice.

(4) Consolidate staff list on the prescribed format duly approved by the affiliation body.

(5) Proceedings of the Selection committee along with a copy of the letter

from the affiliating body nomination a member for the selection."

6. Para 3 of the aforesaid letter contained a recital that conditional recognition was granted with the advise to remove deficiencies shown in 5th column, reproduced above, and furnish compliance within 30 days from the date of issue of the aforesaid letter. The aforesaid letter contained some more directions in paras 4, 5 and 6 of the aforesaid letter, which read as under:

"4. The institution shall undertake appointment of the staff by a duly constituted selected committee and ensure selection of candidates possessing qualifications as prescribed under rules. (Appointment shall be made on the basis of recommendations of the Selection Committee constituted as per the policy of the UGC/ Affiliating University).

5. Attention of the institution concerned is also drawn to section 7(12) of NCTE Regulations dt. 13.01.2006, which reads as "The institutions concerned, after appointing the requisite faculty/staff, shall put the information on its official website and also formally inform the Regional Committee concerned. The Regional Committee concerned shall then issue a formal unconditional recognition order". Compliance with the requirements shall be submitted on a Sworn affidavit and annexures thereto for issue of unconditional recognition order. Until then the institution shall not admit students to the course.

6. Therefore, the institution are hereby issued a letter of conditional recognition for further necessary action to submit requisite compliance and take steps as per the NCTE Rules and Regulations before the commencement of the session."

7. The letter categorically directed the College not to admit any student to the aforesaid course till an unconditional recognition was issued by the Regional Committee, NCTE.

8. The College claims to have complied with the aforesaid five deficiencies and informed NCTE vide letter dated 25th June, 2007. In the meantime State Government also issued a no objection letter on 21st June, 2007, permitting the petitioner-college to run Shiksha Shastri (B.Ed.) Course. Sampurnanand Sanskrit Vishwavidyalaya, Varanasi (hereinafter referred to as "the University") also granted affiliation/recognition as a examining body of the aforesaid course in the College vide university's letter dated 18.12.2007.

9. It is said that for academic session 2007-08, pursuant to a Joint Entrance Examination conducted by Chhatrapati Sahu Ji Maharaj University, Kanpur, 83 students were forwarded to the College for admission to the aforesaid course. The petitioner-college admitted 80 candidates out of said list in academic session 2007-08 and 20 seats remained unfilled. The aforesaid students completed their course and appeared in final examination conducted by the University. 79 students passed the examination and one failed. The students, who passed the examination, were issued marks sheet and degree by University.

10. Again for academic session 2008-09, 111 students were forwarded by the examining body i.e. Agra University out of which 94 candidates took admission in the petitioner's college.

11. It is also said that for academic session 2007-08 joint entrance examining

body namely Chhatrapati Sahu Ji Maharaj University, Kanpur forwarded 8 more candidates, who were granted admission in February, 2009.

12. The matter of unconditional recognition was considered by NCTE and vide order dated 12th August, 2009, it declined to grant recognition to petitioner's college. The petitioner filed an appeal under Section 18 of National Council for Teachers Education Act, 1993, which was allowed vide order dated 8th October, 2009 (Annexure 10 to the writ petition) pursuant whereto the impugned order of recognition has been issued by NCTE.

13. The respondent no. 4 in its counter affidavit filed before the Writ Court took the stand that affiliation was granted, only on the basis of certificate and documents sent by college regarding land and building. For the rest of the matter, it was the decision of the NCTE which was to be final. It was also stated in the counter affidavit that the subject-matter of the writ petition was primarily a dispute between the petitioner and the NCTE.

14. On behalf of NCTE, a separate counter affidavit sworn by Dr. K.S. Yadav, Regional Director, Northern Regional Committee, (NCTE) was filed. It is stated therein that conditional recognition letter specifically mentioned that until issuance of unconditional letter of recognition, the college shall not admit students to the aforesaid course. In the circumstances it was not open or permissible to the College to admit any student in the course in question. If college has done something illegal and in breach of aforesaid specific condition contained in the letter dated 26th May, 2007, it cannot take and cannot be made to take advantage of its own breach. NCTE took further stand that even if final recognition granted by NCTE is deemed to relate back to the date of grant of conditional recognition that would not allow the College to flout one of the clear mandate contained in the letter dated 26th May, 2007, which became final having never been challenged by the College before any appropriate forum.

15. In the rejoinder affidavit filed by the petitioner, the aforesaid breach was admitted but what was stated in defence was that it appeared to be a misconstruction and confusion which prevailed with the respondents. There was no deliberate omission or error on the part of the petitioner. It was also however, pointed out that when students, who were admitted in academic session 2007-08 were not being permitted to appear in examination by University the College filed writ petition no.60218 of 2008 wherein an interim order was passed on 9th February, 2009. Pursuant to the interim order, the students appeared in the examination of University. The aforesaid writ petition was disposed of finally on 4th January, 2010 with the following order:

"Today supplementary affidavit has been filed in writ petition no.60218 of 2008 annexing therewith copy of order dated 11.11.2009. This order has been passed by Northern Regional Committee, National Council for Teacher Education, Jaipur. Learned counsel for the petitioner as well as Shri Neeraj Tewari, learned counsel for Bundelkhand University and Shri Rajeev Joshi, learned for N.C.T.E state that the above order dated 11.11.2009 has been passed in pursuance of earlier order of appellate authority dated 13.7.2009. It has further been stated that in view of order dated 11.11.2009

result of the examination which has already been held under interim order passed in these two writ petitions is to be declared. In view of the above joint statement both these writ petitions are disposed of with the direction that the result of the examination which had been held under the interim order passed in these writ petitions shall be declared."

16. Learned Single Judge after considering the submissions advanced before him by learned counsel for the parties, by impugned judgment and order dismissed the writ petition holding that petitioners were not only guilty of violating statutory provisions but also letter dated 26th May, 2007 and also guilty of defrauding several students while admitting them to a course for which no permission was granted.

17. Hence this appeal.

18. It is contended by Sri Ansul Bhatnagar, learned counsel appearing for the appellants that firstly the words "unconditional recognition" mentioned in the letter dated 26th May, 2007 are a result of typographical mistake and there was no prohibition restraining the petitioner from admitting students to the B.Ed Course 2007-08 and 2008-09.

19. He next contended that once conditional recognition was granted which culminated in grant of final unconditional recognition, the students who had already been admitted by the petitioners in their institution would not have been deprived of the benefit of recognition of the Course and, therefore, the learned Single Judge committed an error apparent on the face of the record by dismissing the writ petition and denying the benefit of the recognition of the Course to the students admitted during the Sessions 2007-08 and 2008-09, as necessarily the recognition related back to the date on which conditional recognition was granted.

20. Learned counsel for the appellant in support of his aforesaid contention has placed reliance upon an unreported judgment of this Court passed by a single Bench of this Court in ***Writ-C No. 21716 of 2010 (Indira Gandhi Girls Degree College vs. National Council for Teacher Education and others),*** which has been brought on record as Annexure-8 to the affidavit accompanying the special appeal, but the same is of no help to him.

21. He has further contended that the Act does not contemplate any conditional or unconditional recognition and once recognition is granted, it is valid for all purposes and cannot be deferred so as to deprive the college from admitting the students in the course concerned.

22. Per contra, Sri V. B. Mishra, learned counsel appearing for respondent no. 4 has made submissions in support of the impugned judgment and order and he has further contended that the judgment passed by learned Single Judge is based upon relevant considerations and supported by cogent reasons and needs no interference by this Court. This appeal lacks merit and is liable to be dismissed.

23. We have heard learned counsel for the parties and perused the material brought on record.

24. As far as parties are concerned, there is no dispute about the fact that unconditional recognition was granted to the petitioner for running one year B.Ed

course by order dated 12.11.2009, issued by respondent no. 6 for the Session 2009-10. Thus, it is apparent that petitioner institution in the absence of any recognition could not have admitted students for the academic Sessions 2007-08 and 2008-09, especially in view of the specific stipulation contained in the conditional recognition to the effect that till the unconditional recognition was granted to the petitioner's college, they shall not admit any student.

25. Coming to the first contention of learned counsel for the appellant, we find the same to be without any merit. We have very carefully gone through the letter dated 26th May, 2007 issued by respondent no. 1 and the same is very specific and does not admit of any other interpretation except that until unconditional recognition was granted, the petitioners could not admit students in the one year B.Ed Course for the Sessions 2007-08 and 2008-09 and there does not appear to us to be any typographical mistake in the impugned order.

26. Coming to the issue upon which the second ground of challenge is based, we find that the said issue has been addressed by the learned Single Judge in great detail and after a comprehensive analysis of the numerous authorities on the issue, the learned Single Judge repelled the same and recorded that in the absence of any authority on the part of the petitioners to admit students in the academic Sessions 2007-08 and 2008-09, merely for the reason that it has proceeded ahead in flagrant defiance of negative mandate contained in letter dated 26th May, 2007 read with Regulation 8(10) of Regulations 2005, it cannot be said that act of the petitioner could be justified by relating back the impugned order to the aforesaid two academic sessions.

27. Learned Single Judge further recorded that it is true that equity, sympathy etc. some time constitute a relevant factor to decide a matter but where a flagrant violation of statutory provision has been shown such attributes on the part of the Court would not justify grant relief to a person who is guilty of proceeding in breach of requisite directions and statutory provisions.

28. The learned Single Judge referred to and relied up the following authorities:

29. In State of ***West Bengal & others Vs. Banibrata Ghosh & others (2009) 3 SCC 250,*** such a request was declined to be accepted by the Apex Court observing that it would be a misplaced sympathy.

30. In ***D.M. Premkumari Vs. The Divisional Commissioner, Mysore Division and others 2009 (2) SCALE 731***, the Court observed:

"The law is merciless", is a most frequently quoted saying. It has led people to mistakenly think that it is separated from feelings of righteousness. We have become used to the understanding that such emotions as indignation, sorrow and compassion should not exist in legal cases, especially not in judiciary. This, in our view, is a misunderstanding. Judiciary has a very strong sense of justice and it works to maintain social justice and fairness. We hasten to add, judiciary does not believe in misplaced sympathy."

31. Giving reasons for not extending the indulgence in favour of the persons, who have worked for sometimes though

not validly appointed, in State of Bihar Vs. Upendra Narayan Singh & others JT 2009 (4) SC 577, the Court observed :

"...the Courts gradually realized that unwarranted sympathy shown to the progenies of spoil system has eaten into the vitals of service structure of the State and public bodies and this is the reason why relief of reinstatement and/or regularization of service has been denied to illegal appointees/backdoor entrants in large number of cases..."

32. In ***Om Prakash & others Vs. Radhacharan & others 2009 (6) SC 329,*** the Court observed :

"It is now a well settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous."

33. In ***Subha B. Nair & others Vs. State of Kerala & others 2008 (7) SCC 210,*** the Court said:

"This Court furthermore cannot issue a direction only on sentiment/sympathy."

34. In ***Jagdish Singh Vs. Punjab Engineering College & others JT 2009 (8) SC 501,*** the Court referred to the observations made earlier in ***Kerala Solvent Extractions Ltd. Vs. A. Unnikrishnan and another 1994 (1) SCALE 63*** with approval as under :

"The reliefs granted by the courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability."

35. As far as the last ground on which the impugned order has been challenged by the counsel for the appellant that there is no provision under the Act envisaging unconditional recognition or conditional recognition and the only word used being recognition, the conditional recognition granted to the petitioners vide letter dated 26th May, 2007 of the respondent no. 3 was in fact an unconditional recognition, the same is also without any merit and deserves to be rejected.

36. In this regard, it would be useful to reproduce Regulation 7(12) and 8(10) of Regulations of 2005 which are hereinbelow:

37. Regulation 7(12) of Regulations of 2005 reads as under:

"The institution concerned, after appointing the requisite faculty/staff, shall put the information on its official website and also formally inform the Regional Committee concerned. The Regional

Committee concerned shall then issue a formal unconditional recognition order."

38. Regulation 8(10) of Regulations of 2005 contemplates that till such unconditional recognition is not granted, no admission shall be given. Regulation 8(10) reads as under:

"An institution shall make admission only after it obtains unconditional letter of recognition from the Regional Committee concerned, and affiliation from the examining body."

39. Admittedly the validity of the aforesaid Regulation was neither challenged before the learned Single Judge nor before the Special Appellate Court and hence we hold that the respondent did not commit any illegality or legal infirmity in granting conditional recognition to the appellants under Regulation 7(12) of the Regulations of 2005 and the recognition granted by the NCTE by letter dated 26th May, 2007 was a conditional recognition.

40. In view of the above, we do not find that the order passed by learned Single Judge suffers from any illegality or legal infirmity requiring any interference by this Court.

41. However, we quash the cost of Rs.50,000/- awarded by the impugned order. The appeal is disposed of accordingly.

(2020)1ILR 558

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.01.2020

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Service Single No. 7347 of 2004 alongwith
Service Single No. 1213 of 2005

H.A.L. Division Korwa ...Petitioner
Versus
DY. Chief Labour Commissioner (C) & Ors. ...Respondents

Counsel for the Petitioner:
P.K. Sinha

Counsel for the Respondents:
Dipak Seth, C.S. Pandey, Maneesh Kumar Singh, Navita Sharma, S.P. Tripathi

A. Service/Labour Law – Wages and conditions of service - The Contract Labour (Regulation and Abolition) Central Rules, 1971: Rules 25(2)(v)(a), 25(2)(v)(b) – Contract labourers have right to approach Dy. Chief Labour Commissioner (Central) u/r 25(2)(v)(b) and to retrospective adjudication.

The cause of action regarding wages and conditions of service arises to the Contract labourers when their wages and other fringe benefits are determined in license agreement and not before. Therefore, the right u/r 25(2)(v)(b) cannot be denied to them because license agreement was in operation. (Para 20)

It is a settled law that all adjudication by a quasi-judicial or by a Judicial Tribunal is retrospective in nature, and the rights and liabilities of the parties are crystallized at the time of filing of application before the Authority concerned. A determination made with prospective effect would be meaningless for those contract labourers who had approached the Authority concerned for a just and fair adoption of their assignments and conditions of service. (Para 7, 19)

B. Parity can be given by comparing the industries engaged in same areas of work - There cannot be any other suitable comparison other than with the sister concern of the petitioner, located within the distance of 125 kms. in the same geographical region in the same State, rather than comparison with industries engaged in completely different

areas of work on the basis that they are situated in the geographical area of the industry in question. (Para 7, 21)

Petition dismissed.

Precedent followed:

1. French Motor Car Co. Ltd. Vs. The Workmen, AIR 1963 SCC 1327 (Para 20)

2. Workmen of Orient Paper Mills Ltd. Vs. Ms. Orient Paper Mills Ltd., AIR 1969 SC 976 (Para 20)

Present petition is against order dated 27.07.2004, passed by the Dy. Chief Labour Commissioner (Central).

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

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

(2) This petition has been filed by the petitioner-Hindustan Aeronautics Limited (HAL), a Central Government Company in Cooperative Public Companies Act challenging the order dated 27.07.2004 passed by the Dy. Chief Labour Commissioner (Central), the opposite party no.1 allowing the application moved by the opposite party no.2-Korwa Safai Karamchari Union, HAL, Korwa Mandal, Amethi, Sultanpur.

(3) The opposite party no.1 has allowed the application moved by the Contract Safai Karamchari of the factory premises and directed them to be given the same wages as were admissible to unskilled regular employees of HAL Unit, Korwa.

(4) Shri Manish Kumar Singh appears on behalf of the opposite party no.2 i.e. Safai Karamchari Union relating to the factory premises only.

(5) It has been submitted by the learned counsel for the petitioner that initially the opposite party no.2-Korwa Safai Karamchari Union, of Sanitation Contract Labourers engaged in factory premises of the petitioner at HAL unit, Korwa, had filed a Writ Petition No.5715 (S/S) of 1996 praying for payment of same salary to them as paid to regular workers of the factory at Amethi. This Court by an order dated 02.04.1997 directed the opposite party no.2 to approach the Dy. Chief Labour Commissioner, under Rule 25 of the Rules of 1971, While disposing of the petition. Instead of approaching the Dy. Chief Labour Commissioner (Central) under the Rules of 1971, the opposite party no.2 filed an application before the Labour Commissioner U.P. under the U.P. Rules of 1975. The Labour Commissioner U.P. determined the wages by its order dated 04.041998 placing the reliance upon the earlier adjudication with regard to the Lucknow unit of HAL relating to Contract Sanitation Labourers therein.

(6) Against the order dated 04.04.1998, the petitioner filed a Writ Petition No.2254 (SS) of 1998, taking several grounds for challenge including a ground that the order passed by the U.P. Labour Commissioner was without jurisdiction. This Court passed a detailed order wherein it upheld the order passed by the U.P. Labour Commissioner under the U.P. Rules of 1975 saying that under the U.P. Contract Labour (Regulation & Abolition) Act, the appropriate Government was the State Government of U.P. as it had issued the license for the Contractor. The petitioner being aggrieved against the order passed by this Court on 18.09.2001 in Writ Petition No.2254 (SS) of 1998, filed a Civil Appeal No.3659 of 2002 which Civil Appeal was allowed by

the Supreme Court by its judgment and order dated 18.07.2002, holding that the Central Government is the appropriate Government with respect to the petitioner's Establishment, and left it open for the Contract Labourers to approach the Dy. Chief Labour Commissioner (Central) for determination of their wages and other conditions of service under the Central Rules of 1971.

(7) The opposite party no.2 thereafter, filed an application under Rule 25 (2) (v) (b) of the Central Rules of 1971, praying that its members be given the same wages and other fringe benefits as were being given to directly recruited workmen of their Company working in the HAL Unit at Korwa. The opposite party no.1 issued notice to the petitioner and on 08.05.2003, the petitioner filed a written statement in the form of a preliminary objection, wherein it took the ground that the opposite party no.1 did not have the power to enter into such inquiry and determination retrospectively, as the Contract Labour Licenses had been issued a long time ago and the agreement with the Contractor was already in operation. A second ground raised with regard to the maintainability of the application was of non-joinder of necessary contractors who had engaged the contract labourers from 1985 till date. It was also specifically mentioned that the parity cannot be given to Korwa Mandal Contract Labourers with Lucknow Unit of HAL as it was situated in the heart of the City of Lucknow whereas the Korwa Mandal HAL Unit was situated in a remote area of District Sultanpur. If at all parity could be given, it could only be by comparing the wages and service conditions of the Industries situated in the Geographical area of Amethi. The petitioner had also filed a chart of wages and service conditions of workers of *Bharat Heavy Electricals Limited and Indo Gulf Fertilizers* Limited as exemplars. It was moreover, submitted that the petitioner's Establishment at Amethi/Korwa was an exempted Establishment by specific notification issued in respect of workers by the appropriate Government, where the Contractor used to pay closure compensation at end of contract period, and thus they were better placed than the Contract labourers of the petitioner's Establishment in Lucknow.

(8) The opposite party no.2 submitted a rejoinder reply on 20.12.2003 wherein it reiterated that the Labour Commissioner, U.P. by its order dated 29.04.1989 had already decided the issue as to what wages should be paid to contract labourers engaged in similar sanitation work in HAL Ltd. Lucknow. The order passed by the Labour Commissioner, U.P. on 28.04.1989 with regard to the contract labourers of Lucknow Division had been upheld by the High Court and the Special Leave Petition and Review Petition had been dismissed.

(9) It has been submitted by the learned counsel for the petitioner that the opposite party no.1, did not appreciate the matter fairly, although the petitioner had relied upon three judgments of the Supreme Court to show that the wages and other conditions of service of the opposite party no.2 shall only be governed by the wages and other conditions of service of the similarly situated workers in Industries located in the same Geographical region. The opposite party no.1 also failed to apply its mind to the objection raised regarding non-joinder of the necessary parties, and that no retrospective

determination could be made under Rule 25 (2) (v) (b) of the Rules of 1971 by the opposite party no.1.

(10) It has been submitted that the opposite party no.1 also failed to appreciate that the petitioner was paying the wages equivalent to the workers of engineering Industry under State Government Notification which was much higher than the wages that were being paid to similarly situated workers of Industries situated in the same Geographical area for example *Bharat Heavy Electricals Limited and Indo Gulf Fertilizers Limited.*

(11) It has also been submitted that the opposite party no.1 failed to appreciate the distinction between the Rule 25 (2) (v) (a) and Rule 25 (2) (v) (b) of the Rule of 1971, under Rule 25 (2) (v) (a) Contract labourers who are discharging the same or similar duties as workmen functioning directly under the principal employer were to be given the same wages and conditions of service, as such, directly recruited regular workmen. The opposite party no.2, on the other hand, had filed an application under Rule 25 (2) (v) (b) of the 1971 Rules, thereby admitting that they were not performing the same or similar duties and functions as regularly recruited workmen of HAL unit and Korwa, Amethi. Therefore, a determination had been asked for, from the opposite party no.1 by the opposite party no.2.

(12) It has also been submitted that when the determination of wages and conditions of service of Lucknow Division was undertaken by the order dated 28.04.1989, it related to Lucknow Division alone and the same could not have been relied upon by the opposite party no.1. A fresh determination was required by the opposite party no.1 necessarily implying independent application of mind to all relevant considerations.

(13) It has been submitted that in between the wages of Group-A workmen directly recruited in the Establishment of Korwa Unit, Amethi, and the minimum wages notified under the Minimum Wages Act by the State of U.P. one Pay scale was available, that was the scale determined by the Engineering Wage Board and, therefore, the petitioner's Unit at Korwa fairly relied upon such wages as fixed by the Engineer Wage Board, and extended the benefit to the said contract labourers as opposite party no.2.

(14) Learned counsel for the Korwa Safai Karamchari Union at HAL Factory premises at its Korwa Unit, Amethi, Sultanpur, Shri Manish Kumar Singh, has pointed out that in the same Industry i.e. HAL there were several units functioning at Bangalore, Kanpur, Lucknow and Amethi. With regard to the Unit at Lucknow, sanitation workers performed the same duties as was performed by sanitation workers at the factory premises of HAL unit at Amethi, they belonged to the same Geographical region and the factories were situated at a distance of mere 125 kms. from each other. In identically situated units on same work being performed, similar wages and conditions of service to contract labourers had been given by the opposite party no.1 and the order passed by the opposite party no.1 dated 27.07.2004 needs no interference by this Court.

(15) It has been pointed out that the Labour Commissioner on 29.04.1989 with regard to contract labourers working at Lucknow unit had passed an order that

they be given the same wages and conditions of service as were given to unskilled regular workmen of HAL unit at Lucknow. Against such order the petitioner had filed a Writ Petition No.4353 (SS) of 1989 which was disposed of on 28.01.1994 by this Court holding that the Engineering Wage Board Notification was not applicable to the petitioner's Establishment and upheld determination of wages to be paid to the contract labourers as fixed by the Labour Commissioner on 29.04.1989. Against such order dated 29.04.1989 the petitioner filed a Special Leave Petition before the Supreme Court which was dismissed in liminie. A Review Petition was filed thereafter, by the petitioner which was also dismissed by the Supreme Court on 28.09.1994. The determination made with regard to the Lucknow unit of Sanitation workers was therefore, rightly relied upon by the opposite party no.1 in passing the order impugned.

(16) With regard to the non-joinder of necessary parties i.e. the Contractors who were engaged from time to time at Amethi Unit by the petitioner since 1985 onwards, till the date of filing of the application and adjudication by the opposite party no.1, the statement recorded of Dy. Manager (Works) on 10.03.2004 filed as Annexure-10 to the writ petition, has been read out by Shri Manish Kumar Singh. He says that from a bare perusal of such statement, it is evident that it was admitted by HAL witnesses themselves that the Contractor used to pay wages and extend other fringe benefits to the Contract labourers only in accordance with the license agreement signed by the HAL where the determination was done by the HAL. The HAL was the principal employer and under Section 21 of the Act of 1971, the principal employer alone is responsible to give fair and just wages to the contract labourers. The Contractor was only executing the service conditions that were fixed by the HAL.

(17) With regard to the retrospective determination, and the objections raised by the learned counsel for the petitioner, Shri Manish Kumar Singh, has pointed out that from a perusal of the order impugned, it is evident that the opposite party no.1 has extended benefit only with effect from 01.02.2003 i.e. from the month and the year of submission of the application before the Authority concerned under the Rules. There was no necessity for impleading contractors who had been engaged by the HAL through license agreement since 1985.

(18) Learned counsel for the petitioner in rejoinder has submitted that there can be no retrospective determination i.e. with effect from the date of the application was filed, as such determination as contemplated under Order Rule 25 (2) (v) (b) has to occur before the license agreement is unsigned by HAL.

(19) This Court cannot appreciate this argument, as a determination made with prospective effect would be meaningless for those contract labourers who had approached the Authority concerned for a just and fair adoption of their assignments and conditions of service. It is a settled law that all adjudication by a quasi-judicial or by Judicial Tribunal is retrospective in nature, and the rights and liabilities of the parties are crystallized at the time of filing of application before the Authority concerned. If prospective application is

given to such orders as passed by the Authority concerned, including the courts, it would mean that the benefit of the adjudication would not be available to the parties before the Court, but to all such future contract labourers for which license agreement would be signed in the future by the petitioner's Establishment.

(20) This Court has carefully perused the order dated 27.07.2004. The opposite party no.1 has carefully noted the arguments raised by the learned counsel for the petitioner-HAL before the Authority concerned in Paragraph-7 onwards and thereafter considered each of the submissions in the light of the submissions made by the opposite party no.2 before it. It has also referred to and considered the judgements cited by the learned counsel for the petitioner herein namely ***French Motor Car Co. Ltd. V. The Workmen reported in AIR 1963 SCC 1327,*** and ***Workmen of Orient Paper Mills Ltd. Vs. Ms. Orient Paper Mills Ltd. reported in AIR 1969 SC 976.*** The Authority has also considered the difference in language sought to be argued by the counsel for the HAL in Rule 25 (2) (v) (a) and 25 (2) (v) (b) of the Rules of 1971, and has observed that if workmen employed by the contractor performed the same or similar kind of work as workmen directly employed by the Principal employer of the Establishment, they shall be entitled to get the same wages and conditions of service etc. under Rule 25 (2) (v) (a). Determination is required under Sub Clause (b) in cases where Clause (a) does not cover the wage rates and conditions of service of workmen of the contractor. Such determination occurs when the grievance occurs, and for a redressal of grievance a forum is provided under Rule 25 (2) (v) (b) of the Rules. It is only when a dispute arises over the rate of wages and other conditions of service and an application is made under the Rule, the Dy. Chief Labour Commissioner has jurisdiction to conduct an inquiry and determine the wages. They may be the same as that of regular directly recruited workers or may be a different, the right of the labourers to approach the Dy. Chief Labour Commissioner (Central) under Rule 25 (2) (v)(b) cannot be curtailed if a cause of action arose on the issue of wages and the conditions of service such cause of action arises to the Contract labourers when their wages and other fringe benefits are determined and spelled out in the license agreement and not before.

(21) Each of the arguments raised by the learned counsel for the petitioner HAL has been dealt with in great detail by the Authority concerned including the arguments that no parallel can be drawn with Lucknow unit of HAL and enquiry should be made only on Region-cum-Industry basis. In order to substantiate their arguments, they had cited three judgments of Hon'ble the Supreme Court as quoted in para 7.5 of the said order. The opposite party no.1 has rightly come to the conclusion that there cannot be any other suitable comparison other than with the HAL unit, Lucknow which is a sister concern of HAL situated at Amethi located within the distance of only 125 kms. in the same Geographical region in the same State. There was no justification to compare with industries engaged in completely different areas of work like BHEL and Indo Gulf Fertilizers. It does not stand to reason that when the same category of employees at HAL, Lucknow are being paid wages of regular employees, why the such benefit should not be extended to the employees engaged by the contractor at Korwa Unit.

(22) It was moreover, observed by the opposite party no.1 that when the workmen engaged on sanitation duty in other units of HAL like Kanpur, Koraput, Nasik, Hyderabad and Bangalore are regular workmen, and not engaged through contractors, and getting the wages and all other benefits like any other regular employee.

(23) A detailed determination of wages to be paid to contract labourers engaged in sanitation work at Korwa Unit has been done at the rate of minimum wages paid to unskilled workers of HAL, Korwa. Since the contract workers were already covered by the beneficial Statutory scheme like Provident Fund, Payment of Bonus Act, etc. such benefit was continued to be given. Moreover, the determination was made with regard to the paid Holidays, Casual Leave, Earned Leave and Uniform etc. also in the order impugned.

(24) I have carefully perused the order passed by the Dy. Chief Labour Commissioner. The distinction sought to be drawn by the learned counsel for the petitioner with HAL Lucknow unit of the same employer, the petitioner, has not been such as would lead to different wages being given to workers at Korwa Unit. This Court does not find any good ground to show interference in writ jurisdiction.

(25) This petition is **dismissed.**

(26) No order as to costs.

Writ Petition No.1213 (SS) of 2005- This petition was filed by the petitioners, the Union of Contract Sanitation workers at Korwa Unit, Amethi, challenging the order dated 27.07.2004 passed by the Deputy Chief Labour Commissioner (Central), praying for enhancement.

Learned counsel for the petitioner Sri Manish Kumar Singh, has been instructed by his Client, not to press this petition, in view of the order passed by this counsel in Writ Petition No.7347 (SS) of 2004.

(2020)1ILR 564

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2019

BEFORE
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ A No. 7885 of 2016

Manoj Kumar Sengar & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Amrendra Pratap Singh, Sri Subhendra Singh

Counsel for the Respondents:
C.S.C., Sri Pranab Kumar Ganguli

A. Service – Payment of Salary – Equal pay for equal work – U.P. State Agricultural Universities Act; Uttar Pradesh Agricultural and Technical Universities Act, 1958: Section 28(r); Agricultural Universities Act – An employee is entitled for parity in pay/ pay scale if he is discharging/performing similar functions, duties and responsibilities. (Para 22 & 26)

It is a settled law that similarly situated employees are entitled for equal pay for equal work where they are discharging same work, function and responsibilities. In the present case, the State Government before bifurcation of State, granted the benefit of the 5th Pay Commission to the Lab Technicians but, post bifurcation the respondent-State is trying to distinguish between the Lab Technicians of the two Universities on the basis of experiences and is trying to create three different slabs in the said pay scale, which was not there at the

time it was granted to the Lab Technicians of the State in the year 1998. The action of the State Government is totally arbitrary and discriminatory in nature. (Para 16, 23, 24 & 26)

B. Constitution of India: Articles 14, 16, 39(d) - It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Article 39(d) of the Constitution proclaims "equal pay for equal work for both men and women" as a Directive Principle of State Policy. Principle of 'equal pay for equal work' is deducible from Articles 14, 16 and 39(d) and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification, though performing identical work. (Para 19 & 27)

Writ Petition allowed. (E-4)

Precedent followed: -

1. Union of India and others Vs. Rajesh Kumar Gond, (2014) 13 SCC 588 (Para 18)

2. Randhir Singh Vs. Union of India and others, (1982) 1 SCC 618 (Para 19, 21, 28)

3. Ashok Kumar and others Vs. State of U.P. and another, (2005) 1 ESC 143 (Para 20)

4. State of Punjab and others Vs. Jagjit Singh and others, (2017) 1 SCC 148 (Para 21, 28)

5. State of Haryana vs. Jasmer Singh and others, (1996) 11 SCC 77 (Para 21)

6. State of Punjab and Anr. Vs. Surjit Singh, (2009) 9 SCC 514 (Para 21)

7. D.S. Nakara Vs. Union of India, (1983) 1 SCC 305 (Para 21)

8. Mewa Ram Kanojia v. All India Institute of Medical Sciences, (1989) 2 SCC 235 (Para 21)

Petition challenges order dated 22.01.2016, passed by Principal Secretary, Agriculture and Research, Government of Uttar Pradesh, Lucknow.

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Anil Bhushan, learned Senior Advocate assisted by Sri Subhendra Singh, learned counsel for the petitioners, learned Standing Counsel for respondent nos. 1 and 2 and Sri P.K. Ganguly, learned counsel for respondent nos. 3, 4 and 5.

2. Petitioners who are ten in number have filed this writ petition for the following reliefs:-

"A). Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 22.01.2016 passed by respondent no. 1, The Principal Secretary, Agriculture and Research, Government of Uttar Pradesh, Lucknow.

B). Issue a writ, order or direction in the nature of Mandamus commanding and directing the respondents to fix the salary of the petitioners as Lab Technicians in the Sardar Vallabh Bhai Patel Agricultural and Technical University Meerut, in the pay scale of Rupees 5000-8000 with effect from 01.01.1996 or from the date of their appointment whichever is later and to ensure payment of the same on monthly basis;

C). Issue a writ, order or direction in the nature of Mandamus commanding and directing the respondents to ensure payment of the same on monthly basis together with arrears of salary with interest @18% per annum consequent upon fixation of their salary in the pay scale of Rs. 5000-8000 with effect from 01.01.1996 or from the date of initial appointment whichever is later;"

3. Brief facts giving rise to the present petition are that Pt. Govind Ballabh Pant Agriculture and Technical University, Pant Nagar, Nainital (hereinafter referred to as 'Pant Nagar University') was constituted and created under U.P. State Agricultural Universities Act for imparting education and research work in technical field of agriculture within the State of U.P. After the reorganisation of the State of U.P. on 09.11.2000, the University came within the limits of newly created State of Uttarakhand. To carry out work of imparting education and technical research in agriculture, one 'Sardar Vallabh Bhai Patel Agricultural and Technical University, Meerut (hereinafter referred to as 'Agricultural University, Meerut') was established on the lines on which the Pant Nagar University was created and constituted. It has been stated that some staff of Pant Nagar University was transferred and absorbed in Agriculture University Meerut. Post of Lab Technicians was created and sanctioned for both the Universities by the State of U.P. The ten petitioners before this Court are working on the post of Lab Technicians at Agriculture University, Meerut. According to petitioners, after the acceptance of recommendation of 4th Pay Commission, pay scale of Lab Technicians was revised and fixed at Rs.1400-2600 with effect from 01.01.1986. It is further stated that the Chancellor granted no objection for creation and sanction of the post of Lab Technicians in the pay scale of Rs.1400-2600 before the creation of new State of Uttarakhand on 23.02.1998,

4. The recommendations of the 5th Pay Commission was accepted by State Government and Principal Secretary (Finance) on 10.07.1998 directed for revision of the pay scale of Rs.1400-2600 with the corresponding pay scale of Rs.5000-8000. The said pay scale stood revised from 01.01.1996, copy of the Government Order dated 10.07.1998 is on record as Annexure-3 to the writ petition. Pursuant to that Pant Nagar University also revised the pay scale of teaching and other staff, and on 24th July, 1998 the Finance Controller issued a letter to the said effect which is on record as Annexure-4 to the writ petition.

5. Petitioners who are Lab Technicians working at Agriculture University, Meerut were paid salary in the pay scale of Rs.4500-7000 instead of pay scale of Rs.5000-8000 which had already been revised as per the recommendation of 5th Pay Commission and accepted in the State of U.P. and being applicable from 01.01.1996. Petitioners raised their grievance before respondent nos. 3 and 4 through representation seeking parity in the pay scale between the Lab Technicians of Pant Nagar University, Nainital and Agriculture University at Meerut. According to petitioners a meeting between the Meerut Workers' Union and the Administration of Agriculture University, Meerut was held on 13th and 14th August, 2008 and it was agreed for resolving the dispute within 45 days but the same was not implemented. As no action was taken, petitioners filed Writ Petition No. 58288 of 2008. The said petition was dismissed on 10.10.2010, against which a Special Appeal No. 1331 of 2011 was preferred, which was disposed of on 07.09.2015 with a direction to State Government to take decision on revision of pay scale. The grievance of the petitioners was turned down by the State Government by the impugned order dated 22.01.2016.

6. Sri Anil Bhushan, learned Senior Advocate appearing for the petitioners submitted that both Pant Nagar University and Agriculture University, Meerut were created and constituted under the U.P. State Agricultural Universities Act and further, the University in question on 18.02.2009 had recommended to the Government that petitioners' pay scale should be amended from Rs.4500-7000 to higher scale of Rs.5000-8000. Sri Bhushan further contended that the order impugned suffers on many counts, as it states that the Lab Technicians working in Agriculture University, Meerut and those working at Pant Nagar University are different because the designation, pay scale, mode of recruitment, educational qualification, duty and responsibilities were not identical and, which according to him are not correct. He further submitted that for judging the equality of work for the purpose of equal pay regard must be not only to the duties and function but also to educational qualifications, qualitative difference and measures of responsibility prescribed on respective post. He further tried to distinguish the four facts for settling dispute regarding equation of post are:-

(1) The nature of duties of post;

(2) The responsibilities and power exercised by officer holding a post, the extent of territorial or the other charges held on responsibilities discharged;

(3) The minimum qualification of any, prescribed for recruitment to his part and

(4) The salary of the post, if the earlier three criteria mentioned above are fulfilled then the fact that the salaries of two posts are different would not in any way to make the post not equivalent.

7. He further contended that petitioners are working on post of Lab Technicians and are discharging same duties, responsibilities and functions and their hours of duties are also same, thus are entitled to receive salary in pay scale of Rs.5000-8000. It was also contended that once the Government Order accepted the recommendation of 5th Pay Commission and was implemented in the State of U.P. from 01.01.1996 and being applicable to Agricultural Universities in the State and the pay scale of Lab Technicians being fixed in the scale of Rs.5000-8000, the action of the respondents in rejecting their claim was illegal, arbitrary and discriminatory. Sri Anil Bhushan, learned Senior counsel vehemently submitted that had the State of U.P. not bifurcated in the year 2000, then the State Government would have been paying the Lab Technicians of Pant Nagar University in the pay scale of Rs.5000-8000.

8. Sri P.K. Ganguli, learned counsel appearing for the respondent nos. 3 to 5 (University) submitted that the University in question is a State Agriculture University and receives funds/ grant in aid from the State Government and it cannot enhance salary of its employee without sanction of the State Government. He, however, supported the fact that petitioners are entitled in the pay scale of Rs.5000-8000 and relied upon the letter of the Vice Chancellor of the University dated 18.02.2009 written to the State Government.

9. Per contra, learned Standing Counsel appearing for the respondent nos. 1 and 2 submitted that the State Government has taken decision regarding the recommendation of the 6th Pay

Commission on 26.09.2013 and accordingly, the petitioners are being paid in the said pay scale. He further contended that Pant Nagar University, Uttarakhand and Agriculture University, Meerut are different institutions, having different nomenclature, pay scale, process of recruitment, work and responsibility, which has been distinguished in the Chart as given in Para 7 of their counter affidavit which is extracted hereasunder:

क्रम सं0		कृषि एवं प्रौद्योगिक विश्वविद्यालय, मेरठ	गोविन्द बल्लभ कृषि एवं प्रोद्योगिक विश्वविद्यालय, पंतनगर
1	वेतनमान	वेतनमान रू0 4500–7000 में शासनादेश सं0 1725/128–2002–5000(10)/2001 दिनांक 17.09.2002 एवं शासनोदश सं0–437/67–कृषिअ–04–500(10)/2001 दिनांक 15.07.2004 द्वारा तकनीशियन के कुल 09 पदों की स्वीकृति।	वेतनमान रू0 1400–2600 पुनरीक्षित वेतनमान 5000–8000 में शासनादेश सं0 3698/12–8–98–400(14)/95 दिनांक 23 फरवरी, 1998 द्वारा लैब तकनीशियन के पदों की स्वीकृति।
2	भर्ती की विधि	सीधी भर्ती द्वारा	50 प्रतिशत सीधी भर्ती 50 प्रतिशत पदोन्नति द्वारा भरे जाने की स्वीकृति इस प्रतिबन्ध के साथ प्रदान की है कि संबंधित कर्मचारियों की शैक्षिक एवं तकनीकी योग्ताएं समान हों।
3	शैक्षिक अर्हता	विज्ञापन सं0–01/2003 I.Sc. With Diploma in Electronics Engg. Experience in handling of Electronic Machines. विज्ञापन सं0–11/2004 High School with Diploma in Electronics/Civil/Electrical / Mechanical Engg. Knowledge. विज्ञापन सं0–01/2006 High School/Intermediate with Science and Diploma in Electronics Engg. Or B.Sc/B.Sc (Ag) & AH having experience in handling of electronic machines/equipments. Desirable Computer	इण्टरमीडिएट साइंस के साथ लेबोरेट्री तकनीशियन का डिप्लोमा तथा टेक्नीशियन के पद पर 02 वर्ष का कार्य अनुभव या विज्ञान स्नातक की उपाधि या इण्टरमीडिएट साइंस के साथ पशुचिकित्सा विज्ञान महाविद्यालय में प्रयोगशाला सहायक के रूप में कमशः 7 वर्ष या 10 वर्ष का अनुभव या एम0एस0सी0 मृदा/रसायन/जीव रसायन विज्ञान।
4	कार्य एवं दायित्व	कृषि एवं जैव प्रो0 महाविद्यालय की प्रयोगशालाओं में उपकरणों का संचालन रख–रखाव, छात्रो के लिये प्रयोग मे आने वाले उपकरणों/रसायनों का आवश्यकता/मात्रानुसार उपलब्ध कराना।	स्नातक तथा स्नाकोत्तर स्तरीय शिक्षण एवं शोध कार्यो में सहायता करना। अध्ययनरत छात्रों एवं शिक्षक/विज्ञानिकों के विभिन्न प्रयोगों तथा शोध कार्यो में सहायता करना। प्रयोगशाला में स्थित उपकरणों के संचालन व उनका रख–रखाव आदि करना।

10. He further contended that the Agriculture University at Meerut being set up under the Uttar Pradesh Agricultural and Technical Universities Act, 1958 is running within the State of U.P. and no parity can be granted to the establishment of post at Pant Nagar University which is running under the Agricultural Universities Act in the State of Uttarakhand.

11. Replying the argument of the learned Standing Counsel Sri Anil Bhushan submitted that the post in the University is sanctioned by the State Government under Section 28(r) of the State Agricultural and Technical Universities Act, 1958. He invited the attention of the Court to the letter of the Vice Chancellor dated 03.06.2017 written to the State Government which is on

record as RA-1, wherein respondent no. 3 had categorically stated that appointment, educational qualification, work and duties of Lab Technicians in both the Pant Nagar University as well as Agriculture University, Meerut are same. Further, both these Universities are doing the same work, but despite the said fact there is disparity in the pay scale of the Lab Technicians of the two Universities. It is also stated in the said letter that respondent no. 3 had already apprised the Chancellor on 30.08.2007 that the statutes of Pant Nagar University are applicable in Agriculture University, Meerut, and it was after the bifurcation of the State of U.P. that Pant Nagar University fell within the territorial jurisdiction of Uttarakhand and Agriculture University at Meerut was created.

12. Having heard learned counsel for the parties and the perusal of the material on record the question which emerges for consideration is whether the petitioners are entitled for the pay scale of Rs.5000-8000 made applicable to the Lab Technicians of Pant Nagar University pursuant to the Government Order dated 10.07.1998 issued by the State of U.P., which was made effective from 01.01.1996 or to be in the pay scale of Rs.4500-7000.

13. It is not in dispute that Pant Nagar University was created and established in the State of U.P. under the U.P. State Agricultural Universities Act. From time to time the teaching as well as non-teaching staff of the said University was paid salary by the State Government according to the recommendations of the Pay Commission. The State of U.P. had accepted the 4th and 5th Pay Commission recommendation which was made applicable in the State, in the year 1986 and thereafter, from 01.01.1996. The Government Order dated 10.07.1998 issued by the State Government accepting and endorsing the recommendation of the 5th Pay Commission was made applicable to all the teaching as well as non-teaching staff in various Universities as well as Agricultural Universities in the State of U.P., which was effective from 01.01.1996. Lab Technicians working at that relevant point of time were given the benefit of the 5th Pay commission from 01.01.1996.

14. Subsequently, State of U.P. was bifurcated on 09.11.2000, and the State of Uttarakhand was carved out, as Pant Nagar University fell within the territorial jurisdiction of Uttarakhand, it came to be governed by the orders of the State of Uttarakhand. It is also not in dispute that after the formation of new State of Uttarakhand another Agricultural and Technical University was created and established in the name of Agriculture University at Meerut under the U.P. State Agricultural and Technical Universities Act, 1958. It is the Lab Technicians of this University who are claiming the benefit of the pay scale of Rs.5000-8000 which was given by the State of U.P. through Government Order dated 10.07.1998 to the Lab Technicians, then working in the State of U.P. in the University at Pant Nagar.

15. Vide order dated 02.08.2019 time was granted to the learned Standing Counsel to seek instructions as to why the Government Order dated 10.07.1998 was not applicable in case of petitioners though they are working as Lab Technicians within the State of U.P. while the benefit of the same had already been extended and given to those Lab Technicians who were earlier working in the State but now after

bifurcation, are within the territorial jurisdiction of State of Uttarakhand at Pant Nagar; but as usual the State again tried to seek time to reply the query raised. As sufficient time had been granted to the State only to reply on this question regarding the applicability of the Government Order and the State having failed to reply the same, I find no option but to proceed with the matter as the petitioners are claiming parity and had been litigating for last 11 years, as no useful purpose would be served in keeping the matter pending but to decide the same on merits.

16. The State Government rejected the representation of the petitioners on 22.01.2016 on the ground that nomenclature, pay scale, process of recruitment, work and responsibility are different in both Universities, that is at Pant Nagar, Uttarakhand and Agriculture University at Meerut. From reading of the Chart distinguishing between the two institution by the State as far as the pay scale is concerned, it is amply clear that the State of U.P. which had accepted and endorsed 4th and 5th Pay Commission made applicable to those Lab Technicians who were working within the State of U.P. at that relevant point of time were paid salary in the pay scale of Rs.5000-8000, while by the subsequent Government Order the State of U.P. placed the petitioners as Lab Technicians in the pay scale of Rs.4500-7000. As far as the mode of recruitment is concerned the University at Meerut prescribes for direct recruitment, while at Pant Nagar University 50% of the Technicians are appointed by direct recruitment and 50% by promotion. The educational qualification as provided in the third column of the Chart for the two Universities also does not show any distinction as both of them provide for almost same qualification while the work and responsibility for the Lab Technicians of the two Universities are also almost the same.

17. In the Chart provided in Para 7 of the counter affidavit the work and responsibilities assigned to the lab technicians in the two Universities, Column 4 provides that the lab technicians are to work for upkeeping and maintaining the electric machines, equipment in the lab for the students in the Agricultural University. The said work or responsibilities provided for the two Universities in the said Column does not provide any distinction as to the work and responsibilities assigned to them.

18. The principle of equal pay for equal work was discussed by the Apex Court in catena of judgments, in one such case while deciding the benefits to be accorded to Hindi Translators in Central Government Directorates with that of Translator in Central Secretariat, the Apex Court in case ***Union of India and others v. Rajesh Kumar Gond (2014) 13 SCC 588*** held as under:-

"10. The respondents herein working as Senior Translators/ Assistant Directors in the offices under the Ministry of Defence. They also sought parity with the translators in the Central Secretariat which has been granted by the Central Administrative Tribunal, Chandigarh by its judgment dated 18-05-2009. That judgment is left undisturbed by the Punjab and Haryana High Court in ***Union of India v. Central Administrative Tribunal,*** *by its order dated 23-03-2011.*

11. Mr Balasubramanian, learned counsel appearing for the

appellant submitted that their source of recruitment was different. However, having noted that no functional difference was shown in their work, we cannot find any fault with the judgments of the Tribunal and the High Court for the reasons stated in the earlier special leave leave petition. The special leave petition is, therefore, dismissed. There will be no order as to costs."

19. While considering the case of Drivers in Delhi Police Force performing same function and duties as Drivers in Delhi Administration, the Apex Court in case of ***Randhir Singh v. Union of India and others (1982) 1 SCC 618*** in Paras 7, 8 and 9 held as under:-

"7. Our attention was drawn to ***Binoy Kumar Mukerjee v. Union of India, ILR (1973) 1 Del 427*** *and* ***Makhan Singh v. Union of India ILR (1975) 1 Del 227,*** *where reference was made to the observations of this Court in* ***Kishori Mohanlal Bakshi v. Union of India, AIR 1962 SC 1139*** *describing the principle of 'equal pay for equal work' as an abstract doctrine which had nothing to do with Art. 14. We shall presently point out how the principle, "equal pay for equal work" is not an abstract doctrine but one of substance.* ***Kishori Mohanlal Bakshi v. Union of India*** *is not itself of any real assistance to us since what was decided there was that there could be different scales of pay for different grades of a service. It is well known that there can be and there are different grades in a service, with varying qualifications for entry into a particular grade, the higher grade often being a promotional avenue for officers of the lower grade. The higher qualifications for the higher grade, which may be either academic qualifications or experience based on length of service, reasonably sustain the classification of the officers into two grades with different scales of pay. The principle of 'equal pay for equal work' would be an abstract doctrine not attracting Art. 14 if sought to be applied to them.*

8. It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Article 39(d) of the Constitution proclaims "equal pay for equal work for both men and women" as a Directive Principle of State Policy. 'Equal pay for equal work for both men and women' means equal pay for equal work for everyone and as between the sexes. Directive Principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins the state not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equality clauses of the Constitution must mean something to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay. Whether the special procedure prescribed by a statute for trying alleged robber-barons and smuggler kings or for dealing with tax evaders is discriminatory, whether a particular governmental policy in the matter of grant of licences or permits confers unfettered discretion on the Executive, whether the take-over of the

empires of industrial tycoons is arbitrary and unconstitutional and other questions of like nature, leave the millions of people of this country untouched. Questions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them. The Preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word 'Socialist' must mean something. Even if it does not mean 'to each according to his need', it must at least mean 'equal pay for equal work'. "The principle of 'equal pay for equal work' is expressly recognized by all socialist systems of law, e.g, Section 59 of the Hungarian Labour Code, para 2 of Section 111 of the Czechoslovak Code, Section 67 of the Bulgarian Code, Section 40 of the Code of the German Democratic Republic, para 2 of Section 33 of the Rumanian Code. Indeed this principle has been incorporated in several western labour codes too. Under provisions in Section 31 (g. No. 2d) of Book I of the French Code du Travail, and according to Argentinian law, this principle must be applied to female workers in all collective bargaining agreements. In accordance with Section 3 of the Grundgesetz of the German Federal Republic, and clause 7, Section 123 of the Mexican Constitution, the principle is given universal significance" (vide International Labour Law by Istvan Szaszy p. 265). The preamble of the Constitution of the International Labour Organisation recognises the principle of 'equal remuneration for work of equal value' as constituting one of the means of achieving the improvement of conditions "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". Construing Articles 14 and 16 in the light of the Preamble and Article 39(d), we are of the view that the principle 'equal pay for equal work' is deducible from those Article and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though these drawing the different scales of pay do idential work under the same employer.

9. There cannot be the slightest doubt that the drivers in the Delhi Police Force perform the same functions and duties as other drivers in service of the Delhi Administration and the Central Government. If anything, by reason of their investiture with the 'powers, functions and privileges of a police officer', their duties and responsibilities are more arduous. In answer to the allegation in the petition that the driver-constables of the Delhi Police Force perform no less arduous duties than drivers in other departments, it was admitted by the respondents in their counter that the duties of the driver-constables of the Delhi Police Force were onerous. What then is the reason for giving them a lower scale of pay than others ? There is none. The only answer of the respondents is that the drivers of the Delhi Police Force and the other drivers belong to different departments and that the principle of 'equal pay for equal work' is not a principle which the Courts may recognise and act upon. We have shown that the answer is unsound. The clarification is irrational. We, therefore, allow the writ petition and direct the respondents to fix the scale of pay of the petitioner and the drivers-constables of the

Delhi Police Force at least on a par with that of the drivers of the Railway Protection Force. The scale of pay shall be effective from January 1, 1973, the date from which the recommendations of the Pay Commission were given effect."

20. This Court also had an occasion to consider the case of Dark Room Assistants performing the work of X-ray technicians who were granted the pay scale of X-ray technicians in case of ***Ashok Kumar and others v. State of U.P. and another (2005) 1 ESC 143,*** the Court held as under:-

"9. The respondents have not paid their salary of the post of X-ray Technicians to the petitioners because of non-amendment of the Rules of 1986 (which is prerogative of the State Government exclusively). The State Government cannot refuse the salary admissible to the post of X-ray Technicians to the petitioners, inasmuch as no one can be permitted to take benefit of his own wrong. The State Government had categorically assured the Dark Room Assistants of appointment as X-ray Technicians provided they are selected and completed the training for being appointed as X-ray Technicians. The decision of the State Government to that effect is patently arbitrary and without any basis. Even otherwise on the principle of "Equal pay for equal work', since the respondents have appointed the petitioners on the post of X-ray Technicians and there is no denial of the fact that the duties and responsibilities of the post of X-ray Technicians are being discharged by the petitioners."

21. Supreme Court while considering the principle of equal pay for equal work applicable to temporary employees had the occasion to consider the same in ***State of Punjab and others v. Jagjit Singh and others (2017) 1 SCC 148.*** The Apex Court laid down the parameters for applicability of the concept of equal pay for equal work, it also considered the earlier judgment of the Apex Court in case of ***Jasmer Singh, (1996) 11 SCC 77, Surjit Singh (2009) 9 SCC 514, Randhir Singh v. Union of India (1982) 1 SCC 618, D. S. Nakara v. Union of India (1983) 1 SCC 305, Mewa Ram Kanojia (1989) 2 SCC 235.*** The Apex Court in the said judgment not only considered for the employees engaged on regular basis but claim of temporary employees. Relevant Paras are 42, 57, 58, 59, 60, which are extracted hereasunder:-

"42. All the judgments noticed in paragraphs 7 to 24 hereinabove, pertain to employees engaged on regular basis, who were claiming higher wages, under the principle of "equal pay for equal work'. The claim raised by such employees was premised on the ground, that the duties and responsibilities rendered by them, were against the same post for which a higher pay scale was being allowed, in other government departments. Or alternatively, their duties and responsibilities were the same, as of other posts with different designations, but they were placed in a lower scale. Having been painstakingly taken through the parameters laid down by this Court, wherein the principle of "equal pay for equal work' was invoked and considered, it would be just and appropriate, to delineate the parameters laid down by this Court. In recording the said parameters, we have also adverted to some other judgments pertaining to temporary employees (also dealt with, in the instant judgment), wherein also, this Court had

the occasion to express the legal position with reference to the principle of "equal pay for equal work'. Our consideration, has led us to the following deductions:-

42.1 The "onus of proof" of parity in the duties and responsibilities of the subject post with the reference post under the principle of "equal pay for equal work", lies on the person who claims it. He who approaches the Court has to establish, that the subject post occupied by him requires him to discharge equal work of equal value, as the reference post (see Orissa University of Agriculture & Technology v. Manoj K. Mohanty, (2003) 5 SCC 188, Union Territory Administration, Chandigarh v. Manju Mathur, (2011) 2 SCC 452, the Steel Authority of India Limited v. Dibyendu Bhattacharya, (2011) 11 SCC 122 and the National Aluminum Company Limited v. Ananta Kishore Rout, (2014) 6 SCC 756).

42.2 The mere fact that the subject post occupied by the claimant, is in a "different department" vis-a-vis the reference post, does not have any bearing on the determination of a claim, under the principle of ''equal pay for equal work'. Persons discharging identical duties, cannot be treated differently, in the matter of their pay, merely because they belong to different departments of Government (see Randhir Singh case v. Union of India, (1982) 1 SCC 618 and the D.S. Nakara v. Union of India, (1983) 1 SCC 305).

42.3 The principle of ''equal pay for equal work', applies to cases of unequal scales of pay, based on no classification or irrational classification (see Randhir Singh case v. Union of India, (1982) 1 SCC 618). For equal pay, the concerned employees with whom equation is sought, should be performing work, which besides being functionally equal, should be of the same quality and sensitivity (see Federation of All India Customs and Central Excise Stenographers v. Union of India, (1988) 3 SCC 91, the Mewa Ram Kanojia v. All India Institute of Medical Sciences, (1989) 2 SCC 235, Grih Kalyan Kendra Workers' Union v. Union of India, (1991) 1 SCC 619 and S.C. Chandra v. State of Jharkhand, (2007) 8 SCC 279).

42.4 Persons holding the same rank/designation (in different departments), but having dissimilar powers, duties and responsibilities, can be placed in different scales of pay, and cannot claim the benefit of the principle of ''equal pay for equal work' (see the Randhir Singh case (supra), State of Haryana v. Haryana Civil Secretariat Personal Staff Association (2005) 6 SCC 72, and the Hukum Chand Gupta v. ICAR, (2012) 12 SCC 666). Therefore, the principle would not be automatically invoked, merely because the subject and reference posts have the same nomenclature.

42.5 In determining equality of functions and responsibilities, under the principle of ''equal pay for equal work', it is necessary to keep in mind, that the duties of the two posts should be of equal sensitivity, and also, qualitatively similar. Differentiation of pay scales for posts with difference in degree of responsibility, reliability and confidentiality, would fall within the realm of valid classification, and therefore, pay differentiation would be legitimate and permissible (see Federation of All India Customs and Central Excise Stenographers case (supra) and the State Bank of India v. M.R. Ganesh Babu, (2002) 4 SCC 556). The nature of work of the subject post should be the same and not less onerous than the reference post. Even the volume of work should be the same. And so also, the level of

responsibility. If these parameters are not met, parity cannot be claimed under the principle of "equal pay for equal work' (see State of U.P. v. J.P. Chaurasia (1989) 1 SCC 121, and Grih Kalyan Kendra Workers' Union v. Union of India, (1991) 1 SCC 619).

42.6 For placement in a regular pay-scale, the claimant has to be a regular appointee. The claimant should have been selected, on the basis of a regular process of recruitment. An employee appointed on a temporary basis, cannot claim to be placed in the regular pay-scale [see Orissa University of Agriculture & Technology case (supra)].

42.7 Persons performing the same or similar functions, duties and responsibilities, can also be placed in different pay scales. Such as - "selection grade', in the same post. But this difference must emerge out of a legitimate foundation, such as - merit, or seniority, or some other relevant criteria [see State of U.P. v. J.P. Chaurasia (supra)].

42.8 If the qualifications for recruitment to the subject post vis-a- vis the reference post are different, it may be difficult to conclude, that the duties and responsibilities of the posts are qualitatively similar or comparable (see Mewa Ram Kanojia case (supra), and Government of W.B. v. Tarun K. Roy (2017) 1 SCC 347). In such a cause, the principle of "equal pay for equal work', cannot be invoked.

42.9 The reference post, with which parity is claimed, under the principle of "equal pay for equal work', has to be at the same hierarchy in the service, as the subject post. pay scales of posts may be different, if the hierarchy of the posts in question, and their channels of promotion, are different. Even if the duties and responsibilities are same, parity would not be permissible, as against a superior post, such as a promotional post [see Union of India v. Pradip Kumar Dey (2000) 8 SCC 580 and Hukum Chand Gupta case (supra)].

42.10 A comparison between the subject post and the reference post, under the principle of "equal pay for equal work', cannot be made, where the subject post and the reference post are in different establishments, having a different management. Or even, where the establishments are in different geographical locations, though owned by the same master (see Harbans Lal case v. State of H.P., (1989) 4 SCC 459). Persons engaged differently, and being paid out of different funds, would not be entitled to pay parity (see Official Liquidator v. Dayanand, (2008) 10 SCC 1).

42.11 Different pay scales, in certain eventualities, would be permissible even for posts clubbed together at the same hierarchy in the cadre. As for instance, if the duties and responsibilities of one of the posts are more onerous, or are exposed to higher nature of operational work/risk, the principle of "equal pay for equal work' would not be applicable. And also when, the reference post includes the responsibility to take crucial decisions, and that is not so for the subject post [see State Bank of India case (supra)].

42.12 The priority given to different types of posts, under the prevailing policies of the Government, can also be a relevant factor for placing different posts under different pay scales. Herein also, the principle of "equal pay for equal work' would not be applicable (see State of Haryana v. Haryana Civil Secretariat Personal Staff Association (2002) 6 SCC 72).

42.13 The parity in pay, under the principle of "equal pay for equal work', cannot be claimed, merely on the ground, that at an earlier point of time, the subject post and the reference post, were placed in the same pay- scale. The principle of "equal pay for equal work' is applicable only when it is shown, that the incumbents of the subject post and the reference post, discharge similar duties and responsibilities (see State of West Bengal v. Minimum Wages Inspectors Association (2010) 5 SCC 225).

42.14 For parity in pay scales, under the principle of "equal pay for equal work', equation in the nature of duties, is of paramount importance. If the principal nature of duties of one post is teaching, whereas that of the other is non-teaching, the principle would not be applicable. If the dominant nature of duties of one post is of control and management, whereas the subject post has no such duties, the principle would not be applicable. Likewise, if the central nature of duties of one post is of quality control, whereas the subject post has minimal duties of quality control, the principle would not be applicable [see Union Territory Administration, Chandigarh v. Manju Mathur (supra)].

42.15 There can be a valid classification in the matter of pay scales, between employees even holding posts with the same nomenclature i.e., between those discharging duties at the headquarters, and others working at the institutional/sub-office level [see the Hukum Chand Gupta case (supra)], when the duties are qualitatively dissimilar.

42.16 The principle of "equal pay for equal work' would not be applicable, where a differential higher pay scale is extended to persons discharging the same duties and holding the same designation, with the objective of ameliorating stagnation, or on account of lack of promotional avenues [see Hukum Chand Gupta case (supra)].

42.17 Where there is no comparison between one set of employees of one organization, and another set of employees of a different organization, there can be no question of equation of pay scales, under the principle of "equal pay for equal work', even if two organizations have a common employer. Likewise, if the management and control of two organizations, is with different entities, which are independent of one another, the principle of "equal pay for equal work' would not apply [see S.C. Chandra case (supra), and the National Aluminum Company Limited case (supra)].

57. There is no room for any doubt, that the principle of "equal pay for equal work' has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India, under Article 141 of the Constitution of India. The parameters of the principle, have been summarized by us in paragraph 42 hereinabove. The principle of "equal pay for equal work' has also been extended to temporary employees (differently described as work-charge, daily-wage, casual, ad-hoc, contractual, and the like). The legal position, relating to temporary employees, has been summarized by us, in paragraph 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us, yet again.

58. In our considered view, it is fallacious to determine artificial

parameters to deny fruits of labour. An employee engaged for the same work, cannot be paid less than another, who performs the same duties and responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so, to provide food and shelter to his family, at the cost of his self respect and dignity, at the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate, constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation.

59. We would also like to extract herein Article 7, of the International Covenant on Economic, Social and Cultural Rights, 1966. The same is reproduced below:-

"7. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

(emphasis supplied)

India is a signatory to the above Covenant having ratified the same on 10.4.1979. There is no escape from the above obligation in view of different provisions of the Constitution referred to above, and in view of the law declared by this Court under Article 141 of the Constitution of India, the principle of "equal pay for equal work' constitutes a clear and unambiguous right and is vested in every employee - whether engaged on regular or temporary basis.

60. Having traversed the legal parameters with reference to the application of the principle of "equal pay for equal work', in relation to temporary employees (daily-wage employees, ad hoc appointees, employees appointed on casual basis, contractual employees and the like), the sole factor that requires our determination is, whether the concerned employees (before this Court), were rendering similar duties and responsibilities, as were being discharged by regular employees, holding the same/corresponding posts. This exercise would require the application of the parameters of the principle of "equal pay for equal work' summarized by us in paragraph 42 above. However, insofar as

the instant aspect of the matter is concerned, it is not difficult for us to record the factual position. We say so, because it was fairly acknowledged by the learned counsel representing the State of Punjab, that all the temporary employees in the present bunch of appeals, were appointed against posts which were also available in the regular cadre/establishment. It was also accepted, that during the course of their employment, the concerned temporary employees were being randomly deputed to discharge duties and responsibilities, which at some point in time, were assigned to regular employees. Likewise, regular employees holding substantive posts, were also posted to discharge the same work, which was assigned to temporary employees, from time to time. There is, therefore, no room for any doubt, that the duties and responsibilities discharged by the temporary employees in the present set of appeals, were the same as were being discharged by regular employees. It is not the case of the appellants, that the respondent-employees did not possess the qualifications prescribed for appointment on regular basis. Furthermore, it is not the case of the State, that any of the temporary employees would not be entitled to pay parity, on any of the principles summarized by us in paragraph 42 hereinabove. There can be no doubt, that the principle of "equal pay for equal work' would be applicable to all the concerned temporary employees, so as to vest in them the right to claim wages on a par with the minimum of the pay scale of regularly engaged government employees holding the same post."

22. Thus, it is settled law that an employee is entitled for parity in pay/ pay scale if he is discharging/ performing similar functions, duties and responsibilities.

23. In the present case, the State Government, itself by Government Order dated 10.07.1998 had accepted the recommendation of the 5th Pay Commission and the benefits of the same was given to all the teaching and non-teaching staff of various Universities as well as Agricultural Universities in the State of U.P. effective from 01.01.1996. At the relevant point of time Pant Nagar University which was part of the State of U.P. and was enacted under the U.P. State Agricultural Universities Act implemented the said recommendation, and Lab Technicians working in the said University were given the benefits of the 5th Pay Commission. It is only after the bifurcation of the State of U.P. in the year 2000, that another Agriculture University, Meerut was created/ established in 2001 and by the Government Order dated 17.09.2002 that post of 9 Lab Technicians was sanctioned in the pay scale of Rs.4500-7000. Though the post created and sanctioned by the State of Lab Technicians for Pant Nagar University in the year 1998 was in the pay scale of Rs.1400-2600 which was revised to pay scale of Rs.5000-8000.

24. The State has failed to justify as to how the post of Lab Technicians sanctioned later in time for an Agriculture University was in the pay scale of Rs.4500-7000, in the year 2002, while it sanctioned the post of Lab Technicians in the year 1998 in the revised pay scale of Rs.5000-8000. The State has also failed to justify as to how 5th Pay Commission which was accepted and endorsed in the State of U.P. in the year 1998, the benefits of the same would not be given to those

Lab Technicians appointed after the bifurcation of the State of U.P. in the year 2002 while the same already been given and granted to those Lab Technicians working in an Agriculture University in the State in the year 1998. The action of the State Government is totally arbitrary and discriminatory in nature distinguishing between the Lab Technicians appointed prior to bifurcation of the State in the Pant Nagar University and thereafter, those appointed in Agriculture University, Meerut in the year 2002.

25. Further, the order impugned also fails to provide any justifiable reason as to distinction of the pay scales of the two, Lab Technicians posted in Agriculture University, Meerut and Pant Nagar University as from the reading of Chart provided in the order impugned the work and responsibility assigned in the two Universities are more or less the same as also the educational qualification provided for the two Universities. Agriculture University at Meerut provides for 100% direct recruitment while in the case of Pant Nagar University 50% posts are to be filled by direct recruitment and 50% by promotion.

26. As, it is a settled law that similarly situated employees are entitled for equal pay for equal work where they are discharging same work, function and responsibilities. In the present case, it is the State Government before bifurcation of State had granted the benefit of the 5th Pay Commission to the Lab Technicians but, post bifurcation the respondent-State is trying to distinguish between the Lab Technicians of the two Universities on the basis of experiences and are trying to create three different slabs in the said pay scale, which was not there at the time it was granted to the Lab Technicians of the State in the year 1998.

27. As Article 14 enshrines equality before law or the equal protection of law and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equity clauses of the Constitution must mean something to everyone. To the vast majority of the people equity clauses of Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equity clauses will have some substance if equal work means equal pay. Construing Article 14, 16 and Article 39(d), I am of the view that principle of 'equal pay for equal work' is deducible from these articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification, though these drawing different scales of pay do identical work. In the present case, the petitioners are entitled to the pay scale of Rs.5000-8000 from 01.01.1996 or from the date of their appointment.

28. In view of the above and the law laid down by the Apex Court in case of ***Randhir Singh*** *(supra)* and ***Jagjit Singh*** (supra), the order impugned dated 22.01.2016 is quashed and the petitioners are entitled to the pay scale of Rs.5000-8000 with effect from 01.01.1996 or from the date of appointment whichever is later. The respondents are directed to fix salary of the petitioners in the said pay scale.

29. The petitioners are also entitled for their arrears of salary in the said pay scale, however, as regard to the interest, the petitioners may set up a claim before the respondent authorities who shall

consider the same. With the aforesaid observation, the writ petition stands **allowed.**

(2020)1ILR 580

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No. 14570 of 2009

Ram Kishan ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri A.K. Ojha

Counsel for the Respondents:
C.S.C.

A. Challenging-order-removing petitioner from service-on ground of conviction-in Session Trial- a condition precedent-to acquire jurisdiction to impose punishment of removal-by considering his conduct-leading to conviction-impugned order-silent on consideration.

B. Held, Thus, it can safely be concluded that while removing the petitioner from service, the respondents were bound to consider the conduct of the petitioner, which has led to his conviction in the session trial. This was the condition precedent for the competent authority to acquire jurisdiction to impose punishment of removal from service. However, the impugned order is unfortunately silent and does not show consideration of conduct of the petitioner which has led to his conviction in the S.T. No.178 of 2005. It was necessary for the respondents, while passing the impugned order, to consider the conduct of the petitioner leading to his conviction and then to decide what punishment is to be inflicted upon him. This has not been done by the respondent No.2 while removing the petitioner from service. Therefore, the impugned order cannot be sustained and is hereby quashed.

Writ Petition allowed. (E-8)

List of cases cited: -

1. Shyam Narain Shukla vs. State of U. P., (1988) 6 LCD 530

2. Sadanand Mishra v. State of U. P. 1993 LCD 70

3. Shankar Das v. Union of India, 1985 (2) SCR 358

4. Sushil Kumar Singhal vs. Regional Manager, Punjab National Bank, 2010 (8) SCC 573

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri A.K. Ojha, learned counsel for the petitioner and Sri Anil Kumar Pandey, learned standing counsel for the State-respondents.

2. This writ petition has been filed praying to quash the order of removal from service dated 17.12.2008 passed by the respondent No.2. The petitioner has also prayed for a writ, order or direction in the nature of mandamus directing the respondents to continue the petitioner in service and pay regular salary month by month.

3. Briefly stated facts of the present case are that the petitioner was a constable in Civil Police. By judgment and order dated 05.05.2008, the petitioner was convicted under Sections 302/34 I.P.C. with life imprisonment and a fine of Rs.10,000/- in S.T. No.178 of 2005 arising from Case Crime No.649 of 2005 passed

by the Additional Session Judge, Court No.3, Jhansi. By the impugned order dated 17.12.2008, the petitioner was removed from service on the ground that he has been convicted in the aforesaid Session Trial. Against the aforesaid judgment and order dated 05.05.2008, the petitioner filed a Criminal Appeal No.3060 of 2008 (Ram Kishan vs. State of U.P.) in which an order dated 17.10.2008 was passed by a Division Bench of this Court releasing the petitioner on bail during pendency of the appeal and realisation of fine was stayed. Subsequently, by order dated 20.07.2009, the execution of the sentence during pendency of the appeal was also stayed by the Dvision Bench. Under these facts, the petitioner has filed the present writ petition challenging the impugned order of removal from service dated 17.12.2008 passed by the Senior Superintendent of Police, Jhansi.

4. Learned counsel for the petitioner submits that the fine imposed by the judgment and order dated 05.05.2008 passed in S.T. No.178 of 2005 has been stayed by the Division Bench in Criminal Appeal No.3060 of 2008 and the petitioner has been released on bail and the execution of sentence has also been stayed, therefore, the impugned order cannot be sustained and deserves to be quashed. He further submits that no finding has been recorded in the impugned order on the conduct of the petitioner leading to his conviction so as to inflict the punishment of removal from service. He, therefore, submits that the impugned order deserves to be quashed.

5. Learned standing counsel supports the impugned order.

6. I have carefully considered the submissions of the learned counsels for the parties.

7. Perusal of the impugned order dated 17.12.2008 shows that it has been passed by the respondent No.2 merely on the ground that the petitioner has been convicted with life imprisonment under Section 302/34 I.P.C. and with fine of Rs.10,000/-. The respondent No.2 while passing the impugned order has not considered at all the conduct of the petitioner, which has led to his conviction.

8. The judgment and order dated 05.05.2008 passed by the Additional Session Judge, Court No.3, Jhansi in S.T. No.178 of 2005 under Section 302/34, I.P.C. convicting the petitioner with life imprisonment and a fine of Rs.10,000/-, has been challenged by the petitioner in Criminal Appeal No.3060 of 2008 (Ram Kishan vs. State of U.P.), in which an order dated 17.10.2008 was by the Division Bench releasing the petitioner on bail and staying the realisation of fine. By order dated 20.07.2009 passed in the aforesaid criminal appeal, the execution of sentence was also stayed during pendency of the appeal. It has been stated before me by the learned counsel for the petitioner that the aforesaid criminal appeal is still pending.

9. In **Union of India vs. Tulsiram Patel, (1985) 3 SCC 398,** Hon'ble Supreme Court has considered the provisions of Article 311(2) of the Constitution of India and held as under:-

"The second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Article 311(2) is itself confined only to these three penalties. Therefore, before

denying a government servant his constitutional right to an inquiry, ***the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank.*** *Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry."*

10. In **Shyam Narain Shukla vs. State of U.P., (1988) 6 LCD 530,** a Division Bench of this court has considered similar question and held as under:-

"In view of the above decision of the Supreme Court, it has to be held that ***whenever a Government servant is convicted of an offence, he cannot be dismissed from service merely on the ground of conviction but the appropriate authority has to consider the conduct of such employee leading to his conviction and then to decide what punishment is to be inflicted upon him.*** *In the matter of consideration of conduct as also the quantum of punishment the employee has not to be joined and the decision has to be taken by the appropriate authority independently of the employee who, as laid down by the Supreme Court, is not to be given an opportunity of hearing at that stage."*

11. Another Division Bench of this Court in **Sadanand Mishra v. State of U.P. 1993 LCD 70** held that on conviction of an employee of a criminal charge, the order of punishment cannot be passed unless the conduct which has led to his conviction, is also considered. It was further held that the scrutiny or exercise of conduct of an employee leading to his conviction is to be done ex parte and an opportunity of hearing is not to be provided for this purpose to the employee concerned.

12. In **Shankar Das v. Union of India, 1985 (2) SCR 358,** Hon'ble Supreme Court while referring to power under Clause (a) of second proviso of Article 311(2)of the Constitution of India, has observed as under: -

"Be that power like every other power has to be exercised fairly, justly and reasonably."

13. Proviso (a) to Article 311 of the Constitution of India, is an exception to clause (2) of Article 311, which is applicable where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge. In case of **Divisional Personnel Officer, Southern Railway Vs. T.R. Chellappan, 1976 (3) SCC 190 (para-21),** Hon'ble Supreme Court considered Article 311(2), Proviso (a) and held that this provision confers power upon the disciplinary authority to decide whether in the facts of a particular case, what penalty, if at all, should be imposed on the delinquent employee, **after taking into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features, if any,** present in the case and so on and so forth. The conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a

summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the inquiry, if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to impose any penalty in spite of the conviction. The disciplinary authority has the undoubted power after hearing the delinquent employee and considering the circumstances of the case to inflict any major penalty on the delinquent employee without any further departmental inquiry, if the authority is of the opinion that the employee has been guilty of a serious offence involving moral turpitude and, therefore, it is not desirable or conducive in the interests of administration to retain such a person in service. In **Sushil Kumar Singhal vs. Regional Manager, Punjab National Bank, 2010 (8) SCC 573 (Paras-24 and 25),** Hon'ble Supreme Court explained the meaning of the words 'moral turpitude' to mean anything contrary to honesty, modesty or good morals.

14. Thus, in view of the law laid down by Hon'ble Supreme Court in the cases of **Tulsiram Patel** (supra), **T.R. Chellapan** (supra) and **Shankar Das** (supra), and two Division Bench judgments of this court in **Shyam Narain Shukla** (supra) and **Sadanand Mishra** (supra), it can safely be concluded that while removing the petitioner from service, the respondents were bound to consider the conduct of the petitioner, which has led to his conviction in the session trial. This was the condition precedent for the competent authority to acquire jurisdiction to impose punishment of removal from service. However, the impugned order is unfortunately silent and does not show consideration of conduct of the petitioner which has led to his conviction in the S.T. No.178 of 2005. It was necessary for the respondents, while passing the impugned order, to consider the conduct of the petitioner leading to his conviction and then to decide what punishment is to be inflicted upon him. This has not been done by the respondent No.2 while removing the petitioner from service. Therefore, the impugned order cannot be sustained and is hereby quashed.

15. For all the reasons afore-stated, the **writ petition is allowed**. Matter is remitted back to the Senior Superintendent of Police, Jhansi to pass an order afresh, in accordance with law, within one month from the date of presentation of a certified copy of this order. In the event, the petitioner is reinstated in service, he shall be entitled to all consequential benefits and shall also be entitled to arrears of salary only for the period he actually worked.

(2020)1ILR 583

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2020

BEFORE
THE HON'BLE RAJAN ROY, J.

Consolidation No. 3438 of 1981

Mohd. Naimuddin & Ors. ...Petitioners
Versus
D.D.C. Barabanki ...Respondent

Counsel for the Petitioners
Smt. Maya Bhatta, Hargur Charan, M.A. Siddiqui

Counsel for the Respondent:
C.S.C.

A. Petitioner's father's a name mutated-lease granted by Zamindar-negotiation for constituting the land as reserve forest-lessee acquired first – status of hereditary tenant-later when UPZALR

was enforced-of sirdar-case filed u/s.8-Petition restored-remanded.

Writ Petition allowed in part. (E-8)

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Shri Aftab Ahmad, learned counsel for the petitioners, Shri Jagdish Prasad Maurya, learned Additional Chief Standing Counsel and Shri Dileep Pandey, learned Standing Counsel for the State.

2. This writ petition was filed in the year 1981 challenging an order dated 25.02.1981 by which revision of the petitioners under Section 48 of the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "the Act, 1953') was rejected. Another order dated 30.04.1981 has been challenged which had been passed by D.D.C. on the review application filed by the petitioners rejecting the same on the ground that he did not have any power of review.

3. In the year 1996 the writ petition was amended and order dated 30.12.1958 passed by the Deputy Commissioner, Barabanki on the appeal of the State Government under Section 17 of the Indian Forest Act, 1927 (hereinafter referred to as "the Act, 1927') as applicable to the State of U.P. was sought to be challenged by way of an amendment which was allowed by this Court on 17.10.1996, however, during the course of argument today Shri Aftab Ahmad, learned counsel for the petitioners submitted that this order has already been declared to be without jurisdiction by this Court in the earlier proceedings bearing Writ Petition No. 917 of 1972; Mohd. Mohinuddin Vs. State of U.P. and Ors. decided on 16.04.1975 which has not been put to challenge by the State and has attained finally, therefore, he does not want to press this part of the relief relating to the validity of the order dated 30.12.1958.

4. In view of the above, this part of the relief claimed in the writ petition is not pressed.

5. From the records and during the course of arguments it comes out that according to the petitioners, their father was granted a Lease which was registered on 31.07.1951 by the Zamindar in respect of certain Gatas of land including Gata No. 1447/1 and 1448/1. In pursuance to the aforesaid Lease, proceedings for mutation were initiated and Mutation Court vide order dated 30.05.1952 ordered mutation of the name of petitioners' father in respect of the Gatas in respect of which Lease was granted by the Zamindar. According to the petitioners, based on the aforesaid order the name of petitioners' father came to be recorded in Khatauni of 1359 Fasli and remained so recorded till 1366 Fasli. It is worthwhile to mention that the Lease dated 31.07.1951 is referable to 1359 Fasli, as, the Fasli year starts from 1st of July. There is not much of a dispute in this regard. On 11.10.1955 a notification was issued under Section 4 of the Indian Forest Act, 1927, by virtue of which Gatas bearing No. 1447/1 and 1448/1, which, according to the petitioners, was leased out in their favour by the Zamindar and consequently was recorded in their name vide order of the Mutation Court dated 30.05.1952, were declared that the said land apart from the other land mentioned in the notification had been decided/proposed to be constituted a Reserved Forest. Accordingly, a proposal was put-forth. By the same notification, a copy of which is annexed as Annexure No. 19 to the rejoinder affidavit of the

petitioners, the Sub-Divisional Officer of Sub-Division concerned was appointed as Forest Settlement Officers under Section 1(o) of Section 4 of the Act, 1927 and Additional Commissioner, Lucknow Faizabad Division was empowered to hear appeals from orders of the Forest Settlement Officers. According to the petitioners, their father had filed objections under Section 6 of the Act, 1927 before the Forest Settlement Officer i.e. the Sub-Divisional Officer concerned of District-Barabanki, although, learned counsel for the State says that no such objection was filed. Be that as it may, the Court finds that under Section 7 of the Act, 1927 read with Section 9 thereof, even if, no claim is made under Section 6 by filing an objection. Forest Settlement Officer could ascertain from the records of the Government and evidence of any person likely to be acquainted with the same, regarding the existence of rights mentioned in Section 4 and Section 5 thereof and could acquire knowledge of existence of such rights in an inquiry under Section 7 as is mentioned in Section 9. The records of earlier proceedings especially the judgment of this Court dated 16.04.1975 rendered in Writ Petition No. 917 of 1972; Mohd. Mohinuddin Vs. State of U.P. and Ors. clearly disclose the aforesaid facts and also that the Forest Settlement Officer accepted the claim of the petitioners under Section 6 of the Act, 1927. There is some dispute about the date of this order. The Writ Court's judgment refers to it as order dated 31.08.1959. There is a letter/order of the Sub-Divisional Officer, Fatehpur dated 22.09.1958 with reference to letter of the Divisional Forest Officer, Gomti Rapti Afforestation Division, Lucknow which is annexed with the rejoinder affidavit. The said document says that the land bearing Plot No. 1447-A/1 measuring 79 bighas, 14 biswas and 6 biswansis, and Plot No. 1448-A/1 measuring 13 bighas 14 biswas i.e. total of 95 bighas, 8 biswas and 6 biswansis were the sirdari plots of Shri Mohinuddin and were wrongly notified for being taken by the Forest Department, and a correction had been ordered to be made in the village records accordingly. The reference in the said letter that a correction had been ordered to be made in the village records accordingly, is obviously a reference to the earlier order dated 31.08.1958 which has been referred in the judgment of the Writ Court. In the same letter it is mentioned that remaining area of 32 bighas, 7 biswas and 4 biswansis of 1447-A/2, and 116 bighas of Plot No. 1448-A/2 i.e. a total of 140 Bighas and 17 Biswa has been ordered to be recorded in the name of Forest Department obviously by the earlier order dated 31.08.1958 which is referred in the judgment dated 16.04.1975. After mentioning this fact the Divisional Forest Officer has been requested by the Forest Settlement Officer to take action for issuance of revised notification by the Government. This document has not been denied by the Official opposite parties inspite of three counter affidavits having been filed by them in this writ petition. Moreover, these facts are clearly borne out from the earlier judgment dated 16.04.1975 as referred above. These facts are also mentioned in the orders of the Consolidation Authority.

6. Now, what comes out from the records is that against the order dated 31.08.1958 passed by the Sub-Divisional Officer the State Government filed an appeal before the Deputy Commissioner, who allowed the same vide his order dated 30.12.1958 a copy of which is also annexed along with the aforesaid rejoinder

affidavit of the petitioners. The order very categorically states that it is being passed in Case No. 2 of 1958. The order of the Deputy Commissioner refers that it is a revisional application, although, it must have been an appeal as no revision is prescribed under the Act, 1927 against order of the S.D.O./ Forest Settlement Officer. Nevertheless, it goes on to say that the same has been filed by the Divisional Forest Officer, Gomti Rapti Afforestation Division, Lucknow against the order dated 31.07.1958 passed by the Sub-Divisional Officer, Fatehpur. Here again in the judgment of the Writ Court the order by the S.D.O. who was the Forest Settlement Officer is mentioned as dated 31.08.1958 but in the order of the Deputy Commissioner it is mentioned as 31.07.1958 but there is no doubt as to what the proceedings were. The proceedings were from an order by which certain lands, which were included in the notification under Section 4 of the Act, 1927, were released by the Settlement Forest Officer in favour of the petitioners obviously in exercise of powers under Section 11(2)(i) of the Act, 1927 and this fact has found mentioned in all the judgments referred hereinabove. The Deputy Commissioner set-aside the order of the S.D.O., Fatehpur with the direction that the land noted above shall remain the property of the Forest Department as before. According to the petitioners, this order of the Deputy Commissioner dated 30.12.1958 was challenged by filing an application with reference to Section 22 of the Act, 1927 before the State Government which had been bestowed with revisional powers in this regard. In this regard learned counsel for the petitioners invited the attention of the Court to a communication from the State Government dated 24.09.1959 mentioning the receipt of an application dated 27.08.1959 which was said to be under consideration. According to the learned counsel for the petitioners reference therein to the application is in fact a reference to the revision filed by the petitioners' father, although, he says that copy of the revision is not available. However, he invites the attention of the Court to the order of the Deputy Director of Consolidation wherein the statement of the Officials of the Forest Department, who were parties before him, has been recorded that against the order of the Deputy Commissioner dated 30.12.1958 a revision was pending consideration before the State Government which according to him is a corroboration of his assertion as aforesaid as also of the letter of the Government dated 24.08.1959.

7. Be that as it may, it is this order of the Deputy Commissioner dated 30.12.1959 which found favour with the Consolidation Officer, the Settlement Officer, Consolidation and ultimately the Deputy Director of Consolidation, who, vide their orders dated 12.01.1970, 13.10.1971 and 14.02.1972, rejected the objections/claim of the petitioners for striking off the entry in basic year Khatauni which was in favour of the Forest Department in respect of the land in dispute, as, according to all these consolidation Courts the said order had attained finality between the parties. The matter came up to this Court as stated earlier by means of Writ Petition No. 917 of 1972 which was filed by the petitioners' father and this Court found that the order of the Deputy Commissioner dated 30.12.1958 which had been passed under Section 17 of the Act, 1927 and which formed the basis for the orders impugned before the Writ Court which was passed by the Consolidation Officer, was without

jurisdiction and accordingly, it was declared as being without authority of law. Though, the Writ Court in its judgment dated 16.04.1975 did not give reasons as to why it found it to be so, the reasons are not far to see as in the notification under Section 4 of the Act, 1927 itself, as mentioned earlier, the State Government exercising its powers had notified the Additional Commissioner Lucknow Faizabad Division as the authority competent to hear the appeal. The Additional Commissioner was an Officer higher in rank than the Deputy Commissioner, therefore, it appears the Court held it to be so. It is true that the order of the Deputy Commissioner was not directly under challenge before the Writ Court, but, then, it is equally true that orders of the Consolidation Officers were based on the order of the Deputy Commissioner which apparently was without jurisdiction, therefore, the Writ Court declared it to be so obviously to do substantial justice between the parties and as an order passed without jurisdiction is a nullity in the eyes of law. Most importantly, the State never challenged the judgment dated 16.04.1975, therefore, the said judgment has attained finality between the parties and the findings/conclusions drawn therein can not be assailed by the State nor have they been sought to be assailed in these proceedings.

8. This Court while hearing this writ petition on the earlier occasions had asked the State Government vide order dated 28.08.2019, inter alia, as to whether against the order of the Sub-Divisional Officer which was in favour of the petitioners, any proceedings were taken by the Forest Department before the competent Authority/Court under the Indian Forest Act, 1927 after the decision of the Deputy Commissioner dated 30.12.1958 had been held to be without jurisdiction by this Court in the earlier round of litigation vide its judgment dated 16.04.1975, if so, what was the result thereof, but inspite of sufficient opportunity the State neither filed any affidavit answering the queries nor produced any document in this regard. As such on 03.01.2020 this Court passed the following order:-

"In spite of the order dated 28.8.2019, the relevant records have not been produced before this Court and every time opportunity is being sought as is evident from the subsequent orders also, therefore, adverse inference is to be drawn against the concerned opposite parties whenever the matter is taken up.

List/ put up on 7.1.2020."

9. Even today, neither any affidavit has been filed nor any attempt has been made to answer the queries made in the order dated 28.08.2019. In this view of the matter, adverse inference is drawn against the State, and it is accordingly inferred that the order of the Sub-Divisional Officer which was in favour of the petitioners as noticed by this Court in the earlier judgment dated 16.04.1975 and which was challenged before the Deputy Commissioner whose order was declared to be without jurisdiction, were never challenged before any higher forum.

10. It is not out of place to mention that till date no notification has been issued under Section 20 of the Act, 1927 declaring the aforesaid Gatas bearing No. 1447/1 and 1448/1 as reserved forest land so as to confirm the proposal under Section 4. It is also true as informed by Shri Maurya, learned Additional Chief

Standing Counsel that inspite of order of the S.D.O./Forest Settlement Officer and his letter dated 22.09.1958 referred hereinabove the notification under Section 4 has not been revised but this is immaterial for the reason that an adjudication by the Forest Settlement Officer and the Court even if it has not been complied by the State Government will hold the field and the notification will be treated to have been modified accordingly in terms of the statutory orders passed by the competent authority and the order of the Writ Court dated 16.04.1975.

11. Vide judgment dated 16.04.1975 the Writ Court interfered with the order of the Deputy Director of Consolidation on the ground that the main basis of the order was the illegal and void order passed by the Deputy Commissioner, accordingly, the Writ Court remanded the matter back to the Deputy Director of Consolidation for consideration of the revision afresh with the observation that he shall see as to whether the Lease granted by the Zamindar in favour of the petitioners had been acted upon or not and whether the land continued to be a forest. It was also observed that if necessary, the Deputy Director of Consolidation may remand the case to the Consolidation Officer for taking evidence on this point. The petition of the petitioners' father was accordingly allowed and the order of the D.D.C. dated 14.02.1972 was set-aside.

12. After remand the Deputy Director of Consolidation considered the matter afresh. It however so happened that for some reason the original copies of documents including lease etc. which were filed by petitioners' father were taken back by him and after remand the same could not be filed again. When confronted the learned counsel for the petitioners submitted that this was on account of fact that the petitioners' father died on 07.02.1979. Thereafter, the petitioners who are his sons got substituted in his place but they were not aware of the fact that the original documents had been taken back by their father. In this scenario the Deputy Director of Consolidation found that the Lease, though, it had been filed by the petitioners had been taken back and had not been filed again inspite of several dates being fixed in the matter. He also found that possession of the petitioners was not proved, although, in his order he has mentioned that during "partal' they were found to be in possession and had also paid rent firstly to the Zamindar and thereafter to the Government. For these reasons he has dismissed the revision of the petitioners and his order is impugned before this Court.

13. Now, before this Court the petitioners have filed copy of the Lease etc. and have also offered an explanation for not filing the same before the D.D.C. as aforesaid.

14. It is also not out of place to mention that all these documents which could not be filed before the D.D.C. were subsequently filed along with a review application which was dismissed on the ground that the D.D.C. did not have any power to review his order, as already stated.

15. Now, after hearing the learned counsel for the parties and perusing the records what comes out is that the order of the Deputy Commissioner, which was the basis for denying the claim of the petitioners by the Consolidation Courts, has been declared to be without

jurisdiction by this Court way back on 16.04.1975 in the earlier writ petition and the said judgment has attained finality and there is no other order passed by any other higher authority or Court which may have set-aside the order of the Sub-Divisional Officer/First Settlement Officer which was admittedly in favour of the petitioner having been passed under the Act, 1927, even though a copy of it is not on record of this writ petition and has not been produced by the State inspite of order of this Court dated 28.08.2019 and 05.09.2019 which compelled the Court to pass the order dated 03.01.2020 regarding adverse inference as already referred earlier. This factual scenario is unrebutted.

16. Though, copy of the Lease is on record this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India is not empowered to appreciate evidence and record findings of fact based thereon, especially, as the language of the Lease is not very clear.

17. It is also not in dispute that based on the order of the Sub-Divisional Officer, who was the Forest Settlement Officer as per Notification dated 11.10.1955, the name of the petitioners' father was entered in the revenue records in respect of Gatas No. 1447/1 and 1448/1 in 1359 Fasli i.e. the Khatuani prepared in the year of vesting and it continued to be so recorded till 1363 Fasli or 1366 Fasli. It is also not in dispute that the land in dispute was recorded as forest land in favour of the Forest Department of the Govt. of U.P. only because of the order of the Deputy Commissioner dated 30.12.1958 which has already been declared void vide judgment dated 16.04.1975. Thus, as far as basic year entry in favour of the Forest Department in respect of the land in dispute referred hereinabove is concerned, the same was susceptible to challenge unless there was any other factual and legal basis to sustain it, but, the Deputy Director of Consolidation while passing the impugned judgment on 25.02.1981 has failed to consider this aspect of the matter. He was greatly persuaded by the fact that the Lease, which was initially filed by the petitioners, was not on record. The circumstances in which the Lease could not be filed have already been dealt with hereinabove. The copy of the Lease is on record of the writ petition. Had the Lease been on record then the D.D.C. would have had an occasion to consider relevant aspects of the matter as referred hereinabove, which he has not considered.

18. It is not the case of the State that the land in dispute had vested in the State in view of Section 4 read with Section 6 or any other provision of the Act, 1950. The case of the State throughout has been that the land was declared to be reserved forest land under Section 4 and it came to be recorded in the name of the Forest Department based on the order of the Deputy Commissioner dated 30.12.1958 which as stated earlier was declared to be void by this Court way back in 1975.

19. The land in dispute was recorded in the name of Forest Department only after passing of the order dated 30.12.1958.

20. In view of the above discussion, the matter requires reconsideration by the D.D.C. The first question to be considered by the D.D.C. is the basis for recording the land as Forest Land in the eyes of law. Assuming he finds absence of any factual and legal basis this by itself would not entitle the petitioners to get their name

recorded in respect thereof and an adjudication would be required with regard to their entitlement based on the alleged Lease issued by the Zamindar, the mutation order passed thereafter and also the points considered by this Court in its earlier judgment dated 16.04.1975 as to whether the said Lease was acted upon. The question which would fall for consideration is as to what rights accrued to the petitioners, if at all such a Lease was executed and mutation order had been passed in terms of the U.P. Zamindari Abolition and Land Reforms Act, 1952. Whether at all any rights accrued or the land in question vested in the State under Section 4 read with Section 6 of the said Act, 1952 or Whether the land was even otherwise liable to be recorded as Forest Land under the Act, 1927 as per law. This aspect of the matter has not been examined by the Consolidation Officer, S.O.C. and the Deputy Director of Consolidation. In this context it is relevant to refer to Section 8 of the Act, 1950 so as to avoid further confusion, complication and multiplicity of litigation in this regard. Section 8 of the Act, 1950 reads as under:-

*"**8. Contract entered into after August 8, 1946, to become void from the date of vesting.-** Any contract for grazing or gathering of produce from land or the collection of forest produce or fish from any forest or fisheries entered into after the eighth day of August, 1946, between an intermediary and any other person in respect of any private forest, fisheries, or land lying in such estate shall become void with effect from the date of vesting.*

***Summary.-** Any contract between an intermediary and any other person made after the 8th day of August, 1946, shall become void from the date of vesting, if it provides for :*

(a) grazing,

(b) gathering of produce from land lying in the estate so vested,

(c) the collection of forest produce from any private forest, and

(d) fish from any fisheries."

21. During the course of arguments a query was put by the Court as to whether the Lease by the Zamindar, who was an intermediary within the definition of the term under the Act, 1950, in favour of the petitioners' father was hit by Section 8, no satisfactory reply could be given by either of the parties, however, the Court finds that there is a Division Bench judgment of this Court reported in ***1960 RD 337; Raghunath Singh and Anr. Vs. State of U.P. and Anr.*** wherein it has been held that Section 8 is not attracted in the case of Leases of land where the purpose of the lease is to use the land for the purpose of agriculture. A lease of land for the purpose of cultivation which confers on the lessee not merely a right in the land but also the right to exclusive possession of the land and to turn it to cultivation, is not a transaction covered by Section 8. Hence, where the land was agricultural purpose the lessee acquired at first a status of hereditary tenant and later when the U.P. Zamindari Abolition and Land Reforms Act was enforced of Sirdar of the lands therein transferred. Relevant extract of the said judgment is quoted herein below:-

"In our opinion Section 8 is not attracted in the case of leases of land where the purposes of the leases is to use the land for the purpose of agriculture, horticulture, pisciculture etc. It is sometimes unavoidable that in the process of using the land for these purposes reclamation also is done and what is known as forest produce is collected or

removed in the process. Land must be cleared of unwanted growth to turn it usefully to agriculture etc. The mere fact that these operations are necessarily involved in making the land agriculture worthy will not take away from the transaction their true nature as leases of land. A contract for the collection of forest produce must in order that it may be such a transaction be contract essentially for the collection etc. of the produce. It will not be such a contract if the removal etc. of the forest has to be done to make the land agriculture worthy- the object and purpose of the lease. In the instant case, admittedly the leases were for using the land for purpose of agriculture and horticulture etc. As a matter of fact the lessees were also entered as hereditary tenants of the lands and later after the abolition of zamindaris as sirdars. They have been paying the land revenue also assessed on them to the Government. It is not possible in these circumstances to hold that the leases were contracts for the collection of forest produce. The contract referred to in Section 8 does not contemplate the conferment on the promises any right in or over land, it, on the other hand, merely refers to the right to collect forest produce or to perform certain acts over the land. A lease of land for the purpose of cultivation which confers on the lessee not merely a right in the land but also the right to exclusive possession of the land and to turn it to cultivation, is not a transaction covered by Section 8. It is not possible under the circumstances to accept that the leases in favour of the petitioners were void under Section 8 of the U.P. Zamindari Abolition and Land Reforms Act. Being leases for agriculture purposes the lessees acquired, at first the status of hereditary tenants and later when the Zamindari Abolition and Land Reforms Act was enforced of sirdars of the lands therein transferred."

22. On a bare perusal of Section 8 of the Act, 1950 what comes out is that any contract between an intermediary and any other person made after the 8th day of August, 1946 which is the date on which the United Provinces Legislative Assembly resolved to abolish the zamindari system in principle, shall become void from the date of vesting, if it provides for :

"(a) grazing,

(b) gathering of produce from land lying in the estate so vested,

(c) the collection of forest produce from any private forest, and

(d) fish from any fisheries."

23. None of the Courts below have considered as to whether the Lease in question would be hit by Section 8, therefore, this discussion has been made only to throw some light on the legal position in this regard so that while reconsidering the matter, as, this Court proposes to remand it back to the D.D.C., this aspect shall also be kept in mind along with the inter play of other provisions of the Act, 1950 by which new tenures were sought to be created. The concept of Adhiwasi was also introduced in the Act, 1950 sometimes in 1952 which will also have to be kept in mind. The relevant dates will have to seen in the matter, chronologically.

24. Learned counsel for the State was asked as to the status of the revision alleged to have been filed by the petitioners but he stated that on account of lapse of time it is not possible to trace out the same and is not available.

25. In view of the above discussion, the order of the Deputy Director of Consolidation is accordingly set-aside. The revision of the petitioners shall stand restored once again. The petitioners and the opposite parties shall put in appearance before the Deputy Director of Consolidation on 10.02.2020. Thereafter, the proceedings shall be held keeping in mind the observations made hereinabove and also the observations made by the Writ Court earlier vide its judgment dated 16.04.1975.

26. The petitioners claim to have filed the Lease and other documents before the D.D.C. along with the review application. If the same are available on record the same shall be taken into consideration. Otherwise it shall be open for the petitioners to again file the said documents if the occasion so requires.

27. It is however, made clear that the claim of the petitioners which is to be considered, shall be restricted to only two Gatas bearing No. 1447/1 and 1448/1, as, it is only these two Gatas regarding which claim was raised by the petitioners' father in the consolidation proceedings in the first place, in his objections, a copy of which has been filed with the counter affidavit.

28. The Deputy Director of Consolidation shall make an earnest endeavour to complete the proceedings, after remand, within a period of one year from the date of submission of a certified copy of this order before him.

29. The writ petition is **allowed in part** in the aforesaid terms.

(2020)1ILR 592

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE MRS. YASHWANT VARMA, J.

Writ C. No. 2372 of 1989

Harish Chandra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Bhushan, Dr. G.S.D. Mishra, Sri H.N. Pandey, Sri H.N. Sharma, Sri Karuna Srivastava, Sri Ramesh Chandra Singh, Sri S.K. Srivastava

Counsel for the Respondents:
C.S.C., Sri Shiv Pratap Singh Rathore

A. The U.P. Imposition of Ceiling on Land Holdings Act 1960 - Section 5(6) – while determining the ceiling area of a tenure holder any transfer of land made after 24 January 1971 which but for the transfer would have been declared as surplus shall be ignored and not taken into account - Notices under Section 10(2) – ' will' which is a testamentary document comes into effect only upon the death of the testator – 'will' by virtue of its intrinsic character is naturally *"ambulatory"* - revocable during the lifetime of the testator - A 'will' in its fundamental terms merely embodies a disposition of property which is to take effect after the death of the deceased – held - 'will' by its very nature is distinct from a 'transfer' - tenure holder failed to establish that 'transfer' falls within the ambit of clause (b) of the Proviso to section 5(6) - impugned orders passed by the Prescribed Authority and Additional Commissioner quashed. (Para 7, 8 & 11)

It is clear on a holistic reading of sub section 5(6) that transfers made after the cutoff date

(i.e.24 January 1971) are not ipso facto liable to be ignored - A transfer, even though made after the cutoff date, can still stand saved provided the tenure holder is able to establish that it falls within the ambit of clause (b) of the Proviso. - it is evident from the order of the Additional Commissioner that the will executed in favour of the brothers of the petitioner on 21 October 1974 has not been tested or evaluated on the anvil of clause (b) at all - The Additional Commissioner while proceeding to reject and ignore that transfer does not record any findings that the transaction was not made bona fide or that it did not satisfy the other factors which stand enumerated in that clause. (Para 7)

Held: - A will would clearly not fall within the scope of the expression "transfer" as employed in Section 5 (6). The will executed in favour of the brothers of the petitioner could not have been held or recognized as embodying a transfer for the purposes of the Act. A will which was executed in favour of the brothers of the petitioner could not be said to fall within the ambit of Section 5(6) of the Act. (Para 10)

Writ Petition allowed. (E-7)
List of cases cited: -

1. S. Rathinam Vs. L.S. Mariappan2

2. Beru Ram and Others v. Shankar Dass and Others, AIR 1999 J&K 55

3. Mahadeo Vs Shakuntalabai3

4. State of West Bengal and Anr. v. Kailash Chandra Kapur and Ors., (1997) 2 SCC 387

5. Beru Ram v. Shankar Dass, AIR 1999 J & K 55

6. S. Rathinam alias Kuppamuthu and Ors. v. L.S. Mariappan and Ors., (2007) 6 SCC 724

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

1. Heard learned counsel for parties.

2. This petition raises the issue of whether a will when executed would amount to a transfer as contemplated under Section 5(6) of the **U.P. Imposition of Ceiling on Land Holdings Act 19601.** Before proceeding to answer the question as framed it would be pertinent to notice the following essential facts.

3. The original tenure holder Devi Dutt had two sons namely Sheo Sampat Lal and Rishal Chandra. Sheo Sampat Lal had one son Raj Narain who died in 1954. However, Raj Narain on 23 April 1954 executed a will in favour of the petitioner bequeathing his share in the ancestral property. It is stated that on the basis of the aforesaid will the name of the petitioner was entered in the revenue records on 1 January 1955. Rishal Chandra had one son named Ram Chandra, the father of the present petitioner. During the course of consolidation operations chaks were carved out equally between the petitioner and Ram Chandra. Ram Chandra, the father of the petitioner, is stated to have entered into a second marriage from which Munish Chandra and Subhash Chandra were born. Since the petitioner already stood recorded over half of the ancestral property and chaks had also been carved out accordingly during the course of consolidation operations, Ram Chandra executed a will on 21 October 1974 bequeathing his half share in the ancestral property to Munish Chandra and Subhash Chandra. Ram Chandra ultimately died on 22 November 1983. Notices under Section 10(2) of the Act, however, came to be issued in his name on 24 September 1984. On receipt of that notice and since Ram Chandra had died in the meanwhile, the petitioner and his two brothers filed objections before the Prescribed Authority. The Prescribed Authority by his order of 21 February 1986 declared 10.15 acres as surplus. While framing the said order,

although the Prescribed Authority noticed the will executed in favour of the petitioner on 23 April 1954, he held the petitioner and his two brothers liable to be recognised as holding 1/3rd share in the entire property. When the matter was taken in appeal the Additional Commissioner in terms of his order of 5 November 1988 ruling upon the validity of the will executed in favour of the brothers of the petitioner held that since that had been executed on 21 October 1974 and thus evidently after the cut off date of 24 January 1971 as prescribed in Section 5(6) of the Act, it was liable to be ignored. It is in the aforesaid backdrop that the instant writ petition came to be preferred before this Court.

4. Assailing the orders impugned, Sri R.C. Singh, learned Senior counsel appearing for the petitioner, contends that both the authorities have clearly erred in holding the petitioner and his two brothers to be co-sharers to the extent of 1/3rd each in the ancestral property. Referring to the will executed in favour of the petitioner on 23 April 1954, it was submitted that by virtue of that testament, the petitioner came to hold one half share in the ancestral property. According to Sri Singh since the consolidation authorities had also recognised his rights and had made allotments in favour of the petitioner and Ram Chandra in equal proportion, there was no occasion for the ceiling authorities to ignore the will and the orders passed in those proceedings. Sri Singh submitted that his two brothers inherited one half share in the ancestral property by virtue of the will executed by the father on 21 October 1974. According to Sri Singh the land holding of the petitioner and his two brothers were liable to be assessed under the Act in accordance with the testamentary instruments referred to above. Sri Singh submitted that the notice under Section 10(2) had undisputedly come to be issued after the death of the father of the petitioner. He assailed the impugned orders also on the ground that although the petitioners appeared and contested those proceedings, no individual notices under section 10(2) of the Act had been issued to them. Sri Singh then submitted that the Additional Commissioner has clearly erred in construing the will executed by his father in favour of his two brothers to be a transfer. Sri Singh contended that a will only embodies the intention of the testator to devolve property after his death. According to Sri Singh, a will only evidences a disposition of property which is to take effect upon the death of the testator. In view of the above, it was his submission that the will could not be construed as a *"transfer"* as contemplated under Section 5(6) of the Act. In support of his submission, Sri Singh relied upon the following principles as enunciated by the Supreme Court in **S. Rathinam Vs. L.S. Mariappan2: -**

"19. A will denotes a testamentary document. It means a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It is in its own nature ambulatory and revocable during his life.

20. In Uma Devi Nambiar and Others v. T.C. Sidhan (Dead) [AIR 2004 SC 1772], it was held :

"10. Will is a translation of the Latin word "voluntas", which was a term used in the text of Roman law to express the intention of a testator. It is of significance that the abstract term has come to mean that document in which the

intention is contained. The same has been the case with several other English law terms, the concrete has superseded the abstract obligation, bond, contract, are examples (William: Wills and Intestate Succession , p. 5). The word "testament" is derived from *" testatio mentis "*, it testifies the determination of the mind. A Will is thus defined by Ulpians as " *Testamentum est mentis nostrae justa contestatio in id sollemniter facta to post mortem nostrum valeat ."* Modastinus defines it by means of *voluntas.* It is *"voluntatis nostrae justa sententia, de eo quod quis post mortem suam fieri vult (or velit)"*; the word " justa " implying in each, that, in order to be valid, the testament must be made in compliance with the forms of law. It means, "the legal declaration of a man's intentions, which will be performed after his death". A last Will and testament is defined to be "the just sentence of our Will, touching what we would have done after our death". Every testament is consummated by death, and until he dies, the Will of a testator is ambulatory. *Nam omne testamentum morte consummatum est; et voluntae testamentoric est embulatoria usque od mortem.* (For, where a testament is, there must also of necessity be death of testator; for, a testament is of force after men are dead; otherwise it is of no strength at all while the testator liveth.) A "Will", says Jarman, "is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." (Jarman on Wills, 1st Edn., p. 11.) This ambulatory character of a Will has been often pointed out as its prominent characteristic, distinguishing it, in fact, from ordinary disposition by a living person's deed, which might, indeed postpone the beneficial possession or even a vesting until the death of the disposer and yet would produce such postponement only by its express terms under an irrevocable instrument and a statement that a Will is final does not import an agreement not to change it. (Schouler: *Law of Wills,* S. 326). A Will is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the statute."

21. A testator by his will, may make any disposition of his property subject to the condition that the same should not be inconsistent with the laws or contrary to the policy of the State. A will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing. It is not a transfer but a mode of devolution. [See Beru Ram and Others v. Shankar Dass and Others - AIR 1999 J&K 55]. "

5. Refuting those submissions, learned Standing Counsel submitted that since no partition had been affected amongst the brothers in formal and legal terms, the respondents correctly recognised them as holding 1/3rd share in the ancestral property. According to the learned Standing Counsel while notices may not have been issued individually to the petitioner and his brothers, since they appeared and contested the matter before the Prescribed Authority as well as the Additional Commissioner, no prejudice as such stood caused and consequently the impugned orders are not liable to be set aside on this score.

6. The answer to the question of whether a will would be liable to be construed as a *"transfer"* would depend upon the construction of Section 5(6) of the Act. That provision reads thus: -

"(6) In determining the ceiling area applicable to a tenure-holder, any

transfer of land made after the twenty-fourth day of January, 1971, which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account :

Provided that nothing in this sub-section shall apply to--

(a) a transfer in favour of any person (including Government) referred to in sub-section (2);

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transaction or for immediate or deferred benefit of the tenure-holder or other members of his family.

Explanation I.--For the purposes of this sub-section, the expression 'transfer to land made after the twenty-fourth day of January, 1971, includes--

(a) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971;

(b) any admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner.

Explanation II.--The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit."

7. The Section prescribes that while determining the ceiling area of a tenure holder any transfer of land made after 24 January 1971 which but for the transfer would have been declared as surplus shall be ignored and not taken into account. On plain terms sub-section (6) appears to empower the respondents while implementing the provisions of the Act to ignore transfers made after 24 January 1971. However as is evident from the Proviso appended to sub-section (6), a transfer per se is not liable to be rejected. This, since firstly, transfers in favour of persons including those specified in Section 5(2), are excluded from the operation of the injunct engrafted in sub-section (6). Section 5(2) enumerates the categories of persons and legal entities who would stand exempted from the rigour of Section 5(1). Amongst others, it includes the Central Government, State Government, Local Authority, University, an intermediate college etc. Similar safeguards stand placed in respect of transfers that may be affected by individuals after 24 January 1971. This is evident from a perusal of clause (b) to the Proviso which states that it would be open for a tenure holder to commend to the respondents not to ignore a transfer made after the cut off date provided it is established that it was made in good faith, for adequate consideration and by way of an irrevocable instrument as also in a situation where the transfer is made for the immediate or deferred benefit of the tenure holder or the members of his family. On a holistic reading of sub section (6) it is therefore manifest that transfers made after the cut off date are not ipso facto liable to be ignored. A transfer, even though made after the cut off date, can still stand saved provided the tenure holder is able to establish that it falls within the ambit of clause (b) of the Proviso. As this Court reads the order of the Additional Commissioner, it is evident that the will executed in favour of the brothers of the petitioner on 21 October 1974 has not been tested or evaluated on the anvil of

clause (b) at all. The Additional Commissioner while proceeding to reject and ignore that transfer does not record any findings that the transaction was not made bona fide or that it did not satisfy the other factors which stand enumerated in that clause.

8. Notwithstanding the above, in the considered view of the Court, the impugned orders are liable to be set-aside on a more fundamental ground. Sub-section (6) speaks of *"transfer"*. As is evident upon a conjoint reading of the substantive provision of that Section and the Proviso appended thereto, it clearly contemplates a transfer made *in praesenti.* This, since evidently that provision would stand attracted only if a transfer has been made, completed and accomplished after the 24th of January 1971. It clearly operates in respect of a disposition of property made after the cut off date which has taken effect. It cannot by any stretch be read as taking within its ambit something which is indefinite or undetermined. As was lucidly explained by the Supreme Court in **S Rathinam,** a will which is a testamentary document comes into effect only upon the death of the testator. It was also significantly observed that a will by virtue of its intrinsic character is naturally *"ambulatory"*. This since it is always revocable during the lifetime of the testator. A will in its fundamental terms merely embodies a disposition of property which is to take effect after the death of the deceased. It is in that light that the Supreme Court held that a will by its very nature is distinct from a transfer.

9. Dealing with an identical question, the Supreme Court in **Mahadeo Vs Shakuntalabai3** was called upon to consider whether a will would fall within the ambit of Section 57 of the Bombay Tenancy and Agricultural Lands Act 1958. Section 57(2) of that Act provided that any transfer of land made in violation of sub-section (1) would be invalid. Dealing with that question, the Supreme Court held thus: -

"5. On a plain reading of the aforesaid provision, it is clear that transfer without the previous sanction of the Collector is impermissible by way of sale, gift, exchange, mortgage, lease or assignment. There is no prohibition in so far as the transfer of land by way of a Will is concerned. In fact, in view of the decision of this Court in State of West Bengal and Anr. v. Kailash Chandra Kapur and Ors. (1997) 2 SCC 387, devolution of property by way of a Will does not amount to a transfer of the property. This is clear from para 12 of the aforesaid decision wherein it has been observed that transfer connotes, normally, between two living persons during life. However, a Will takes effect after demise of the testator and transfer in that perspective becomes incongruous.

6. That the beneficiary of a Will receives the property by way of devolution and not by way of transfer is also made clear by the decision of this Court in S. Rathinam alias Kuppamuthu and Ors. v. L.S. Mariappan and Ors. (2007) 6 SCC 724 wherein this Court has held in para 21 that:

"21. A testator by his Will, may make any disposition of his property subject to the condition that the same should not be inconsistent with the laws or contrary to the policy of the State. The Will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing. It is not a transfer but a mode of devolution."

In coming to this conclusion, this Court referred to Beru Ram v. Shankar Dass AIR 1999 J & K 55."

10. From the position of law as exposited in **S. Rathinam** and **Mahadeo,** it is manifest that a will would clearly not fall within the scope of the expression "transfer" as employed in Section 5 (6). The will executed in favour of the brothers of the petitioner could not have been held or recognised as embodying a transfer for the purposes of the Act. It is manifest that the will which was executed in favour of the brothers of the petitioner could not be said to fall within the ambit of Section 5(6) of the Act. This in itself renders the impugned orders wholly unsustainable.

11. The writ petition is accordingly **allowed.** The impugned orders dated 21 February 1986, passed by the Prescribed Authority and 5 November 1988 passed by the Additional Commissioner are hereby quashed.

(2020)1ILR 598

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE
THE HON'BLE AJAY BHANOT, J.

Writ C No. 13214 of 2019

Anant Narayan Mishra ...Petitioner
Versus
The Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha, Sri Girijesh Kumar Mishra, Sri Ratnakar Upadhyay

Counsel for the Respondents:
A.S.G.I., Sri Ajeet Kumar Singh, Sri Ishan Shishu, Sri K.R. Singh, Sri Krishna Raj Singh Jadaun, Sri Rijwan Ali Akhtar, Sri Vikram D. Chauhan, Sri V.K. Upadhyaya

A. Moral turpitude - definition - wide ambit - criminal offence does not automatically lead to an inference that the act is of moral turpitude - offences can be categorized as those involving moral turpitude will depend on facts of each case.

The Court found that the issue whether the offending act attributed to the petitioner, fell in the categories of "heinous crime (including violence and intimidation) or was an act of moral turpitude", is wholly absent from consideration. The impugned order suffers from non-application of mind, and was passed mechanically. (Para 35)

B. Education - essence - its values - modern threats - can be curtailed through discipline - punishments for violation of discipline - Court issued directions to the State to create a reform, self- development and rehabilitation programme for accused students.

C. Punishment - deterrent approach - punitive approach - reformative approach - self development and rehabilitation.

The Court finds that there is no structured, professionally designed reform, self development and rehabilitation programme, or therapeutic support system backed by a legal frame work to deal with the delinquent students and like issues in the universities. (Para 91)

D. Article 21 - Constitution of India - includes right to human dignity - jurisprudential aspect - punishment should protect the essential sanctity of human life.

Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality (Para 140)

Failure to consider susceptibility to reform, while denying the right to access privileges and activities of the university, negates the possibility of rehabilitation. Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation. Termination of dialogue with the delinquent

student, without offering an opportunity to reform, makes him an outcaste. The individual is permanently discarded by the institution, and loss of human self worth is total. This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India (Para 145)

The statutory omission of reform measures, is an inadequacy which renders the university incapable of rectifying the violation made by it. The systemic fault-line is contrary to the mandate of Article 21 of the Constitution of India. (Para 157 (ii))

E. Constitutional Jurisprudence - Doctrine of Proportionality - fundamental rights - can never be exhaustive - text of the Constitution is fixed, fundamental rights are always evolving.

The essence of proportionality is that, the competent authority while imposing a punishment upon a delinquent student, has to co-relate and balance the imperatives of institutional discipline with the demands of individual rights. Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice. (Para 222)

The impugned action fails the test of proportionality as the suspension of the petitioner from the university, for an undefined or indefinite period, is an action of extreme severity. It is de-facto expulsion from university. (Para 224)

Writ Petition partly allowed. (E-10)

List of cases cited: -

1. State Bank of India and Others Vs. P. Soupramaniane 2019 SCC OnLine SC 608

2. Vishaka Vs. State of Rajasthan 1997 (6) SCC 241

3. Rattan Chand Hira Chand v. Askar Nawaz Jung (1991) 3 SCC 67

4. Ajay Singh Vs. Union of India and Others Writ C No. 32955 of 2019

5. Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

6. Maneka Gandhi v. Union of India (1978) 1 SCC 248

7. Olga Tellis v. Bombay Municipal Corpn. (1985) 3 SCC 545

8. Prem Shankar Shukla v. UT of Delhi (1980) 3 SCC 526

9. Francis Coralie Mullin v. UT of Delhi (1981) 1 SCC 608

10. Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161

11. Khedat Mazdoor Chetna Sangath v. State of M.P. (1994) 6 SCC 260

12. M.Nagaraj v. Union of India (2006) 8 SCC 212

13. Shabnam v. Union of India (2015) 6 SCC 702

14. Jeeja Ghosh v. Union of India (2016) 7 SCC 761

15. Mehmood Nayyar Azam v. State of Chhattisgarh (2012) 8 SCC 1

16. National Legal Services Authority v. Union of India (2014) 5 SCC 438

17. Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal (2010) 3 SCC 786

18. Selvi v. State of Karnataka (2010) 7 SCC 263

19. Sunil Batra (II) Vs. Delhi Administration 1980 (3) SCC 488

20. T.K. Gopal v. State of Karnataka (2000) 6 SCC 168

21. Asfaq v. State of Rajasthan and Others (2017) 15 SCC 55

22. K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

23. Rosenblatt v. P Baer 1966 SCC OnLine US SC 22: 383 US 75 (1966)

24. Armoniene v. Lithuania (2009) EMLR 7

25. Procunier, Corrections Director, ET AL. Vs. Martinez ET AL. 416 U.S. 396 (1974)

26. Trop Vs. Dulles 356 US 86 (1958)

27. Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others (1997) 2 SCC 534

28. Devarsh Nath Gupta Vs. State of U.P. and Others 2019(6) ADJ 296 (DB)

29. Ranjit Thakur Versus Union of India (1987) 4 SCC 611

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

This judgment has been structured by dividing it into various sections to facilitate analysis and for easy read. They are:

A.	Reliefs sought
B.	Arguments of learned counsels for the parties
C.	Facts (i). Background (ii). Suspension order : Consequences (iii). Suspension order : Validity
D.	Legal Issues common in all writ petitions
E.	Stands of various respondents on (i).Response of IIT BHU (ii).Response of AMU (iii).Response of BHU (iv).Response of UGC (v).Response of UoI
F.	Evolution of Fundamental Rights by courts (i) Legislative lag, executive inertia and fundamental rights
G.	Process of law and the courts : Current State & Contemporary challenges
H.	Education (i). Importance and scope (ii). Role and obligation of universities
I.	Discipline in Universities: Concept, Need & Challenges (i). Violence, intimidation and moral turpitude (ii). Communal disturbances in universities (iii). Discipline in universities (iv). Statutory approach to maintaining discipline
J.	Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality
K.	Punishments & Article 21 (i). Right to human dignity (ii). Supreme Court on human dignity (iii). Comparative International Jurisprudence (iv). Constitutionality of punishments under the statutes (v). Systemic responses : Responsibilities of the State and the universities
L.	Reform, Self Development & Rehabilitation: (i). Role of universities in achieving behavioural change (ii). Imbibing constitutional values and purging communal hatred (iii). Present discontents of students and solutions (iv). Creation of reform, self development, rehabilitation programmes (v). Concerns of universities regarding discipline & restraints during the reformation, self development & rehabilitation programme
M.	Proportionality and Punishment
N.	Conclusions & Reliefs
O.	Appendix

A. Reliefs sought

1. The petitioner has assailed the order dated 30.03.2019, passed by the Registrar, Banaras Hindu University, Varanasi, suspending the petitioner from all privileges and activities of the University.

2. The petitioner has also prayed for a writ in the nature of mandamus to command the authorities and permit the petitioner to pursue his Integrated Rural Development and Management (IRDM) course as well as Ph.D. course and permit

the petitioner to participate in the activities of the University.

B. Arguments of the learned counsels for parties

3. Sri R.K.Ojha, learned Senior Counsel assisted by Sri Ratnakar Upadhyay, learned counsel for the petitioner submits that the impugned order was passed in violation of the statutes of the university. The punishment imposed upon the petitioner is disproportionate. There is no provision for reform and rehabilitation of delinquent students in the statutes, which has resulted in violation of the fundamental right of the petitioner guaranteed under Article 21 of the Constitution of India.

4. Sri Anish Kumar, and Sri Pankaj Misra and Sri Gaurav Pundir, learned counsels for the petitioner in connected writ petitions adopt the aforesaid arguments of the learned Senior Counsel, apart from raising factual issues peculiar to the respective writ petitions in which they appear.

5. Sri V.K. Upadhyaya, learned Senior Counsel assisted by Sri V.D. Chauhan, learned counsel for the BHU submits that the BHU has taken action as per law.

6. The learned Senior Counsel relied on the affidavits filed by the B.H.U., on creation of a reform and rehabilitation programme for delinquent students.

7. Sri Ajit Kumar Singh, learned Senior Counsel assisted by Sri V. D. Chauhan, learned counsel for the IIT BHU, contends that the IIT BHU, as a matter of policy accepts and is willing to adopt a professionally designed reform and rehabilitation programme for delinquent students. However, good order and discipline have to be maintained in the University, at all costs. In fact IIT BHU is currently even running a reform programme. Though he fairly conceded that the programme is not fully developed and does not have a supporting statutory/legal frame work.

8. Sri Shashank Shekhar Singh, learned counsel for the respondent-AMU, submits that the AMU fully accepts the idea of a reform and rehabilitation programme for delinquent students on an institutional basis. He also contends that no compromise with the good order, discipline, and the stability of the academic atmosphere can be made in any manner.

9. Sri Rizwan Akhtar, learned counsel for the UGC, Sri Rakesh Srivastava, and Sri Abrar Ahmed, learned counsels for the Union of India, have also been heard.

C. Facts

(i) Background

10. The petitioner completed his master's degree in Social Works (MSW) from the Banaras Hindu University in the year 2017. Thereafter he enrolled in the Post Graduate Degree Course in Integrated Rural Development and Management (IRDM) for the academic sessions 2017-19. The petitioner qualified the National Eligibility Test in December, 2018. The petitioner had qualified for admission to the Ph.D. course, standing second in Ph.D. admission merit list of the Department of the Sociology, Faculty of Social Sciences, Banaras Hindu University, Varanasi. Before the petitioner could start the Ph.D.

programme in the BHU, the order dated 30.03.2019 was passed.

(ii) Suspension order : Consequences

11. The petitioner was suspended from all privileges and activities of the University and hostel by order dated 30.03.2019, purportedly passed under ECR No. 264 of 1979 as contained in Chapter VIII of the BHU Calender Part I Volume II, providing for ordinances governing maintenance of discipline and grievances procedure.

12. Consequent to the order dated 30.03.2019, the petitioner shall remain suspended, till his acquittal by the court in the criminal case. No terminal date can be set for conclusion of the criminal trial. Hence the suspension is for an indefinite period. The suspension order bars the petitioner from entering the university campus, or accessing any facilities therein. All further academic pursuits are denied to the petitioner during the suspension. The effect of the order of suspension is punitive.

(iii) Suspension order : Validity

13. The validity of the impugned suspension order on its merits shall be considered in the following sequence. The material before the authority passing the order will be examined, followed by the consideration of scope of the provisions. Finally adherence to the procedure prescribed by law will be tested.

14. The impugned suspension order dated 30.03.2019 records that an F.I.R. No. 0115 dated 28.01.2019 under Sections 147, 323, 120-B and 3(1)(da) of SC/ST, (Prevention of Atrocities) Act, 1989 (amendment 2015), was filed against various persons including the petitioner at Police Station Lanka, by Professor X (names are being anonymized for the purpose of writ petition). The case in the F.I.R. is briefly set forth hereafter. The petitioner and other accused had physically assaulted, and made derogatory caste remarks against the complainant when the latter was going to take a class in the faculty of Social Science on 28.01.2019. The petitioner was arrested by the police.

15. The order dated 30.03.2019 references a fact finding enquiry into the incident of manhandling of Professor X and finds a prima facie involvement of the petitioner in the said incident. The order dated 30.03.2019 recommends appropriate disciplinary action as per University Rules against the petitioner.

16. The impugned order dated 30.03.2019 also notices the order of the Vice Chancellor dated 27.03.2019 for a detailed enquiry into the aforesaid incident.

17. On the foot of the aforesaid reasoning and material, the impugned order dated 30.03.2019 suspends the petitioner from all privileges and activities of the University.

18. Contents of the enquiry report in brief, shall be set forth.

19. The enquiry committee in its report, records that Professor X had posted "undesirable photographs" of girls students on his facebook account. This had created "profuse reactions in student community". Professor X had admitted to the aforesaid post, and apologized for the same.

20. A written complaint, before the enquiry committee stated that Professor X had complained that he was beaten, humiliated, and forcibly made to wear a garland of shoes, and his caste was also denigrated. Professor Y, was named as the instigator and the petitioner was identified in the said complaint.

21. The enquiry committee, prima facie, concluded that the complaints against Professor X, were fabricated only to smear his reputation and character. Many girls students who had alleged harassment at the hands of Professor X, did not appear before the enquiry committee. However, some girls students had appeared before the enquiry committee and testified to the indecent behaviour of Professor X towards them.

22. The committee found that the incident was pre-planned and a result of the rivalry and strained relations between Professor X and Professor Y. The committee also pointed out, the shortcomings of the teachers which led to the incident. The committee recommended that the teachers should remain above reproach in their character and conduct.

23. From the fact finding committee report, it is clear that the physical assault of Professor X was undisputed. The material in the record which identified the petitioner, as one of the assaulters also cannot be seriously disputed on the limited yardsticks of judicial review. Material in the record also points to the strained relationship between Professor X and Professor Y. The incident was not spontaneous but a result of instigation of the students. Conduct of Professor X too, in some respects was not above board.

24. The Court need not restate the obvious, that violence in the University campus against a teacher cannot be justified under any circumstances.

25. The provision for suspension empowers the competent authority of the University to suspend a student from all privileges and activities of the University, when such student is "accused of, or involved in, an offence involving moral turpitude or heinous crime (including those involving violence or intimidation) and is wanted by the police or has been released on bail in connection with any such offence, or detained under any provision, or against whom Police investigation or criminal prosecution for any such offence is pending, of enquiry under U.P. Goonda Act is initiated;"

26. Lodgement of an F.I.R. for any criminal offence, does not automatically lead to a suspension under the aforesaid provision.

27. The intention of the legislature is not far to seek. Lodgement of false criminal cases is not uncommon in the country. Further criminal trials take an inordinately long time to conclude. No terminal date can be set once criminal proceedings are set in motion.

28. Mechanical exercise of power of suspension upon mere lodgement of a criminal case will lead to unintended consequences. On many occasions it would lead to an indefinite suspension and denial of opportunities of education. At times causing a stigma, without any enquiry.

29. The provision obligates the authority, to record its satisfaction whether the FIR is in respect of an offence involving moral turpitude, or a heinous

crime (including those involving violence and intimidation). This condition precedent has to be followed before an order of suspension is passed.

30. Moral turpitude is a phrase of wide ambit. Some definitions of moral turpitude, from good authority will be extracted, to take the discussion forward. The Black's Law Dictionary defines "moral turpitude" as under:

"An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

31. According to Bouvier's Law Dictionary, meaning of "moral turpitude" is under:

"Bad faith, bad repute, corruption, defilement, delinquency, discredit, dishonor, shame, guilt, knavery, misdoing, perversion, shame, ice, wrong."

32. The mere commission of a criminal offence will not lead to an inference that the act is one of moral turpitude. Offences which can be categorised, as those involving "moral turpitude", will be depend on the facts of each case.

33. The scope and terms of such enquiry were elaborated by the Hon'ble Supreme Court, in the case of ***State Bank of India and Others Vs. P. Soupramaniane, reported at 2019 SCC OnLine SC 608***, by holding that:

"10. There is no doubt that there is an obligation on the Management of the Bank to discontinue the services of an employee who has been convicted by a criminal court for an offence involving moral turpitude.Though every offence is a crime against the society, discontinuance from service according to the Banking Regulation Act can be only for committing an offence involving moral turpitude. Acts which disclose depravity and wickedness of character can be categorized as offences involving moral turpitude. Whether an offence involves moral turpitude or not depends upon the facts and the circumstances of the case. Ordinarily, the tests that can be applied for judging an offence involving moral turpitude are:

a) Whether the act leading to a conviction was such as could shock the moral conscience or society in general;

b) Whether the motive which led to the act was a base one, and

c) Whether on account of the act having been committed the perpetrators could be considered to be of a depraved character or a person who was to be looked down upon by the society.

11. The other important factors that are to be kept in mind to conclude that an offence involves moral turpitude are :- the person who commits the offence; the person against whom it is committed; the manner and circumstances in which it is alleged to have been committed; and the values of the society. According to the National Incident - Based Reporting System (NIBRS), a crime data collection system used in the United States of America, each offence belongs to one of the three categories which are: crimes against persons, crimes against property, and crimes against society. Crimes against persons include murder, rape, and assault where the victims are always individuals. The object of crimes against property, for

example, robbery and burglary is to obtain money, property, or some other benefits. Crimes against society for example gambling, prostitution, and drug violations, represent society's prohibition against engaging in certain types of activities. Conviction of any alien of a crime involving moral turpitude is a ground for deportation under the Immigration Law in the United States of America. To qualify as a crime involving moral turpitude for such purpose, it requires both reprehensible conduct and scienter, whether with specific intent, deliberateness, willfulness or recklessness."

34. A similar fact based enquiry, will determine if the offending act was a "heinous crime (including those involving violence & intimidation)".

35. Satisfaction of these jurisdictional prerequisites, is not recorded in the impugned order. No enquiry in that regard was conducted. The issue whether the offending act attributed to the petitioner, fell in the categories of "heinous crime (including violence and intimidation) or was an act of moral turpitude", is wholly absent from consideration. The impugned order suffers from non application of mind, and was passed mechanically.

36. In light of the preceding discussion, this Court finds that the order dated 30.03.2019 was passed in violation of ECR No. 264 of 1979, as contained in Chapter VIII of the BHU Calender Part I, Volume II, providing for ordinances, governing maintenance of discipline and grievances procedure, and is arbitrary.

D. Legal Issues common in all writ petitions

37. Absence of any reform and rehabilitative measures in the administrative and legal frameworks of the universities, has serious legal and constitutional implications.

38. The impugned action and the statutory regime of imposing punishments will also be judged in such constitutional and legal perspectives. The discussion on these issues, shall be common in all the companion writ petitions.

39. Calling attention to the statutes of the universities namely, BHU, IIT BHU and AMU, the learned counsels for the petitioners; contended that the said statutes do not contain provisions for reform and rehabilitation of delinquent students. The action against delinquent students, is governed and regulated, solely by the penal provisions of the statutes of the respective universities. The punitive scheme is a common thread, in the statutes of all the three universities.

40. In response, all the counsels for the various respondents universities', in fact conceded that as on date no structured and professionally designed programmes for reform, self development and rehabilitation of delinquent students, backed by a proper legal frame work exist in the respective universities.

41. Accordingly, various orders were passed by this Court, from time to time, requiring the respective universities, namely, Banaras Hindu University, Indian Institute of Technology Banaras Hindu University, and Aligarh Muslim University, as well as the University Grants Commission and the Union of India through the Ministry of Human Resource Development, New Delhi, to submit their responses in regard to creation of a reform and rehabilitation frame work, for

delinquent students in universities and institutions of higher learning. The respondents were also required to indicate, whether they had any opposition or even reservation in regard to the creation of the reform and rehabilitative programme for delinquent students in the universities.

42. All the respondents, namely, Banaras Hindu University (hereinafter referred to as BHU), Indian Institute of Technology, Banaras Hindu University (hereinafter referred to as IIT BHU), Aligarh Muslim University (hereinafter referred to as the AMU) as well as Union of India through Ministry of HRD and University Grants Commission (hereinafter referred to as UGC) have submitted their responses to the aforesaid issues.

E. Stands of respective respondents on affidavits

(i) Response of IIT BHU

43. The IIT BHU in its affidavit has recorded its full agreement with a reform oriented approach to deal with deviant behaviour in students. Thus IIT, B.H.U., has made a ringing endorsement of the need to adopt a reform and rehabilitation programme for delinquent students. However, it has also underscored the need for punitive action, to maintain a peaceful environment in the campus. The relevant paras of the affidavit are quoted hereinunder:

"2. That the present affidavit is being filed in compliance of the order dated 19.9.2019 passed by this Hon'ble Court.

4. That the Institute as indicated in the foregoing paragraph, is in full agreement with a reform oriented approach. However, in cases where reformative steps do not yield the desired corrections in behavior and actions of erring students, the Institute has to resort to punitive action in order to maintain the peaceful environment in the campus."

44. By categorically stating its commitment to reform of delinquent students, the IIT BHU has been true to its founding principles, and has faithfully discharged its obligations, under law and to the society.

(ii) Response of AMU

45. Upon orders being passed by this Court, the AMU to its credit, constituted an expert committee. The report of the expert committee has been submitted, and is made part of the record of the Court. The relevant parts of the Committee Report are extracted hereinbelow:

"In the light of the above the committee observes as under:

1. Our criminal justice system envisages two type of laws: one for Juveniles and second for other than Juveniles. There is a separate law for Juveniles known as Juvenile Justice Act, 2015 whereas others are covered under Code of Criminal Procedure, 1. 1976 and Indian Penal Code, 1860. The application of AMU Discipline and Conduct Rules, 1985 does not come primarily under the definition of Juvenile therefore the protection available to Juveniles are not available to the Students of the university in general. It becomes more relevant in view of the fact that at the time of admission every the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University is

required to sign a declaration to the effect that he submits himself to the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University.

2. That it is also pertinent to mention here that Aligarh Muslim University is primarily a RESIDENTIAL UNIVERSITY and there are approximately 36,665 Students [22.593 University Students and departments/courses/Schools in the Aligarh Muslim University. Among these students 12,158 students reside in 56 Hostels (22 for girls) in the campus within the radius of 10 KM. Therefore, the future career of thousands of the students cannot be allowed to be jeopardized for the sake of handful of students who are involved in the indiscipline act and are destroying the whole atmosphere of the University.

3. In principle that criminal activity has no role to play in our education system therefore the students who are involved in the criminal activity have also no role to play in our education system. The students who are indulged in the criminal activity have different mind-set and have nothing to do with their studies. They are not at all interested to pursue their studies and their presence only hampers the study of the other students who are interested to pursue their study. It is the duty of the University to marginalize such type of students so that the students at large, who are more interested to pursue their studies, may pursue their studies in cordial and peaceful/ atmosphere.

4. That as per existing rules of the University, there is no compulsory/ mandated counselling available to students against whom the discipline and conduct rules are invoked. These rules are also not invoked in a routine way but being a residential University there are day-today interactions/counselling with the Wardens, Provost Tutors, Teachers and Senior Students holding positions of Senior Hall/Food etc.

5. That the extreme punishments as provided in the 1985 rules are invoked when there is an extreme situation and continuance/presence of the students became a threat to the academic environment and campus life of the University.

6. At the same time the observations of the Hon'ble Mr. Justice Ajay Bhanot in this matter are highly appreciable in the context to infuse a reformative approach that the solution lies in engaging with the students, and harnessing their energies creatively. Errant behavior has to be reformed and not condemned. Erring students have to be transformed and not judged. The purpose of education is to unlock the immense potentiality in the human resource of the nation. This is possible by bringing about a conceptual shift in the concept of enforcing discipline, in the portals of the University. Indiscipline unchecked is indiscipline unleashed. But it is equally true. that expelling students from the University is a short term, if not a myopic view of the issue. A balance has to be drawn by the University authorities. The University has to create an ecosystem, with qualified staff and detailed programs of engaging with such students, with a view to give them an opportunity to reform themselves. Expulsion of students would abandon them to their own devices, close the doors of reformation to them, and shut them out from the redeeming light of knowledge. Leaving children accused of misconduct or deviant behavior, to fend for themselves would create issues for the society at large. In case Universities decline to shoulder the responsibilities of bringing such children back to the correct

path, and do not provide the frame work for mainstreaming this class of students, the consequences would be detrimental to the society at large. There is no better institution in our democratic frame work, to embrace the young and questing spirits who have strayed from their path of morally upright and correct conduct. The Universities are uniquely equipped to deal with the challenge on an institutional basis. The Universities are repositories of knowledge, resources and experience to meet the challenge at hand. What is at stake, is not merely the future of an individual, but stability of the society The concerns of the society have to be handled by the University. The magnitude of the challenge is large, but it is imperative for the Universities to accept it and provide the adequate response.

After detailed deliberations and in the backdrop of above the committee proposes that:

1. Structural reformative approach may be included in the AMU Students Conduct and Discipline Rules of 1985 as this committee has identified some areas (not all inclusive) for counselling by a psychologist as enumerated above.

2. As the misconduct offences/crimes related to internet and cyberspace were not available when the Discipline Rules were framed, the same needs to be identified and appropriately included in the AMU Students Conduct and Discipline Rules of 1985 as it is growing among young and youth.

3. Outside campuses were not established when these rules were framed, hence, there is also need to amend these rules to include a structure for those centres.

The committee therefore recommends to the Vice-Chancellor as follows:

AMU Students Conduct and Discipline Rules 1985 were framed almost 30 years back and in the light of the observations given above, a detailed and exhaustive exercise may be undertaken by a committee to be appointed by the Vice-Chancellor under the convenorship of the Proctor of the University to formulate and propose a draft of revised AMU Students Conduct and Discipline Rules, inclusive of reformative approach, after exploring similar rules already enforced by sister universities and institutions in India and abroad for further consideration of the Vice-Chancellor and Academic Council of the University."

46. The AMU has thus in principle, recognized the need for a reform and rehabilitation programme for delinquent students in some areas in the university. The AMU too has accorded top priority to the maintenance of discipline in the campus, and is rightly unwilling to compromise with the same.

(iii) Response of BHU

47. The initial affidavit filed by the BHU, in regard to their stand on a reformative and rehabilitation programme for delinquent students, stated in effect that the reformation of the students indulging deviant behaviour is achieved by providing for various categories of punishments, depending upon the nature of indiscipline. It further asserted, that in the name of reformation, the University cannot give a "go by", to the objectives of the university. The relevant paras 17 and 18 of the affidavit dated 17.09.2019 are extracted hereunder:

"17. In the present case no such conditions exist and as such the

continuance of the order of suspension of the petitioner from the privileges of the University and Hostel is in accordance with law. That 17. it is the University humbly that submitted administration and the Vice-Chancellor in particular is the custodian of the interests of all the students involved in various academic pursuits in the University. In the case of Banaras Hindu University the number of all the students at various levels runs into more than 30 thousand. For the smooth functioning of the University and maintenance of an environment conducive to academic pursuits the interest of an individual student must give way to the larger interests of all the students as a whole. This is not only in the interest of the students themselves but also in public interest. In the of reformation of the students the University name administration cannot give a go by to the objectives of the University nor can it take an action which may have the potential of destroying the smooth functioning of the University embroiling the University in large scale unrest both in the student as well as in the teaching community. If the University such situation is brought about a administration would be failing in its duty. The fact that Banaras Hindu University is the largest residential University in the country if not the world cannot be lost sight of. Even small spark has the potential of turning into a conflagration which may become difficult to contain.

18. That the facility and provisions aimed at reformation of the erring students found indulging in deviant behavior is inherent in the Ordinances of the University dealing with students' indiscipline by providing for various categories of punishments depending upon the nature of indiscipline."

48. However, subsequently, the BHU filed an affidavit on 26th September, 2019, easing its reservations, against a reform and rehabilitation programme. The affidavit exhibited a shift in stand, indicating a willingness to consider a reformative approach. The para 7 of the affidavit is extracted hereunder:

"7. That all the aforesaid mechanisms and provisions exist in the University for creation and preservation of an academic ambience conducive to teaching and learning and vibrant and peaceful community life. However, there exist no provision in the Rules of the University for any formal reformative mechanism or process for such students as are found involved in an offence involving moral turpitude or heinous crime and hence are suspended from the privileges of the University. However, the University is not averse to considering this aspect, if it is found appropriate by the University through Constitution of a Committee of stakeholders which may look into as to whether such a mechanism is desirable in principle in the context of maintenance of academic ambience of the University or it may be detrimental to it, particularly, to the interest of larger group of the students, teachers and employees."

49. In substance the BHU was open to the concept of a structured reformative programme. It has however, desisted from taking a categorical position, on this most critical issue. While openness to new ideas is appreciated, failure to take a specific stand is also noticed. The Court will go no further.

(iv) Response of UGC

50. Sri Rizwan Ali Akhtar, learned counsel for the UGC has relied on the

affidavit filed by the UGC. The UGC in its affidavit, stated that the universities are autonomous institutions. The academic and administrative decisions, are to be taken by the universities concerned, as per law. It was also stated that "the UGC has no role to play on day to day function of the Central Universities".

(v) Response of UoI

51. The Ministry of Human Resource Development, Government of India has chosen not to file any affidavit, despite orders passed by the Court and opportunities granted by the Court. The Court has to proceed, with the hearing in the interests of justice.

52. It was informed that the Ministry of Human Resource Development, Government of India, on its part had sent communications to the AMU and BHU, to protect its interests. The Court finds that the interests of the Union of India, are in no manner adversely affected. In these cases the interests of the Union of India, are not converse to the universities.

"The best lack all conviction."
~WB Yeats

53. Present discontents cannot be addressed by rote responses. Contemporary problems cannot be resolved by jejune formulae.

54. The universities cannot avoid a stand at the decision point. By prevarication at the decision point, the university may postpone the reckoning, but cannot escape responsibility.

55. Law has to hold institutions accountable to their obligations to the founding purposes to the students and to the society at large.

56. Universities of eminence cannot justify present inertia on the foot of past glory. Universities have to be aware of the risks, of basking in the reflected glory of the past. Eminence is achieved by past glory, however, reputation is retained by present endeavours.

57. Universities at certain critical decision points, would be true to their founding purposes and extant obligations by making clear and creative interventions. The universities as well as other authorities cannot show ineptitude in the face of crises, and equivocation in the face of solutions. In these critical situations the universities as well as other authorities, have to stand up and intervene and not stand by and equivocate.

F. Evolution of Fundamental Rights by courts

58. The fundamental rights of citizens are stated in Part III of the Constitution of India. But as in all cases, text of the rights can never be the exhaustive description of all rights. Rights have to be interpreted from the text of the Constitution. The process of interpretation of the text, often results in the evolution of rights. The Constitution is the textual origin of fundamental rights. Constitutional law defines the substance of fundamental rights.

(i) Legislative lag, executive inertia and fundamental rights

59. The fast pace of life in modern times often, outstrips the capacity of the

legislature, to cope with the consequences of social change. There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight. The legislative process is complex and even time taking. Human affairs do not wait on the legislative process. These facts frequently create a legislative lag. It is almost inevitable in the nature of things.

60. The first intersection of life with law, at times happens in courts, even before the legislature grapples with the problems. The courts are often seized, of various emerging issues in social and individual lives, before the legislatures are cognizant of them.

61. A legislative hiatus or executive lethargy, cannot cause a constitutional stasis. The enforcement of fundamental rights, cannot be forestalled by a legislative lag or executive inertia. Constitutional guarantees and Fundamental Rights, have to be enforced on demand. Constitutional overhang is perpetual. Law is always in motion, and never on a holiday.

62. The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights. The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence. There is a method in the evolution of constitutional law jurisprudence.

63. Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point. The march of law is also assisted by consensus of values, in the comity of civilized nations. These universal values are often manifested in International Conventions and Treaties. Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts. Development of constitutional law happens on these sure foundations. Constitutional rights are distilled from this process. In this process, the courts discharge their constitutional obligations. This is not judicial activism by courts. It is judging.

64. The Hon'ble Supreme Court in the case of ***Vishaka Vs. State of Rajasthan,*** reported at ***1997 (6) SCC 241,*** issued various guidelines for the safety of women at working places. The guidelines held the field, till the Parliament enacted the legislation in that regard. Judicial directions in that case preceded, the legislative enactment. Infact the legislature was alerted, to the need of a legislation to cover the field, by the judgment of the Hon'ble Supreme Court.

65. This narrative will profit from the observations of the Hon'ble Supreme Court, in the case of ***Rattan Chand Hira Chand v. Askar Nawaz Jung, reported at (1991) 3 SCC 67:***

"The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly

delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed.

All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

G. Process of law and the courts : Current State & Contemporary Challenges

66. The pace of technological, social and economic developments, often pose a challenge to the courts. Courts of today often have to deal with complex issues ranging from science, technology, economics, archaeology, medicine, social sciences and across other fields of highly specialized knowledge.

67. Lawyers on occasions lack the expertise, to grasp and simplify issues of varying complexity, from fields unrelated to law. Judges do not fare any better. Parties have their interests to protect.

68. The intellectual capital created by traditional resources of the judicial process, may not be adequate to manage such contemporary challenges. The judicial process would have to evolve, to meet the felt needs of the time. The rising tides of human knowledge, cannot pass the courts by. This shall require change in procedures, and development of infrastructure.

69. The intellectual resource base has to be widened. The debate has to be broadbased, to include direct inputs from experts as well. This would also entail well equipped libraries, which are staffed by qualified personnel and research assistants, and may be even experts. Institutional arrangements for interface of the courts with experts, have to be in place to ensure procedural propriety.

70. Debate on these issues will pave the way for the most important change, i.e. change in mindset. For the process to be credible and efficacious, a change has to come from within the judicial system. But change is inevitable, if judicial adjudication is to be just and remain relevant. In this regard, the High Court has a responsibility to fulfill, if not an obligation to discharge.

H. Education

(i) Importance and scope

"Where the mind is without fear
and the head is held high,
Where knowledge is free".

~Tagore

71. In education mankind discovered the message of unquenchable optimism,

that humans could be separated from the cycle of repetitive thought and action. Learning was the key to the uninterrupted progress of any society. Knowledge instilled the belief that human life could be improved. Through knowledge alone, the hope is realized that humans can be reformed, and humanity can be transformed. Education is the supreme act of nation building, which essentially means nurturing of constitutional values, realization of constitutional goals, and strengthening the rule of law.

72. The idea of the Indian nation is founded, on the ideals of the Indian civilization. Many of these ideals are manifested in the Constitution, and find expression in constitutional law.

73. The quest for knowledge defines the Indian civilization. A salient feature in the search for learning, distinguishes the Indian civilization. Knowledge in Hellenic civilization was founded on reason. The human thirst for knowledge was also quenched by revelation. The distinctive feature of learning in Indian civilization, is that India's search for knowledge, while always embracing reason as a method and never denying revelation as a source, insists on realization as its goal.

74. The diversity of thought is reflected in the plurality of discourse in India. The enduring values which define India, have been preserved and propagated by the tradition of civilized debate. The unity of our nation is protected by respect and affirmation of a multi hued cultural heritage and embracement of varied traditions of thought.

(ii) Role and obligation of universities

"Where the mind is led forward by thee

Into ever widening thought and action."

~Tagore

75. The universities are the custodians of the old values, even as they ceaselessly push the boundaries of modern knowledge.

76. In universities students of diverse backgrounds, and different beliefs, congregate in a common pursuit of knowledge. Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand, that diversity enriches human life, and does not divide humankind. University experience will help them, cultivate constitutional values, and transcend violent and other aberrational tendencies.

77. Universities are not teaching shops, nor are they mere examining bodies. Universities nurture the intellect and develop the character of the young citizens in a wholesome manner. Students gain knowledge and imbibe values in universities. These dual pursuits constitute the founding purpose of a university, in fact its raison detre.

78. A unifocal approach promoting scholastic achievements, to the exclusion of character building, would undermine the founding principles of a university. A failure of character or deficit of values in students, may impel action against the delinquent student, but should also cause introspection in university authorities.

79. University education is not an arm's length transaction, between the

teachers and the taught. Nor is university education an exact contractual relation, in the likeness of a consumer and a service provider.

I. *Discipline in Universities: Concept, Need & Challenges*

(i) Violence, intimidation and moral turpitude

"Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit"

~Rabindranath Tagore

80. Violence degrades human life. Intimidation stifles human thought. Moral turpitude is the low ebb of human conduct. These are the scourges and yet inescapable facts of human life. Our society faces these issues, and our varsities grapple with them.

81. Violence, intimidation, and acts of moral turpitude, are not conducive to the academic atmosphere of a varsity, and pose a mortal threat to the values of a university. They retard the growth of free thought and reasoned debate. These evils have no place in our universities. The universities can prosper only when such evils are got rid of.

(ii) Communal disturbances in universities

"Where the world has not been broken up into fragments by narrow domestic walls".

~Rabindranath Tagore

82. In Writ C No. 32955 of 2019, (Ajay Singh Vs. Union of India and Others), the petitioner is charged with disturbing the communal harmony in the university.

83. Stoking communal hatred not only disrupts peace and order in a university, but can roil the foundations of law and harmony in our society. The problem cannot be tackled as a "discipline" issue alone. A composite and a conceptual approach has to be adopted. The roots of communal hate have to be analyzed and addressed. Communal hatred is a narrative, which stands in direct opposition, to our civilizational ethos and constitutional values. Communal hatred holds a threat, to the rule of law. Communal hatred cannot be countenanced in our universities, nor can be given any space in our society.

(iii) ***Discipline in universities***

84. Discipline is the bedrock of any organization. In a university, discipline does not mean conformity of thought, or creation of a regimented class of people. In a varsity discipline is not the residue, after dissent is stifled and dissenters purged.

85. Discipline in a university is the consensus among all stakeholders, to live by the universal values which define the academic world. Discipline in a varsity is common allegiance and unshakable adherence, to values which nurture free thought, respect dissentient opinions, and create an environment of unimpeded academic pursuits. Hate and true debate cannot co-exist. Violence and true learning cannot cohabit.

86. Discipline has to be preserved at all costs, if the raison detre of the University is to be protected at all times. Indiscipline unchecked is indiscipline unleashed. However in our constitutional scheme, the means of ensuring discipline, is as important as the end of keeping discipline.

(iv) *Statutory approach to maintaining discipline*

87. The universities have created legal frameworks, to deal with acts of indiscipline, and to maintain discipline and order.

88. The power to take disciplinary action, and impose punishment upon delinquent students, is vested in the competent authorities, by the statutes of the concerned university. The following statutes govern and regulate, the process of initiating disciplinary action against delinquent students, and imposition of penalty for misconduct.

BHU -The Banaras Hindu University Act No. XVI of 1915 {Section 60}

ii. Chapter VIII, Ordinances Governing Maintenance of Discipline and Grievances Procedure.

iii. Notification, New Delhi, 31st July, 2017, BHU

AMU- The Aligarh Muslim University (Act No. XL of 1920), [Amendment] Act, 1981 (62 of 1981)

ii. Section 35 (5) of the AMU

iii. The Statutes of the University (as adapted under Section 28 of the Act) amended upto December, 2012).

IIT BHU - i The Institutes of Technology Act, 1961

ii. The Institutes of Technology Amendment Act, 2012.

iii. Section 17(2) of the Act, 1961 (already quoted)

(The relevant extracts of the statutes are appended as appendix 1 to the writ petition.)

J. ***Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality***

89. The statutes of all the three universities contemplate only penal action, to deal with all forms of indiscipline or deviant conduct. The penal action may lead to suspension, and can even extend to expulsion and debarment.

90. The punitive provisions of the Statutes of the respective universities, manifest the deterrent intent of the law. A reformist approach to the problem is absent in the statutes. The makers of statutes have solely adopted a punitive or deterrent approach to the exclusion of other methods of dealing with issues of indiscipline or deviant conduct.

91. The aforesaid ordinances of the universities and the affidavits of the respondents have been perused. Submissions of the learned counsel for the universities have been considered. This Court finds that there is no structured, professionally designed reform, self development and rehabilitation programme, or therapeutic support system backed by a legal frame work, to deal with the delinquent students and like issues in the universities.

92. The statutory monopoly of a punitive approach, to deviant behaviour, and the exclusion of all other responses, often creates a lack of balance in the actions of the concerned University. In such cases, the punishment becomes disproportionate, not because the decision maker was incapable of measured action, but because the ordinances/statutes preclude a proportional response.

93. It is clarified, that the requirement of punitive provisions in the statutes is a given. The need to empower the authority, to take disciplinary action in law is undisputed. There is no infirmity in the statutory provisions. The inadequacy is in the reach of the statutory provisions.

94. The decision maker is constrained in his choices, by the absolute dominance of punitive provisions, and complete omission of reformative measures in the ordinances.

95. The impact of absence of reformative provisions and the presence of a statutory bias in favour of a punitive approach, on the fundamental rights of the petitioners, shall also be assessed in the next part of the judgment.

K. Punishments and Article 21

(i) *Right to human dignity*

96. A life without dignity is robbed of its meaning. Absent self worth, life is devoid of content.

97. Human dignity as a concept, was created by an international consensus, on universal human values. "Human dignity" and "self worth" are used, in close proxmity in international instruments, reflecting the affinity between the concepts.

98. The comity of nations, first pledged commitment to protecting the "dignity and worth" of the human person, in the charter of the United Nations. These eternal values were reiterated, in subsequent international instruments and conventions including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1951); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

99. Human dignity and self worth, were increasingly incorporated in the jurisprudence of all liberty loving nations in the post World War II era.

100. The complexity of the concept of human dignity, never diluted the usefulness of the theory of human dignity in enhancing the worth of the human person. Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world.

101. However, the Court would do well to observe the caution, that a sweeping judicial definition of human dignity, would make an abstract theory, unintelligible. An unduly wide judicial construct of human dignity, would create unworkable judicial tests.

102. Likewise if the courts adopt too narrow a view of human dignity, a concept which has made stellar contribution to the advancement of human rights will be lost.

103. Keeping these pitfalls in mind, a balance has to be maintained, between attempting too much and recoiling from the task altogether.

104. The applicability of human dignity, would be determined in this case, by evolving a workable test or construct of human dignity and self worth applicable to these cases.

105. Human dignity is not inserted in the text of the fundamental rights under the

Constitution of India. Human dignity occurs in the Preamble to the Constitution of India.

106. The Preamble to the Constitution, reflects the resolve of the People of India, to secure to all its citizens

"Justice social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

and to promote among them all and

Fraternity assuring the dignity of the individual and the unity of the Nation."

The Preamble to the Constitution is not analogous, to a preamble to any legislative enactment.

107. The unique place of the Preamble, in the Constitution came to be noticed very early, in ***Sajjan Singh v. State of Rajasthan,*** reported at ***AIR 1965 SC 845***. The Hon'ble Supreme Court found that the Preamble to our Constitution is "not of the common run". Further the Preamble bore the "stamp of deep deliberation" and precision.

108. This feature shines light on the special significance, attached to the Preamble by the framers of the Constitution. The Preamble was held to be a part of the Constitution, by the Hon'ble Supreme Court in ***Kesavananda Bharati v. State of Kerala,*** reported at ***(1973) 4 SCC 225.***

109. The words 'life, law and liberty' in Article 21 of the Constitution of India, were freed from the confines of narrow and literal interpretation by the Courts. (See ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248)***

110. A defining moment came when the Hon'ble Supreme Court, liberated "life" from the fetters of mere physical existence. (see **Olga Tellis v. Bombay Municipal Corpn. Reported at (1985) 3 SCC 545).**

111. Over the years human dignity, has been read into the meaning of life and liberty, under Article 21 of the Constitution of India, by consistent pronouncements of the courts.

112. A broad overview of some of the leading pronouncements of the Hon'ble Supreme Court, elevating human dignity to the status of a fundamental right, are discussed in the succeeding paragraphs.

(ii) Supreme Court on human dignity

113. The concept of human dignity forming a part of Article 21, was introduced in ***Prem Shankar Shukla v. UT of Delhi,*** reported at ***(1980) 3 SCC 526.*** While construing the constitutional rights of prisoners, in ***Prem Shankar Shukla (supra),*** Krishna Iyer, J. speaking for a three-Judge Bench of the Hon'ble Supreme Court held:

"1. ... the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanise him and, therefore, to violate his very personhood, too often

using the mask of "dangerousness" and security.

21. The Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."

114. Undermining the human dignity of a detenue, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 was not countenanced by the Hon'ble Supreme Court in ***Francis Coralie Mullin v. UT of Delhi,*** reported at ***(1981) 1 SCC 608*** by ruling thus:

"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. ... the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival."

115. The right to live with human dignity flowing from Article 21, was employed by the Hon'ble Supreme Court to unlock the fetters of those living in bondage and setting them free in ***Bandhua Mukti Morcha v. Union of India,*** reported at ***(1984) 3 SCC 161***. The Hon'ble Supreme Court in ***Bandhua Mukti Morcha (supra)*** observed that:

"10. ...This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State -- neither the Central Government nor any State Government -- has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

116. Dehumanizing treatment given to the arrested activists of an organization by the police authorities was called out by the Hon'ble Supreme court, in ***Khedat Mazdoor Chetna Sangath v. State of M.P.***, reported at ***(1994) 6 SCC 260,*** wherein it was recognized:

"10. ... It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation, determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities."

117. The right of human dignity was also construed by the Hon'ble Supreme Court in ***M.Nagaraj v. Union of India, reported at (2006) 8 SCC 212.*** In that case the right was held to be intrinsic to and inseparable from human existence:

"26. ... The rights, liberties and freedoms of the individual are not only to be protected against the State, they should

be facilitated by it. ... It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence.

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised."

118. The Hon'ble Supreme Court in **Shabnam v. Union of India,** reported at **(2015) 6 SCC 702** elaborated the following elements of the human dignity;

"14. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being "as a human being". Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being."

(emphasis in original)

119. Aharon Barak (former Chief Justice of the Supreme Court of Israel), discussed the constitutional value of human dignity, in the following celebrated passage:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right. "

120. The views of the Judge Aharon Barak, were approved and incorporated in the corpus of human dignity jurisprudence, in our country by the Hon'ble Supreme court in ***Jeeja Ghosh v. Union of India***, reported at ***(2016) 7 SCC 761.***

121. The consequences of loss of human dignity in an individual's life, were noted by the Hon'ble Supreme Court in ***Mehmood Nayyar Azam v. State of Chhattisgarh,*** reported at ***(2012) 8 SCC 1.***

122. Similar sentiments were expressed on human dignity, by the Hon'ble Supreme Court in ***National Legal Services Authority v. Union of India,*** reported at (2014) ***5 SCC 438***.

123. In ***Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal*** reported at ***(2010) 3 SCC 786,*** the Hon'ble Supreme court upon consideration of good authority, reiterated the dignity of the individual as a core constitutional concept.

124. While in ***Selvi v. State of Karnataka reported at (2010) 7 SCC 263***, the Hon'ble Supreme Court ruled thus:

"244.....we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences."

125. Even prisoners have been found entitled to the fundamental rights while in custody by the Hon'ble Supreme Court (see ***Sunil Batra (II) Vs. Delhi Administration, reported at 1980 (3) SCC 488)***.

126. The importance of therapeutic approach in dealing with the criminal tendencies of prisoners and the necessity for reform, was considered by the Hon'ble Supreme Court in ***T.K. Gopal v. State of Karnataka,*** reported at ***(2000) 6 SCC 168,*** by holding that:

"15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy."

127. In **Asfaq v. State of Rajasthan and Others,** *reported at* ***(2017) 15 SCC 55,*** the Hon'ble Supreme Court emphasizing the need for reform of a convict held that "redemption and rehabilitation of such prisoners for good of societies must receive due wightage while they are undergoing sentence of imprisonment."

128. The judicial authorities can be multiplied, reiterating the above holdings. However, the same will add volume, but not value to the narrative.

129. Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India.

130. The narrative would not be complete without reference to the most authoritative pronouncement, of the Hon'ble Supreme Court in the case of ***K.S. Puttaswamy v. Union of India*** reported at (2017) 10 SCC 1

131. Dr. D. Y. Chandrachud, J. speaking for the Constitution Bench,

firmly and irrevocably, reiterated that human dignity is a fundamental right under Article 21 of the Indian Constitution, with customary eloquence, in ***K.S. Puttaswamy (supra)***. Dr. D. Y. Chandrachud, J., upon consideration of the judicial precedents in point distilled the concept of human dignity and its place in part III of the Constitution:

"Jurisprudence on dignity

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

118. Life is precious intself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

(iii) Comparative International Jurisprudence

132. A survey of comparative international jurisprudence, on the point of human dignity and the rights flowing therefrom, shows convergence in the values of human dignity across the free world.

133. The foreign authorities can be cited to show that human dignity is an accepted universal value in the comity of nations.

134. In ***Rosenblatt v. P Baer,*** **reported at 1966 SCC OnLine US SC 22 : 383 US 75 (1966),** the US Supreme Court found that "The essential dignity

and worth of every human being" was at the root of any system of "ordered liberty".

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty."

135. In the case of ***Armoniene v. Lithuania,*** reported at ***(2009) EMLR 7,*** the European Court of Human Rights set its face against an act of disclosure of a person's state of health, causing "exclusion from social life", and found it violative of the right to privacy by holding thus:

"The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life."

136. The human dignity rights of prisoners included rehabilitation, in the opinion of the US Supreme Court in ***Procunier, Corrections Director, ET AL.*** Vs. Martinez ET AL. reported at ***416 U.S. 396 (1974):***

"The Court today agrees that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society - values which "do not turn to dross in an unfree one." Sostre v. McGinnis, supra, at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.

The First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity. 14 Cf. Stanley v. Georgia, 394 U.S. [416 U.S. 396, 428]557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, Aeropagitica 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest

for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit."

137. The validity of a punishment causing loss of nationality, for an act of desertion in military service, was in issue before the US Supreme Court, in ***Trop Vs. Dulles,*** reported at ***356 US 86 (1958).*** The US Supreme Court in **Trop (supra)** reiterated the importance and role of rehabilitation in a penal system, while dealing with the validity of the punishment. The principle holding of the US Supreme Court on these points is as under:

"Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation. However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications."

(iv) Constitutionality of punishments under the statutes

"Universities are made by love, love of beauty and learning."

~ Annie Besant

138. The engagement of human dignity and Article 21 will now be

examined in the context of punishment, imposed on a delinquent student.

139. The statutory scheme of enforcing discipline by imposition of punishments and suspension has a salutary purpose, but it needs to be compliant with the requirements of fundamental rights.

140. Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality.

141. Severity of a punishment is not sufficient basis for holding it unconstitutional. The enquiry into the constitutionality of a punishment, will examine the relationship between the punishment and its purpose, and whether the penalty can achieve the purpose. The enquiry will also determine whether the punishment degrades the human person, and whether it devalues human dignity against established norms of decency, or has a dehumanizing effect.

142. Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment.

143. Experience teaches the fact of human fallibility, but knowledge holds the hope of human redemption. If error is part of human nature, reform is an element of human spirit. The capacity of human beings to introspect on erring ways and the power of human will to reform deviant conduct are building blocks of the concept of human dignity. "Every sinner has a future, many a saint had a past."

144. Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. Any act which dehumanizes life cannot be countenanced by societies and courts which value life and liberty. The degrading or dehumanizing elements of the punishment have to be eliminated to bring it in conformity with requirement of human dignity, contemplated by Article 21 of the Constitution of India.

145. Failure to consider susceptibility to reform, while denying the right to access privileges and activities of the university, negates the possibility of rehabilitation. Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation. Termination of dialogue with the delinquent student, without offering an opportunity to reform, makes him an outcaste. The individual is permanently discarded by the institution, and loss of human self worth is total. This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India.

146. Another aspect of the punishment which needs consideration, is the consequence exclusion from higher education.

147. Education is a most credible and effective mode of restoring self esteem and enhancing self worth. By denying opportunities of education to a delinquent student, without looking at the possibility of reform, the power to redeem one's errors and enhance self worth is taken

away from an individual. In these cases, closure of avenues of education, extinguishes the hope for a better tomorrow. Loss of hope and its sequitor perpetual condemnation are fatal blows to the human spirit and self esteem.

148. Acts of deviant conduct, violence or intimidation, do not cease the need for social engagement or knowledge. Such needs are more acutely felt and require satisfaction in these cases.

149. Order may be enforced by punishments. Causes of deviant conduct can be addressed only by engagement. Punishments deal with the offence, reform deals with the offender.

150. Public interest however demands that the claim for further education, and engagement with delinquent students, should be guided and controlled by the authorities.

151. Statutory regimes in universities, dealing with delinquent behaviour and university environments, which are bereft of therapeutic and reform based support systems, are incompatible with the constitutional mandate to uphold human dignity. The violations of human dignity, in such cases, are summed up hereinunder:

152. Dignity violations occur when a punishment meted out to a student, does not consider his susceptibility to reform, and degrades his person by exclusion to the point where his diminished self worth cannot be reinstated due to systemic inadequacies or institutional shortcomings.

153. By denying further education, and neglecting to create an institutional system of reform, self development and rehabilitation, the university in effect tells the delinquent student, that it does not recognize the student's need to re-establish his self esteem. In other words, the student is not only impervious to reform, but incapable of enhancing his self esteem.

154. Dignity of an individual/student is injured, when it is found that the punishment precludes reform by rehabilitative measures, and prevents self enhancement by further education.

155. The punitive consequences of the action, cannot go beyond the requirements of the case. In this case they do.

An institutional reform, self development and rehabilitation programme, will enable a delinquent student to introspect on errors, express remorse and correct course.

156. Neglect by the universities to create an institutional reform, self development and rehabilitation programme thus places substantial obstacles in the enjoyment of the fundamental right of human dignity under Article 21.

157. The result of the preceding narrative is as follows:-

(i) The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform, and does not enable the petitioner to undergo a reform

and self development process to redeem himself.

(ii) The statutory omission of reform measures, is an inadequacy which renders the university incapable of rectifying the violation made by it. The systemic fault-line is contrary to the mandate of Article 21 of the Constitution of India.

(v) Systemic responses : Responsibilities of the State and universities

158. Exercise of judicial power is the prerogative of the courts; but upholding the Constitution is not the monopoly of the courts.

159. To realize the fundamental rights guaranteed under the Constitution and to achieve the goals contemplated under the Preamble, all stakeholders have to play their part and all organs of governance have to perform their obligations. Constitutional ideals will become meaningful only if constitutional values animate the functioning of all institutions of governance. Universities have a special role to play.

160. The State and in this case the universities too, have the obligation to create an ***enabling environment,*** *(emphasis supplied)* where life and life enhancing attributes under Article 21 of the Constitution of India flourish and where constitutional ideals become a reality.

161. The importance of "therapeutic approach" in solving social dysfunctions, the growth in role of the State to give away public recognition in the way they treat their citizens, the evolution of law on the subject, and the contribution of universities were analyzed by **Francis Fukuyama** in his book **"Identity".** Some of the instructive passages are extracted below:

"The therapeutic turn in the popular culture of advanced liberal democracies such as the United States was inevitably reflected in its politics, and in an evolving understanding of the role of the state. In the classical liberalism of the nineteenth century, the state was held responsible for protecting basic rights such as freedom speech and association, for upholding a rule of law, and for providing essential public services such as police, roads, and education. The government "recognized" its citizens by granting them individual rights, but the state was not seen as responsible for making each individual feel better about himself or herself."

"Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition. Governments are readily able to give away public recognition in the way that they talk about and treat their citizens, so modern liberal societies naturally and perhaps inevitably began to take on the responsibility for raising the self-esteem of each and every one of their citizens".

"Therapeutic services came to be deeply embedded in social policy, not just in California but throughout the United States and in other liberal democracies. States began to offer psychological counseling and other mental health services, and schools began to incorporate therapeutic insights into the way that they taught children."

"In the early twentieth century, social dysfunctions such as delinquency or teen pregnancy were seen as deviant behaviour that needed to be dealt with

punitively, often through the criminal justice system".

"But with the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention".

"The 1956 amendments to the Social Security Act allowed for federal reimbursements of a range of therapeutic services to strengthen family life and self-support."

"The therapeutic state metastasized across a wide number of institutions, including a large non-profit sector that by the 1990s had become the delivery vehicle for state-funded social services".

"Universities found themselves at the forefront of the therapeutic revolution."

(emphasis supplied)

162. These special needs of citizens have to be addressed by State action, and also through judicial interventions in a nuanced manner, and in a larger perspective. Exclusive reliance on coercive powers of the law, shall be inadequate and an unsatisfactory way of dealing with the problem. The therapeutic jurisprudence draws heavily from concept of human dignity and self worth for its philosophical underpinning.

163. Disciplinary action should also be supported by reformative philosophy. Reformative philosophy does not undermine the deterrent approach.

164. The statutory regime imposes punishment for delinquent acts. The reform programme will address the cause of delinquency itself. Framing the approach to discipline as a choice between punishment or reform is misleading. A just corrective system needs both. Both approaches complement each other and can be pursued simultaneously. Deterrent aspect may also be reinforced, by making grant of the degree contingent upon successful completion of the reform programme.

165. The ordinances providing for punishments for deviant conduct need to be duly supported by a legal framework for structured reform, self development and rehabilitation programmes. This environment will accord social recognition to the need for reform of delinquent students. The degrading effect of punishment will be ameliorated. Dialogue will end isolation, reform will reinstate self worth and education will enhance self esteem.

166. Structured reform, self development and rehabilitation programmes and therapeutic support, within a legal framework, will create an ***enabling environment*** *(emphasis supplied)* in the universities, to realize the fundamental right of human dignity, flowing from Article 21 of the Constitution of India.

L. Reform, Self Development & Rehabilitation

(i) Role of universities in achieving behavioral change

"You must be the change you wish to see in the world"

~Mahatma Gandhi

167. Non violence as a philosophy of thought, and a creed of conduct, was developed in India on a scale wider than

elsewhere. From the Buddha to Ashoka and the Mahatma, behavioral change in adopting non violence as a way of life, at the national scale was greatly accomplished in India.

168. The response of the Indian civilization, to the challenges of communal hatred and communal otherness, was profound and without parallel. The unique response of the Indian society was fashioned by the universal philosophy of the Indian civilization; of affirming the unity of the human race, of embracing diversity, of respecting dissent, and creating a harmonious dialogue of faiths. The lives and teachings of saints and thinkers like Guru Nanak, Kabir, Vivekananda, Tagore and Mahatma Gandhi, bear testimony to this composite culture.

169. For each generation to produce such individuals of excellence is an exorbitant demand. Today behavioral change is achieved in a different manner, albeit more incrementally and less dramatically. Institutions like universities have a critical role to play. Universities have an obligation to the society and the individual. The universities have an irrevocable compact, and an organic connect with the society.

170. University is a paternal institution. By the act of suspension or debarment of a delinquent student, the university abandons its ward. The university has solved its problem, but the society has one at its hands. The downstream effects of the punishments, have not been considered by the respondents. Clearly there are direct costs to the society as well. There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies.

171. The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct. Thereafter the responsibility to achieve behavioral change commences. The fruit of knowledge imparted by the universities lies in the manifestation of human values in the human personality and expression of humanity in human conduct. Knowledge which does not change human behaviour in this manner is futile.

(ii) Imbibing Constitutional values and purging communal hatred

172. The Indian civilizational ethos and the Indian constitutional values are congruent. The Supreme Court distilled the essence of Indian values, when it emphasised "our tradition teaches tolerance, our philosophy preaches tolerance and our Constitution practises tolerance; let us not dilute it" while upholding the religious rights of Jehovah's witnesses in ***Bijoe Emmanuel and others vs. State of Kerala and others,*** reported at ***(1986) 3 SCC 615.***

173. Universities have to protect the space for open dialogue, respectful engagement and reasoned debate. Universities need to ensure that the space for constitutional values, is not encroached by communal hatred.

174. The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. University

experience has to inculcate these values in the students.

175. The universities may consider holding seminars, workshops, heritage festivals, cultural festivals, literature festivals, and encourage other activities to achieve this end. This has to be a part of the larger programme of value creation and self development.

(iii) Present discontents of students and solutions

176. The preceding discussion shows how a reform, self development and rehabilitation programme, will create an enabling environment, for realization of the fundamental rights of the individual under Article 21. How such programme, will yield tangible benefits for the society, will now be examined.

177. The paradox of the digital age is a plethora of devices and a dilution of dialogue, the substitution of conversation by chatter. There is the ever present danger of growth of knowledge and diminution of thought. The young are empowered by technology, but made restless by the void in values, and lack of direction.

178. The dilemmas of the digital age were acutely summed up by Yuval Noah Harari in his profound and acclaimed work "Homo Deus":

"Today our knowledge is increasing at breakneck speed, and theoretically we should understand the world better and better. But the very opposite is happening. Our new-found knowledge leads to faster economic, social and political changes; in an attempt to understand what is happening, we accelerate the accumulation of knowledge, which leads only to faster and greater upheavals. Consequently we are less and less able to make sense of the present or forecast the future."

179. In this situation lack of avenues of engagement, absence of a structured reform, self development and therapeutic support system, leaves the students with little options. The choices available in the society, to satisfy their need for belonging, to recover self esteem, and to channelize youthful energies are not very encouraging.

180. Re-establishing meaningful dialogue, recreating an environment of fruitful conversation, and making empathetic engagement are some of the present challenges. The responsibility of reaching out and engaging with the students, and increasing quality interface with them, lies with the universities and the teachers.

181. These obligations can be accomplished by a meticulously created reform/self development programme and high quality of academic leadership within a comprehensive legal framework.

182. Universities are a microcosm of the society. They are laboratories of social change, and also agents of social transformation.

183. The manner in which the universities deal, with aberrations of violence other forms of deviant conduct, and deficit of values in students, has repercussions for the society at large. The divergent pulls of primordial instincts of hate and violence, against a citizen's duties

in a nation ruled by law can best be managed by universities.

184. The universities are uniquely placed to deal with these issues. The universities have the intellectual capital, institutional framework and moral leadership, which puts them in the front rank of institutions to effect such change. The environment in the University should encourage and engender reflective actions instead of automatic choices.

185. The reform/self development and rehabilitation programme, will give an individual student correct direction in life, and prevent one from drifting away. The student will be anchored in constitutional values, and will not be led astray by social evils. The support and aid by the university will give one a sense of ownership and belonging. No harvest is richer for a nation, than citizens empowered by a constitutional value system.

186. The high pedestal at which teachers are placed in Indian traditions and thoughts, was recalled to explain the current role of teachers in Indian society, by the Hon'ble Supreme Court in the case of **Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others,** reported at **(1997) 2 SCC 534.** The relevant extracts were succinctly summed up by a Division Bench of this Court, in the case of **Devarsh Nath Gupta Vs. State of U.P. and Others, reported at 2019(6) ADJ 296 (DB):**

"22. Special status of teacher has been reminded by Court in Avinash Nagra vs. Navodaya Vidyalaya Samiti and others (1997) 2 SCC 534. Quoting Father of the Nation, Court said that a teacher cannot be without character. If he lacks it, he will be like salt without its savour. A teacher must touch the hearts of his students. Boys imbibe more from the teacher's own life than they do from books. If teachers impart all the knowledge in the world to their students but do not inculcate truth and purity amongst them, they will have betrayed them. Quoting Shri Aurobindo, Court said that it is the teacher's province to hold aloft the torch, to insist at all times and at all places that this nation of ours was founded on idealism and that whatever may be the prevailing tendencies of the times, our children shall learn to live among the sun-lit peaks. Court also referred Dr. S. Radhakrishanan saying that we, in our country, look upon teacher as gurus or, as acharyas. An Acharya is one whose achar or conduct is exemplary. He must be an example of Sadachar or good conduct. He must inspire the pupils who are entrusted to his care with love of virtue and goodness. The ideal of a true teacher is "andhakaraniridhata gurur itya bhidhiyate" (Andhakar is not merely intellectual ignorance, but is also spiritual blindness). He, who is able to remove that kind of spiritual blindness, is called a 'guru'. Swami Vivekananda was also quoted saying that student should live from his very boyhood with one whose character is a blazing fire and should have before him a living example of the highest teaching. In our country, the imparting of knowledge has always been through men of renunciation. The charge of imparting knowledge should again fall upon the shoulder of Tyagis."

187. In ***Avinash Nagra (supra)***, the obligations of teachers to transform students into responsible citizens, and inculcate the value system of the Indian Constitution, was stated thus:

"...The State has taken care of service conditions of the teacher and he

owed dual fundamental duties to himself and to the society. As a member of the noble teaching profession and a citizen of India he should always be willing, self-disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to articulate and communicate and imbibe in his students, as social duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing Constitutional ideals enshrined in Article 51A so as to make the students responsible citizens of the country. Thus the teacher either individually or collectively as a community of teachers, should regenerate this dedication with a bent of spiritualism in broader perspective of the Constitutionalism with secular ideologies enshrined in the Constitution as an arm of the State to establish egalitarian social order under the rule of law. Therefore, when the society has given such a pedestal, the conduct, character, ability and disposition of a teacher should be to transform the student into a disciplined citizen, inquisitive to learn, intellectual to pursue in any walk of life with dedication, discipline and devotion with an inquiring mind but not with blind customary beliefs....."

188. The students entering universities embark on a new phase in their lives. Many are often removed from their comfort zone, and the secure environment of their homes, to face the challenges of independent life. At times these new challenges can be intimidating, and the uncertainties can create apprehensions, in the minds of the young adults.

189. Some students are unmoored in this trying phase of life and change of circumstances. Ragging of juniors in institutions of higher learning and other evils make the situations worse for freshers. Such students especially girls students in our country, need full institutional support to face these challenges.

190. It is the responsibility of the universities and the institutions of higher learning to create requisite environment of sensitizing the senior students and supporting the freshers in every possible manner.

191. A programme for self development implemented in a proactive manner shall foster constitutional values among students. Students need to realize the value of dissent in a democracy, but also have to understand the manner of dissent in a society ruled by law.

192. This process also requires initiation of engagement with the students and improving the quality of interface between the teachers and the taught. Educating the educators in this regard has to be a part of any such programme. Workshops have to be held and other methods have to be explored, to cultivate constitutional values in students and achieve behavioral change.

193. These are the preventive measures to address the issues of indiscipline, deficit in values and deviant behaviour in all institutions of higher learning.

194. The preventive measures preclude the occurrence of deviant behaviour. The post facto rehabilitation measures prevent recurrence of deviant behaviour. Both have to be integrated into

one conjoint system of value creation, in the universities and institutions of higher learning.

195. Structured reform/self development programmes run by universities, can be catalysts for inducing behavioral change, and inculcating a constitutional value system in students. A successful reform, self-development & rehabilitation programme, can convert a possible danger into a real asset for the society.

(iv) Creation of reform, self development & rehabilitation programmes

196. Many branches of knowledge in modern times are devoted to the study of human psychology, social behaviour and behavioural change. Psychology, Psychiatry, Sociology, Anthropology and Behavioral Economics, are some fields dedicated to gaining insights into human behaviour and inducing behavioural change.

197. Works of the Nobel prize winning economist Richard Thaler deserve special mention. The methodology of "nudges", in creating behavioral change has been gaining acceptability. The organization "Nudge" in Lebanon, has done noteworthy work with refugee children, and on environmental protection.

198. The Behavioral Insights Teams sometimes called "Nudge Units", are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom. The Economic Survey released by India's Finance Ministry in July, 2019 has concluded with the clear recommendations that "the proposal to set up a behavioral economics unit in the NITI Ayog must be immediately activated". The report further noticed that the unit should work with State Governments, helping them to make their programme more effective, and informing them of the potential value of Behavioural Insights.

199. Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from.

200. Many scientific researches have confirmed the efficacy of these ancient systems of human wellness. These branches of knowledge have to be approached with a scientific and an open academic mindset. Personal beliefs have to be respected at all times. There can be no imposition of any system, which is resisted on grounds of faith or beliefs; in which cases other options may be given.

201. Socially useful work like planting and taking care of trees, and flora may be a part of the programme. Sports and sporting activities also go a long way in creating integrating social values, and enhancing emotional intelligence. Teaching needy children, serving the sick, and other forms of service to the society are options which may be explored. Counselling sessions with experts and psychologists could prove useful.

202. Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike.

203. Creation of course content of the reform or self development

programme, and manner of its implementation has to be decided by the respondents. This requires wide consultations, deliberations and workshops with academia, varsities, institutions of research, student counsellors, psychologists, psychiatrists, students and other stakeholders.

204. The UGC is a statutory body, and cannot abdicate its responsibilities in this scenario. The functions of the UGC are enumerated in the University Grants Commission Act, 1956. The UGC will play an important role, in the creation and standardization of the course, for reformation and self development, and aid its implementation on an institutional basis.

205. The Government of India in particular, the Ministry of Human Resource Development, also has a contribution to make in the process. The Ministry of Human Resource Development, Government of India, New Delhi, has to provide the necessary support to the University as may be required under law to create and implement the reform, self development and rehabilitation programme. This support would include the creation of necessary infrastructure for implementing the programmes.

206. Both the University Grants Commission and the Ministry of Human Resource Development, Government of India, are required to support the universities in their endeavours to create and implement the programmes of reform, self development and rehabilitation.

207. Law enforcement agencies the world over are engaging with the youth, to draw them away from the appeal of extreme ideologies.

208. The prestige enjoyed by universities and the teachers in society, will make the programme credible to concerned individuals, and acceptable to the student community. The key to the efficacy of any structured reform programme, is empathetic engagement and a supportive environment.

209. An impersonal approach and institutional prejudice, can make the programme a non starter. Due sensitization of all stakeholders is required, before implementing the programme.

210. The founding purpose of universities to supply intellectual and moral leadership to the society, and to be at the vanguard of social transformation, will be eminently achieved by effective reformation/therapeutic/self development programmes.

(v) Concerns of universities regarding discipline & restraints during the reformation, self development & rehabilitation programme:

211. The Court is cognizant of concerns of the universities, that a reform programme should not derail university administration, nor should it have a detrimental effect on discipline and good order in the campus. A reform and rehabilitation programme, is not intended to allow a wrongdoer to escape justice.

212. Apprehensions of the universities need to be addressed. The reform programme has to be created and structured and implemented in a manner

that it does not adversely impact the good order and discipline in the university campus.

213. The start of reform programme does not inevitably mean a free access to, or unconditional reinstatement of a delinquent student into the university campus. In cases of indiscipline where presence of individuals poses a threat of breakdown of order in the university campus, a decision can be made only by the university. Even when such students undergo a reform programme, and the students are pursuing their academic studies, the university may impose restraints it deems fit.

214. To obviate possibilities of disruption in the academic atmosphere, various measures of graduated restrictions may be imposed on a case to case basis. These restraints may include minute monitoring of movements in campus, restricting movements and contact, an employee escort till the student is in the campus, alteration of class schedules and timings. Such lighter restrictions could continue, while undergoing reform programmes along with the academic course.

215. More stringent measures in aggravated cases, may include a campus ban, with on-line classes and home schooling. Transfer to constituent colleges or other universities from a pool of universities, or setting up separate premises are among the options. In these cases entry to the specific university campus may be barred, even as the reform programme is underway, and the student is prosecuting his academic course.

216. These are some illustrative instances, of restraints which may be imposed by the universities.

M. Proportionality & Punishment

217. The controversy has to be seen from another critical legal perspective. The doctrine of proportionality is an established ground of judicial review in the Indian Constitutional jurisprudence.

218. Aharon Barak, former President of Supreme Court of Israel in his book "Proportionality" thus defines the rules of the doctrine of proportionality, "According to the four components of proportionality a limitation of constitutional right will be permissible if, (1) It is designated for a proper purpose, (2) The measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose, (3) The measures undertaken are necessary and in that there are alternative measures that may similarly achieve that same purpose with a lesser degree of limitation and finally; (4) Their needs to be a proper relation "proportionality strict senso and balance" between the importance of achieving the proper purpose and social importance of preventing the limitation on the constitutional right."

219. The concept of proportionality essentially visualizes, a graduated response to the nature of the misconduct by a delinquent student. The purpose of the institution, its role in the society and its obligations to the nation, provide the setting for adjudication of the issue of proportionality.

220. Proportionality first came to be applied in the context of punishments imposed for misconduct in service jurisprudence. The necessity of proportional punishment, in cases of

misconduct by students is more strongly needed. Hence action of the respondent-University, is liable to be tested on the anvil of disproportionality.

221. The "doctrine of proportionality" was introduced, and embedded in the administrative law of our country, by the Hon'ble Supreme Court in the case of ***Ranjit Thakur Versus Union of India,*** *reported at* ***(1987) 4 SCC 611.*** The Hon'ble Supreme Court in Ranjit Thakur held thus:

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. "

222. The essence of proportionality is that, the competent authority while imposing a punishment upon a delinquent student, has to co-relate and balance the imperatives of institutional discipline with the demands of individual rights. Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice.

223. The enquiry into the four components of proportionality, as elucidated by Justice Aharon Barak in his book "Proportionality" has been made in the preceding part of the judgment. The purpose and obligations of universities, have also received consideration, in the earlier part of the narrative.

224. The suspension of the petitioner from the university, for an undefined or indefinite period, is an action of extreme severity. It is a de-facto expulsion from the university. These actions carry drastic penal consequences for the students. Denial of education to a soul, in quest of knowledge is the severest form of restriction. Moreover, the instigatory role of the Professor Y in causing the incident, has not been factored into the decision.

225. The measures undertaken against the petitioner, are not rationally connected to the fulfillment of the purpose sought to be achieved. The proper and designated purpose of a punishment in a university, has to include reform of the student, not mere imposition of penalty. Clearly there are alternative reformative measures, that can achieve the same purpose, with a lesser degree of curtailment of the students rights.

226. The impugned action fails the test of proportionality. The action taken against the petitioner, does not achieve the purpose, and social importance of the reform and rehabilitation of the delinquent student. The impugned order is liable to be set aside on this ground as well.

N. Conclusions & Reliefs

227. The past record of the petitioner is unblemished. The incident was an isolated act of violence by the petitioner. It was a one off. The petitioner has tendered a contrite apology, to the Court through his counsel, (this is without prejudice to the defence to the petitioner in criminal case), and seeks an opportunity to evolve into a law abiding and responsible citizen of the country.

228. From the facts in the record, it appears that the petitioner does not have a criminal history (prior to this case), nor can it be said that the petitioner has a depraved criminal mindset. The academic background also shows promise. In these facts, this Court feels that the petitioner is capable of reforming himself, and evolving into a law abiding citizen.

229. The acts of violence if proved, may warrant disciplinary action to maintain discipline in the campus. But the facts of the case, also require reformative measures to protect the future of the petitioner.

230. In the wake of the preceding discussion, this Court finds that the order dated 30.03.2019 passed by the Registrar, Banaras Hindu University, Varanasi, is arbitrary and illegal and of no effect.

231. The order dated 30.03.2019, passed by the Registrar, Banaras Hindu University, Varanasi is quashed.

232. The quashment of the impugned order, does not in any manner exonerate the petitioner of his guilt. Nor does it preempt the regular enquiry into the misconduct. The law shall take its course, unhindered by any observation made in this judgement.

233. In the facts of the instant case and the material in the record, the reinstatement of the petitioner in the Ph.D. Course, shall happen in the manner and the time frame provided in the final directions.

234. The matter is remitted to the respondents.

235. **A writ in the nature of mandamus is issued commanding the respective respondents to execute the following directions in the light of this judgment:**

I. The University shall create a reform, self development and rehabilitation programme, for students accused of misconduct and against whom disciplinary action or any action to deny facilities of the university is proposed or taken;

II. The reform, self development and rehabilitation programme should be created after wide consultations and workshops with institutions of higher learning and research, universities, experts, student counsellors/psychologists, psychiatrists, students and other stakeholders;

III. University Grants Commission will aid the above process by providing the necessary support to the University to create, standardize and effectuate the reform, self development and rehabilitation programme in the University.

IV. The Secretary, Ministry of Human Resource Development, Government of India, New Delhi (respondent no.1 herein), shall also provide necessary support to create infrastructure in the University to effectuate the reform, self development and rehabilitation programme in the

University, in light of this judgment and as per law.

V. The reform, self development and rehabilitation programmes shall be processed as per law, and integrated into the existing legal/statutory framework of the University dealing with deviant conduct and punishments.

VI. The petitioner shall be given the benefit of the reform, self development and rehabilitation programme. After the creation of the reform, self development and rehabilitation programme, the petitioner shall be reinstated as a student and permitted to continue the Ph.D. course or any other course along with the said programme.

VII. Attendance of the petitioner in the said programme shall be compulsory. An evaluation sheet of the petitioner's performance in the programme shall also be prepared.

VIII. It shall be open to the BHU to impose necessary restraints, as it deems fit, upon the petitioner even as he pursues his academic course along with the reform, self development and rehabilitation programme. These restraints may include a campus entry ban upon the petitioner, if the University deems it necessary.

IX. The exercise shall be completed, preferably, within six months, but not later than 12 months. At all times the respondents, keeping in mind the best interests of the students and the society, shall make all efforts to expedite the compliance of the directions.

X. It shall be open to the respondents to create a scheme for reform, self development and rehabilitation for convicts in criminal cases who wish to pursue further higher studies in the respondent University.

XI. The counsels for the respondents shall provide certified copy of this judgment to the Vice Chancellor, Banaras Hindu University, Varanasi (respondent no. 2 herein), the Secretary, Ministry of Human Resource Development, Union of India, New Delhi (respondent no.1 herein) and the Chairman, University Grants Commission, New Delhi (respondent no. 6 herein), for necessary compliances.

236. The writ petition is allowed to the extent and manner indicated above.

(2020)1ILR 637

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2020

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ C No. 28202 of 2019

Jagbhan Singh & Anr. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
Sri Deepak Kumar Jaiswal, Sri Prem Singh

Counsel for the Respondents:
C.S.C., Sri Manvendra Nath Singh, Sri R.C. Singh, Sri Rajesh Kumar, Sri Anurag Prasad

A. U.P. Revenue Code, 2006 - Section 116 - suit for partition - Section 134 – suit for eviction - petitioners' dispossessed from land in their possession, in the garb of execution of a final decree for partition, to which, they were not parties - the Sub Divisional Magistrate is not empowered to issue a direction for the execution of a partition decree, on the administrative side – SDM has by an administrative order, tried to decided an eviction suit under section 134 of the Revenue Code, 2006 – exparte order passed without

hearing the petitioners and also without considering the report of the Revenue Inspector – impugned order passed is illegal and arbitrary. (Para 4, 19, 24 & 25)

The Sub Divisional Magistrate, has manifestly misused his position to provide undue benefit to the plaintiff by ignoring material before him which showed that third parties were in possession, directed execution of a partition decree on the administrative side, in the process evicting occupants of land who were not parties in the partition suit and against who existed no eviction decree. (Para 26)

Held:- The administrative authorities cannot, in the garb of executing a decree for partition, resort to execution proceedings on the administrative side and in the process evict a person in possession, who is not a party in the partition suit nor is a party to the decree, allegedly being executed. (Para 25)

Writ Petition allowed. (E-7)

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard learned counsel for the petitioner and Shri R.C. Singh, learned Senior Advocate for the respondent no.6 and learned Standing counsel for the State-respondents.

2. The writ petition arises out of a suit for partition under Section 116 of the U.P. Revenue Code, 2006 and seeks a writ of certiorari for quashing order dated 10.08.2019 (Annexure No.14) passed by the Sub Divisional Magistrate, Mau Chitrakoot, respondent no.2.

3. The second prayer made is for expeditious disposal of a revision filed by the opposite party, respondent no.6, which is directed against an order passed by the Commissioner, whereby the petitioners were directed to be impleaded in the suit for partition.

4. Primarily, grievance of the petitioners' is that they have been dispossessed from land in their possession, in the garb of execution of a final decree for partition, to which, they were not parties.

5. On the petition coming up for admission, the following order was passed on 29.04.2019 -

"Prima facie it appears that a final decree in a suit for partition has been executed on the administrative side by the SDM with the use of police force.

This action is sought to be justified by counsel appearing for the respondent on the ground that the proceeding for implementation of the final decree in the suit, was judicial proceedings.

He has referred to the second paragraph on page 84 of the paper book, the second page of the impugned order, wherein reference has been made to evidence, and objections available on record.

The SDM, Mau, District Chitrakoot is directed to transmit the record relied upon by him while passing the impugned order dated 10.08.2019 to this Court, forthwith.

Put up this case in the additional cause list on 15.10.2019 by which time learned Standing Counsel shall also ensure that the relevant record is available for perusal of this Court."

6. Subsequently, the matter has been heard and is being decided finally.

7. The contention of counsel for the petitioner is that the impugned order dated 10.08.2019 has been passed on the administrative side and not in proceedings for execution of final partition decree. The

order and action consequent thereto, is without jurisdiction, even though it purports have been been taken in compliance of directions issued on 11.04.2019 in Writ Petition No.12130 of 2019.

8. It is submitted that the impugned order could not have been passed because in the partition suit, the petitioner had filed an impleadment application. The impleadment application was rejected by the trial Court. However, in appeal, the same was allowed. The respondent no.6 challenged the appellate order before the Board of Revenue in Revision No.1077 of 2018, Smt.Geeta Singh Vs. Udai Bhan Singh and others, wherein the order passed by the Commissioner has been stayed. This stay would not amount to rejection of the petitioner's impleadment application. *Prima facie*, therefore, the petitioner has interest in the land subject matter of the partition suit but ignoring the same, the partition decree has been executed on the administrative side. The order passed by the respondent no.2 is not only illegal, it also clearly malafide and abuse of the process of law.

9. Shri R.C. Singh, learned Senior Advocate appearing for the respondent nos. 3 and 6 on the basis of the date chart filed by him, submitted that the petitioners have no interest in the property in question. Only an illegal entry, under Class 9, had been obtained. Therefore, a suit under Section 229B of the U.P. Zamindari Abolition and Land Reforms Act, filed by Bhuriya Singh was decreed and the Class 9 entry in favour of Bhikham Singh was expunged. Bhikham Singh nor his sons, the petitioners, were ever in possession over the land in question.

10. Bhuriya Singh, who filed the declaratory suit for expunging the Class 9 entry, was succeeded by respondent no.3, Dev Narayan Singh, who in turn, was succeeded by his sons Raja Gulab Singh, Chhote Lal and his widow Prema Devi. Prema Devi executed a sale deed of her share in favour of respondent no.6. The respondent no.6 thereafter filed the suit for partition, wherein the final decree was passed and the same has rightly been executed on the spot. The petitioners have no right, title or interest in the land in question. Neither they are in possession thereon.

11. It is also contended that upon the order of the writ Petition No.12130 of 2019 dated 11.04.2019 being filed before the Sub Divisional Magistrate, respondent no.2, notices were issued to the petitioners and after considering their objections, the impugned order dated 10.08.2019 has rightly been passed. The writ petition is therefore, liable to be dismissed.

12. I have considered the submissions made by learned counsel for the parties and perused the record as also the original record produced by learned Standing Counsel.

13. The original record produced is in three compilations -

(i) Record of Suit No.09 of 2018 under Section 116 of the U.P. Revenue Code, 2006.

(ii) Record which contains no Case number and only mentions Misilband No.22.

(iii) Record of Revision No.2912 of 2018 under Section 207 of U.P. Revenue Code, 2006, pending before the Board of Revenue.

14. The third compilation is the one required to be looked into. However, I do

not find copy of the order impugned in this writ petition, on the record of the trial Court of partition suit No.9 of 2018. This is the first compilation is only upto preparation of the final decree and a parwana amaldaramad being issued for incorporation of the same in the revenue records. The Parwana Amaldaramad has been issued on 22.09.2018.

15. Although, it is sought to be contended that the order impugned has been passed in execution of the final decree for partition, no record of any execution case has been produced, although, learned Standing Counsel had been directed to produce such record, as also the material, on the basis whereof, the impugned order had been passed. Non production of this record clearly supports the contention of the petitioners that the impugned order has been passed on the administrative side.

16. The second and relevant compilation contains copy of the letter, which is impugned in this writ petition. This file contains two copies of this order / letter dated 14 August 2019. The first copy available on the file, does not bear any date below the signature. The second copy bears the date 10.08.2019 below the signature The certified copy annexed along with the writ petition is a copy of this second document, but is manifestly, incomplete. One whole page of the same appears to be missing. The other copy contains the part which is manifestly missing in the certified copy, noticed above. This copy bears no date on which it was signed.

17. Annexure 14 to the writ petition which is impugned, bears letter No.2250 / ST/Mau. Subject of this letter is implementation of the order passed in Writ Petition No.12130 of 2019 dated 11.04.2019. The order dated 11.04.2019 was that the final decree in the suit for partition be implemented on the spot, in case, there was no legal impediment to such implementation.

18. The objections that had been raised by the petitioners as regard the legal impediments, find mention in this letter.

19. Despite the order passed by the writ Court on 11.04.2019, the Sub Divisional Magistrate is not empowered to issue a direction for the execution of a partition decree, on the administrative side. There is no mention of any execution case in the impugned letter/order. It also does not bear any case number and as noticed above, is merely a letter directing compliance of directions issued in Writ Petition No.12130 of 2019, vide order dated 11.04.2019. The subject of this letter is not execution of the final partition decree.

20. On the top, the letter/ order impugned is mentioned the date August 14, 2019. This document bears the signature of the Sub Divisional Magistrate and below is a date has been transcribed in the same ink and hand writing which reads 10.08.2019. This is not possible. A letter prepared / typed on August 14, 2019 could not have been signed four days prior to its preparation.

21. In pursuance of this letter, the partition decree has been executed on the spot with the help of police force, on 2.9.2019.

22. On the same file, there is a report by the Lekhpal dated 27.06.2019, duly

forwarded by the Revenue Inspector, wherein it has been categorically mentioned that Udai Bhan Singh, Jag Bhan Singh and Prem Bhan Singh sons of Bhisham Singh are in unauthorized occupation over plot no.1268M area 0.100 hectare. They have planted trees and constructed a well. They claim to be in possession for the last 40 years and that a suit for their dispossession under Section 134 of the U.P. Revenue Code, 2006 is pending consideration before the Sub Divisional Magistrate, Mau, District Chitrakoot.

23. Once, there was material on record to show that a case under Section 134 of the U.P. Revenue Code, 2006 was pending against the petitioners, there was no justification for forcibly dispossessing them, in execution of a decree for partition, to which, the unauthorized occupants were admittedly, not parties.

24. In any case, the impugned order / letter dated 10.08.2019 cannot be a judicial order because it does not refer to any case number or the details of the parties. Even otherwise, the impugned letter/order dated 10.08.2019 has not been passed after hearing the parties. It, at best, considers the objection that was filed by the petitioners, but in my considered opinion, this is not enough. This order is manifestly exparte, passed without hearing the petitioners and also without considering the report of the Revenue Inspector referred to above. The letter/order is therefore, illegal and also arbitrary and therefore cannot be sustained.

25. The administrative authorities cannot, in the garb of executing a decree for partition, resort to execution proceedings on the administrative side and in the process evict a person in possession, who is not a party in the partition suit nor is a party to the decree, allegedly being executed. For the same reason, the impugned order and the consequential action in pursuance thereof, cannot be sustained. The SDM has by an administrative order, tried to decided an eviction suit under section 134 of the Revenue Code, 2006.

26. The Sub Divisional Magistrate, Mr. Ramesh Yadav, has manifestly misused his position to provide undue benefit to the plaintiff by ignoring material before him which showed that third parties were in possession, directed execution of a partition decree on the administrative side, in the process evicting occupants of land who were not parties in the partition suit and against who existed no eviction decree. That is why police force was directed to be used. In normal circumstances, execution of a partition decree, does not require police force, unless demanded by the Amin, who has to execute the decree. Even the memo prepared at the time of execution states that the encroachers were not present on the spot when the decree was being executed. Besides, the plaintiff, below her signature has recorded that items and a vehicle (gaddi) lying over the land given in her possession, be removed.

27. The writ petition is accordingly allowed. The impugned letter/ order dated 10.08.2019 (Annexure 14) is hereby quashed. The Sub Divisional Magistrate, Mau, District Chitrakoot, respondent no.2 is directed to ensure that status-quo ante as existing on the date the order dated 10.08.2019 was passed by him, is restored, forthwith.

28. For his illegal conduct and actions, geared to providing undue benefit to respondent no:6, Ramesh Yadav, SDM,

Mau, District Chitrakoot is liable to costs of Rs.25,000/- to be deposited by him within a month, failing which, the same shall be deducted from his salary/ and or recovered as arrears of land revenue.

29. Moreover, an entry shall be made in his service record that he has been found by this Court to be guilty of acting beyond jurisdiction with a view to favour a private party and to provide her possession over land by forcibly dispossessing its occupants, in the garb of executing a partition decree especially when there was no decree for dispossession against the occupants nor they were parties to the partition decree and for this purpose having passed and signed an order on 10.08.2019 which had been dated 14.08.2019, at its top. This was done by him on the administrative side, having signed the order / letter impugned in this petition as Sub Divisional Magistrate and not as Sub Divisional Officer, a designation to be used when discharging, judicial functions.

30. The original records produced by Learned Standing Counsel be returned back to him, forthwith.

(2020)1ILR 642

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Matters Under Article 227 No. 9606 of 2019 (Criminal)

Smt. Lalita Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Sengar

Counsel for the Respondents:
C.S.C.

A. Criminal Procedure Code, 1973 - Section 145 (1) - 'stating the grounds of his being so satisfied' - Magistrate gets jurisdiction to initiate proceedings and pass a preliminary order u/s 145 of the Code - only on being satisfied that - there is a *real dispute* existing - concerning the *possession of immovable property* - and that such dispute is likely to *cause breach of peace* - This satisfaction Magistrate may get from - report of the police officer or upon other information - Magistrate shall make an *order in writing, stating the grounds* of his satisfaction is *mandatory* . (Para 10)

Held - City Magistrate neither called for any police report regarding spot inspection of the plot in dispute nor obtained other information as required under u/s 145 Cr.P.C - City Magistrate on the basis of presumption illegally rejected the claim of the applicant that she is in possession over the plot in dispute. (Para 11)

Matter Under Article 227 allowed. (E-5)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Ajay Sengar, learned counsel for the petitioner and learned A.G.A. for the State.

2. The present petition under Article 227 of the Constitution of India has been filed to quash the order dated 1st April, 2019 passed by the City Magistrate, Paragana-Orai, Jalaun at Orai in Case No. 02 of 2018 (Smt. Lalita Devi Vs. Veni Madhav & Others), under Section 145 Cr.P.C., Kotwali-Orai, District-Jalaun as well as the order dated 13th September, 2019 passed by the Additional Sessions

Judge/Special Judge (E.C.Act), Jalaun at Orai in Criminal Revision No. 49 of 2019 (Smt. Lalita Devi Vs. Veni Madhav & Others), under Section 397 Cr.P.C., Police Station-Kotwali, District-Jalaun.

3. Learned counsel for the petitioner and the learned A.G.A. agree that this application may be finally disposed of without issuing notice to opposite party no.2 in view of the order proposed to be passed today. Normally, this Court would have issued notices to opposite party no.2 to file counter affidavit but no purpose would be served by keeping the present application pending. However, it shall be open for opposite party no.2 to file recall application against this order, if he feels so aggrieved.

4. Under the order impugned dated 1st April, 2019, order/notice dated 17th October, 2018 under Section 145 (1) Cr.P.C. directing the parties to maintain status quo passed on the application filed by the applicant, has been quashed, which has also been affirmed by the revisional court under the order impugned dated 13th September, 2019.

5. According to the learned counsel for the petitioner, the brief facts are as follows:

Respondent no.3, namely Komal Yadav being owner of plot measuring 20 x 40 fee, situated at Churkhi Road, Pargana and Tehsil-Orai, District-Jalaun at Orai, had offered the said land to the petitioner on a reasonable rate i.e. Rs. 2,00,000/- lacs. Petitioner accepted the said proposal and paid Rs. 2,00,000/- to respondent no.3 for purchasing of the said land as sale consideration with the assurance that the possession shall be handed over immediately but the registered sale-deed will be executed in favour of the petitioner in the year 2016. According to the said deal, the petitioner after paying Rs. 2,00,000/- to respondent no.2, has taken possession over the plot in dispute and now she is still in possession over the said plot. Thereafter the petitioner has requested respondent no.3 to execute the sale-deed in favour of the petitioner as per the assurance given by her, but respondent no.3 has avoided the request of the petitioner and has not executed the registered sale deed even after expiry of a period of three years. On 16th October, 2018, respondent no.2, namely, Beni Madhav came and wanted to take possession over the plot in dispute. The petitioner contacted respondent no.3 about the same but respondent no.3 did not respond to her properly. Thereafter the petitioner has also immediately moved written complaint to the Station House Officer, Kotwali-Orai, District-Jalaun and City Magistrate, Jalaun at Orai on 17th October, 2018. Upon the said written complaint of the petitioner, the City Magistrate, Jalaun at Orai vide order dated 17th October, 2018 initiated proceedings under Section 145 (1) Cr.P.C. and directed to maintain status quo issuing notice to respondent nos. 2 and 3and fixing 31st October, 2018. On the notice being received, respondent nos. 2 and 3 filed their written objections on 15th November, 2018 stating therein that petitioner has no concern with the aforesaid plot and neither respondent no.3 has ever taken any consideration from the petitioner nor assured her to execute any sale-deed qua the plot in dispute. On the objections filed by respondent nos. 2 and 3, the City Magistrate under the order dated 28th October, 2018 has dropped the proceedings initiated under Section 145

(1) Cr.P.C. and has also recalled the earlier order directing the parties to maintain status quo. Feeling aggrieved by the said order of the City Magistrate dropping the proceedings initiated under Section 145 (1) Cr.P.C., the petitioner has preferred Criminal Revision No. 49 of 2019 (Smt. Lalita Devi Vs. Veni Madhav & Others) under Section 397 Cr.P.C. The learned Additional Sessions Judge/Special Judge (E.C. Act), Jalaun at Orai has rejected the criminal revision under the order dated 13th September, 2019. It is against these two orders that the present petition under Article 227 of the Constitution of India has been filed.

6. Learned counsel for the petitioner submits that both the courts below have committed manifest error in law determining the ownership of the land in dispute while passing the impugned orders. Both the courts below have also exercised their powers beyond the scope of provisions under Sections 145 and 145 (1) Cr.P.C. and have wrongly rejected the claim of the petitioner. It is an admitted case that the petitioner was in possession over the plot since 2016 but the courts below have wrongly determined the possession of the respondent nos. 2 and 3. Under the orders impugned the findings recorded therein are perverse and wrongly determined that there is the apprehension among the parties regarding the land in dispute. The petitioner is in possession over the plot in dispute and she cannot be evicted by the private respondents beyond the procedure known to law. It is further submitted that the respondent nos. 2 and 3 have no legal right or title to claim that they are the owners of the plot in dispute. It is further submitted that both the courts below only on the basis of apprehension has recorded a finding that respondent no.3 has title and is in rightful possession over the plot in question and the petitioner is not in possession over the same. Learned counsel for the petitioner, therefore, submits that both the impugned orders are to be set aside.

7. I have considered the submissions of the learned counsel for the applicant and the learned A.G.A. for the State and have gone through the records of the present application as well as the impugned orders.

8. Before adverting on the merits of the case set up by the parties, it would be worthwhile to reproduce Sections 145 Cr.P.C., which is quoted herein below:

"145. Procedure where dispute concerning land or water is likely to cause breach of peace.

(1) ***Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.***

(2) For the purposes of this section, the expression" land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon

such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute,

(4) The Magistrate shall then, without, reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub- section (1), in possession of the subject of dispute: Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub- section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub- section (1).

(5) Nothing in this section' shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under subsection (1) shall be final.

(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to sub- section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub- section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub- section shall be served and published in the manner laid down in sub- section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of. such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107."

9. Section 145 (1), Criminal Procedure Code, provides that the

Magistrate having jurisdiction shall make an order in writing that he is satisfied either from a police report or other information that a dispute likely to cause a breach of the peace exists and state the grounds of his satisfaction before requiring the parties concerned in such dispute to attend his Court and put in written statements. This provision of making the order in writing and stating the grounds of his satisfaction appears to be mandatory. The words "shall make an order in writing stating the grounds of his being so satisfied" would clearly indicate that the order must be in writing and the grounds for satisfaction also must be stated. Unless the grounds are stated in the order itself, it will be difficult to test the correctness or otherwise of the order passed by the Magistrate. So, the preliminary order should state clearly the reasons and grounds on which the satisfaction is based and that the Magistrate had applied his mind in passing the preliminary order.

10. On a careful reading of section 145 as a whole, particularly sub-section (1) it can be seen that every foundation of an action under the sub-section is the satisfaction of the Magistrate that a dispute likely to cause a breach of the peace existed on the date of the preliminary order, concerning the possession of any land or water or boundaries thereof situated within his or her local jurisdiction. It is only on being satisfied that there is a real dispute existing concerning the possession of immovable property and that such dispute is likely to cause the breach of peace that the Magistrate gets jurisdiction to initiate proceedings and pass a preliminary order under section 145 of the Code. This satisfaction he or she may get from a report of the police officer or upon other information. The Magistrate must be satisfied of the necessity to take action under section 145 of the Code, before a. preliminary order is passed and it cannot be said that in every case such satisfaction would automatically follow from a report of the police officer or upon other information. The provision in the Sub-section that the Magistrate shall make an order in writing, slating the grounds of his satisfaction is mandatory. If the grounds are not stated in the order, it will be difficult to test the correctness and validity of the order.

11. From the perusal of the aforesaid provisions and the orders impugned, this Court finds that the City Magistrate on the basis of presumption has rejected the claim of the applicant that she is in possession over the plot in dispute and has accepted the objections filed by respondent nos. 2 and 3. Neither the City Magistrate has called for any police report regarding spot inspection of the plot in dispute nor has obtained other information as is required under the provisions of Section 145 Cr.P.C.

12. For the reasons aforesaid, this Court is of the view that the learned Magistrate had not applied his mind while passing the order dated 1st April, 2019 in that the learned Magistrate has not considered the claim of the applicant as required by sub-sections (1) and (4) of Section 145. The same mistake has also been committed by the revisional court in its order dated 13th September, 2019.

13. In view of the aforesaid, the impugned orders dated 1st April, 2019 and 13th September, 2019 cannot be legally sustained and are hereby quashed. The matter is remanded to the City Magistrate concerned to pass reasoned and speaking

order afresh in the proceeding initiated under Section 145 (1) Cr.P.C. after affording opportunity of hearing to all the parties concerned in accordance with law.

14. The present application is allowed subject to the observations made above.

(2020)1ILR 647

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Matters Under Article 227 No. 9749 of 2019
(Criminal)

Pradeep ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Chandra Srivastava

Counsel for the Respondents:
C.S.C.

A. Criminal Procedure Code, 1973 - Section 204 - Summoning Order - Prima facie case - At the stage of passing of summoning order u/s 204 of Cr.P.C Magistrate is not required to make meticulous analysis of factual evidence, rather, existence of a prima facie case is to be seen by application of judicial mind- ***Held*** **- Summoning order was passed on the basis of evidence, collected by the Magistrate, in its enquiry - held no illegality in summoning order.** (Para 7)

Matter Under Article 227 dismissed. (E-5)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Article 227 of the Constitution of India, has been filed by the applicant, Pradeep, with a prayer for setting aside impugned summoning order, dated 29.6.2018, passed by the Additional Chief Judicial Magistrate, Ist, Saharanpur, as well as order of revisional court, dated 19.10.2019, passed by the learned Sessions Judge, Saharapur, in Criminal Revision No. 183 of 2018, Pradeep vs. State of U.P. and others. Learned counsel for applicant argued that both of the courts below, i.e., Trial court and the Revisional court, have failed to appreciate facts and law placed before them. There was inconsistency in the statements, recorded, under Sections 200 and 202 of Cr.P.C. Applicant is a witness in a murder case, wherein, complainant's husband is an accused. Prior to it alleged occurrence, a criminal case, under Section 323, 504 and 506 of I.P.C., was also got registered upon a report of the applicant and owing to this previous enmity, this false implication was made and concocted case was got lodged, but, both of the courts below failed to appreciate it. Hence, this Application, invoking jurisdiction of this court of general superintendence over subordinate courts, conferred by Article 227 of the Constitution of India, has been filed, with above prayer.

2. Learned AGA, representing State of U.P., has vehemently opposed this Application.

3. Heard learned counsel for both sides and gone through the record.

4. From very perusal of the complaint, it is apparent that it was filed by Smt. Poonam with this contention that on 6.12.2016, at about 5.00 PM, while she was all alone at her home and her husband, Dhan Prakash, was away at Saharanpur

with regard to his labour job, Pradeep, applicant, herein, did criminal trespass in her house. He outraged her modesty by doing obscene act by touching her private parts. When she protested, he assaulted her by hands and feet and also beaten her by leg shots and by the Batt of Tamancha (country made pistol). Her cloths were torn. She sustained injury. Upon rescue call, Keshu, resident of same village and mother of complainant, Smt. Pramod Devi, who came there to meet her, rushed there and saved her with great difficulty. Subsequently, Ram Kumar, Lalit, Sudhir and Hari Ram, family members of accused/Opposite party, also came at the home of the complainant. They assaulted her and extended threat of dire consequences. She was medically examined on 7.12.2016, but her report was not got lodged. Magistrate took cognizance and registered it as a complaint case, wherein, complainant was examined, under Section 200 of Cr.P.C. and her three witnesses, Smt. Pramod, Smt. Gandadai and Smt. Kuntlesh, under Section 202 of Cr.P.C. Thenafter, summoning of Pradeep, applicant herein, was ordered by the Magistrate, for offences, punishable, under Sections 323, 452 and 506 of IPC. Against this summoning order, a revision, being Criminal Revision No. 183 of 2018, was filed, which was dismissed.

5. Statements, recorded, under enquiry made by the Magistrate, are fully intact and alleged contentions of the complaint are very well in it.

6. At the stage of passing of summoning order, under Section 204 of Cr.P.C., Magistrate is not required to make meticulous analysis of factual evidence, rather, existence of a prima facie case is to be seen by application of judicial mind and in present case, it was very well there. Accordingly, summoning order was passed in accordance with provisions of law.

7. Revisional court was to see as to whether the Magistrate failed to appreciate facts and, thereby exceeded or mis-exercised his jurisdiction or if there is any apparent error on the face of record and in present case, in the impugned order, there was no such situation because the order was passed on the basis of evidence, collected by the Magistrate, in its enquiry and as such revision was rightly dismissed in accordance with provisions of law.

8. Hence, in view of what has been discussed above, there was no failure by either of the courts below, warranting interference by this Court, in exercise of power of general superintendence over subordinate courts, conferred upon it, under Article 226 of the Constitution of India.

9. Accordingly, this Application merits its dismissal and it stands dismissed as such.

(2020)1ILR 648

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 4317 of 1998

Prof. Onkar Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Arun Prakash, Sri Vikram D. Chauhan

Counsel for the Opposite Parties:
A.G.A., Sri Dinesh Pathak

A. Indian Penal Code, Sections 147, 323, 325 & 426 - Complaint-Application filed u/s 210(2) Cr.P.C. rejected on the ground that it was infructuous since police has submitted final report- Another application for discharge rejected- Before summoning accused, Court has to examine whether offence(s) under the Sections in which complaint has been filed are made out or not-The allegation of beating by Applicant-1 by Danda or boot or legs is an improvement in oral deposition under Section 200 Cr.P.C - Complaint against security personnel rejected-Reading entire complaint and statement it cannot be said that alleged injuries were caused by Applicant-1- Alleged medical reports remain unproved-Neither there is any allegation nor any evidence that applicants caused any hurt or grievous hurt to Informant/complainant-Sections 321 and 322 IPC - "voluntarily causing hurt" or "voluntarily causing grievous hurt"- Accused must intend to cause or known himself to be likely to cause hurt or grievous hurt-Intention and knowledge clearly lacking- Offences under Sections 321 and 322 IPC punishable under Sections 323, 325 IPC respectively are not attracted in the case-Section 426 IPC "Mischief"- Section 425 IPC –No offence made out-No "unlawful assembly" in terms of Section 141 IPC and so no offence under Section 147 IPC made out. (Para 12, 24, 25, 26, 29, 33 & 36)

Criminal Misc. Application u/s 482 Cr.P.C allowed. (E-3)

List of cases cited: -

1. Roy Fernandes vs. State of Goa, 2012(3) SCC 221

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

1. This is an application under Section 482 Cr.P.C. filed by two applicants, namely, Prof. Onkar Singh and P.N. Pathak, praying for quashing of orders dated 26.02.1998 and 02.07.1998, rejecting application of applicants for discharge in Case No. 1277 of 1995, under Section 147, 323, 325 and 426 IPC, Police Station Lanka, Varanasi.

2. At the outset it may be placed on record that Applicant-2, P.N. Pathak son of Sri Kuber Pathak, has died on 03.03.2014, as per report submitted by Chief Judicial Magistrate, Varanasi vide letter dated 05.12.2016 after making inquiry as per this Court's circular dated 18.01.2017. Hence this application has abated qua Applicant-2 and is now surviving only in respect of Applicant-1.

3. Facts, in brief, giving rise to this application are that a First Information Report *(hereinafter referred to as "FIR")* being Case Crime No. 226 of 1992 under Section 147, 323, 426 IPC was filed in Police Station Lanka, Sadar, Varanasi, on 17.08.1992 by one Atul Mishra son of Sri Laxmi Narayan Mishra against applicants alleging that in the morning on 17.08.1992, when L.L.B. First Year examination was going on in Multipurpose Hall of Kashi Hindu University (Law Faculty), at around 10.15 am some security personnel attempted to take out the students from examination hall. Thereupon Informant protested and said that security personnel should go out of examination hall and allow students to complete examination. Thereupon Chief Security Officer, Onkar Singh, i.e., Applicant-1 assaulted Informant. Accompanying Security Officer, P.N. Pathak, i.e., Applicant-2 helped him in assaulting Informant. Thereafter on the instructions of Applicant-1, about ten number of security personnel came, took

out Informant from examination hall and beat him with lathi and boots. Applicant-1, Onkar Singh also came out from examination hall and beat Informant. In the meantime some friends of Informant reached there and protested against assault committed by accused person and other Security Officers but Security Officers did not stop and dispel friends of Informant also. In this process clothes of one student, Rajesh Rai got torn. Informant is President of National Students Union of University and had raised voice against accused applicant, Onkar Singh, protesting against his misbehaviour with students.

4. Alleging that police, in collusion with accused, has not taken any further action in the above FIR, Informant filed a complaint dated 20.10.1992 registered as Case No. 106 of 1992 in the Court of Third Judicial Magistrate, Varanasi against applicants as also ten other security personnel, whose names were not known to Informant but he could recognize them. In the said complaint names of Rajesh Rai, Rajendra Prasad, Pravin Kumar Singh, Head Munshi Thana Lanka, Dr. S.K. Singh and Radiologist-Shiv Prasad Gupt Hospital, were mentioned as witnesses. A medical report was also made part of complaint. The complaint was registered on 20.10.1992 itself and for recording statement under Section 200 Cr.P.C. 29.10.1992 was fixed. Subsequently, Magistrate recorded statement under Section 200 Cr.P.C. and statement of witnesses i.e. PW-1, Pravin Kumar was recorded under Section 202 Cr.P.C. on 05.11.1992. No further witness was produced.

5. When matter was pending, police submitted a final report dated 31.12.1992 in Case Crime N. 226 of 1992 under Section 147, 323, 426 IPC.

6. Proceeding further on the complaint of Sri Atul Mishra, concerned Magistrate on 06.01.1993 passed order summoning both accused-applicants under Section 323, 325 and 426 IPC. Magistrate observed that in the light of statement of Complainant under Section 200 Cr.P.C. and witness, Pravin Kumar (PW-1), under Section 202 Cr.P.C., and documentary evidence comprising of medical report and X-ray as also the copy of FIR, prima facie case against accused applicants under Sections 323, 325, 426 IPC is made out.

7. Applicants filed an application dated 10.02.1993 under Section 210(2) Cr.P.C. for stay of proceedings in complaint case on the ground that police investigation was already in process pursuant to FIR lodged by Sri Atul Mishra on 17.08.1992. Thereafter on 20.02.1993 Applicant-1, Onkar Singh filed an application for discharge and to close proceedings in view of Section 16-D of Banaras Hindu University Act, 1915 *(hereinafter referred to as "BHU Act, 1915").*

8. Application dated 10.02.1993 filed under Section 210(2) Cr.P.C. was rejected on the ground that it was infructuous since police has submitted final report dated 31.12.1992. Another application dated 29.01.1997 was filed by applicants stating that for the last four years nothing has happened in complaint case, therefore, applicants should be discharged. This application dated 20.01.1997 was rejected by Special Chief Judicial Magistrate, Varanasi vide order dated 26.02.1998. Further, the application filed by Applicant-1, Onkar Singh dated 20.02.1993 for discharge was considered on 02.07.1998 and rejected by Special Chief Judicial Magistrate, Varanasi holding that proceedings are not barred by Section 16-D of BHU Act, 1915.

9. It is contended by Sri V.K. Upadhyay, learned Senior Advocate assisted by Sri Vikram D. Chauhanthat, Advocate pearing for applicants that Applicant-1, Onkar Singh was Chief Proctor and Applicant-2 is a security personnel and both were discharging duties in above capacities under the provisions of BHU Act, 1915 and Statutes, Ordinances and Regulations framed thereunder, therefore, prosecution and legal proceedings were barred by Section 16-D of BHU Act, 1915. Chief Proctor is an "Officer of University" as per Section 6 of BHU Act, 1915. Ordinance 9 framed under Section 18 of BHU Act, 1915 made Chief Proctor responsible for maintenance of discipline in students. Further, injuries of Informant as per report were simple and may have been inflicted upon during course of discharge of official duty by applicants during examination, therefore, Section 16-D is attracted. It is also said that proceedings were only counter blast to embarrass and teach a lesson to Applicant-1, Onkar Singh and hence malicious. Referring to averments contained in rejoinder affidavit it is argued that Applicant-1, Onkar Singh is now 77 years of age and in discharge of his duties in University he has received several appreciations and commendations from time to time which show that he had been performing his duties efficiently. Due to the nature of duties of Chief Proctor, some students particularly office bearers of Students Union may have felt annoyed and criminal proceedings initiated against Applicant-1, Onkar Singh in the case in hand in fact is result of one of such annoyed student. In rejoinder affidavit Applicant-1, Onkar Singh has narrated the incident in his own way and placed certain documents on record but in my view the same being not part of record of Court below when orders impugned in this application were passed, cannot be looked into by this Court at this stage. This Court has to examine, whether orders passed by Court below on the material before it are sustainable or not and whether it is a case fit for intervention of this Court under Section 482 Cr.P.C.

10. Learned A.G.A. for State and Sri Dinesh Pathak, Advocate for Informant urged that the Court has passed order on the basis of evidence adduced by Informant hence no interference would be justified.

11. In the present case, FIR was lodged on the same day when incident said to have taken place. Complainant received injuries which are prima facie supported by medical reports and also admitted in para 26 of affidavit where it has said that injuries may have been sustained by complainant during official discharge of duties by Applicant-1, Onkar Singh and not for any other reason. Complainant has also supported allegations contained in complaint in his statement recorded under Section 200 Cr.P.C. and corroborated by witness PW-1, Pravin Kumar Singh. He was one of the examinee present in the examination hall and an eye witness of the incident. Therefore, it cannot be said that complaint has been lodged as an afterthought or malicious.

12. Still when a complaint is made, before summoning accused, Court has to examine whether offence(s) under the Sections in which complaint has been filed are made out or not.

13. In the present case Applicant-1, Onkar Singh has been summoned under Sections 147, 323, 325, 426 IPC. I proceed

to examine, whether offence under the aforesaid Sections, even if the allegations made in complaint and statement of complainant and witness PW-1 on the face value are taken to be true, is not made out or not.

14. Section 323 IPC provides for punishment for voluntarily causing hurt and reads as under:

*"**323. Punishment for voluntarily causing hurt.**--Whoever, except in the case provided for by section 334, **voluntarily causes hurt,** shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."*

15. The term 'Hurt' has also been defined under Section 319 IPC and reads as under:

*"**319. Hurt.**--Whoever causes **bodily pain, disease** or **infirmity to any person** is said to cause hurt."*

16. Term "grievous hurt" has been defined under Section 320 IPC and reads as under:

*"**320. Grievous hurt.**--The **following kinds of hurt only are designated as "grievous":--***

*First -- **Emasculation**.*

*Secondly --**Permanent privation** of the **sight of either eye.***

*Thirdly -- **Permanent privation** of the **hearing of either ear,***

*Fourthly --**Privation** of any **member or joint.***

*Fifthly -- **Destruction or permanent impairing** of the powers of **any member or joint.***

*Sixthly -- **Permanent disfiguration** of the **head or face.***

*Seventhly --**Fracture** or **dislocation of a bone or tooth.***

*Eighthly --**Any hurt** which **endangers life** or which causes the sufferer to be during the space of **twenty days in severe bodily pain, or unable to follow his ordinary pursuits."***

17. Terms "voluntarily causing hurt" and "voluntarily causing grievous hurt" have been defined under Sections 321 and 322 IPC and read as under:

*"**321. Voluntarily causing hurt.**--Whoever does any act **with the intention of thereby causing hurt** to any person, or **with the knowledge that he is likely thereby to cause hurt** to any person, and **does thereby cause hurt to any person,** is said "voluntarily to cause hurt".*

***322. Voluntarily causing grievous hurt.**--Whoever **voluntarily causes hurt,** if the hurt which **he intends to cause or knows himself to be likely to cause is grievous hurt,** and if the **hurt which he causes is grievous hurt,** is said "voluntarily to cause grievous hurt."*

*Explanation.--A person **is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt.** But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind."*

18. The entire complaint made allegations as under:

´मुस्तगीस का0हि0वि0वि0 के विधि संकाय के प्रथम वर्ष का छात्र है और राष्ट्रीय छात्र

संगठन बी0एच0यू0 का अध्यक्ष है जिसके नेतृत्व मे अभियुक्त नं0 1 के विरूद्ध प्रदर्शन वगैरह किया गया था और उनके विरूद्ध कार्यवाही की मांग की जा रही थी जिससे अभियुक्त नं0 1 मुस्तगीस सेबुरा मानता था और उसका जीवन बर्वाद करने की धमकी भी दिया था। दि0 17.8.92 को सुबह 8 बजे से मुस्तगीस की परीक्षा विश्वविद्यालय स्थित मल्टीपरपज हाल में हो रही थी। उपरोक्त समय व स्थान घटना पर परीक्षा दे रहे एक छात्र को विश्वविद्यालय के सुरक्षा कर्मी हाते के अन्दर पकड़कर ले जाने लगे जिसका मुस्तगीस ने विरोध किया और कहा कि आप लोग परीक्षा हाल से बाहर जाय और इस छात्र से परीक्षा ले रहे प्रोफेसर लोगों से भी बातचीत करने दिजिए। **हमारे इसी कहने पर** वहॉ मौजूद विश्वविद्यालय के मुख्य सुरक्षा अधिकारी श्री ओंकार नाथ सिंह ने हमारे **कुर्ते को पकड़कर खींचा एवं मारने लगे।** और वहॉ खडे **एक अन्य सुरक्षा अधिकारी जिनको मैं सिर्फ पाठक जी के नाम से जानता हूँ** ने भी **मुझे मारा पीटा और ओंकार सिंह के पुकारने पर वहॉ खड़े करीब 10 सुरक्षा कर्मी मुस्तगीस को पकड़कर हाल से बाहर लाये और लाठी डण्डा से मारने लगे। श्री ओंकार नाथ सिंह** ने मुस्तगीस को **डण्डे से मारा।** अभियुक्तगण के मारने से मुस्तगीस को **चोंटें आई।** इसी बीच कुछ अन्य छात्र भी वहॉ पहुँचकर अभियुक्त के इस कार्य का विरोध करने लगे। जिस पर अभियुक्त आंकार नाथ सिंह व उनके साथियों ने उन्हें भी ढकेल दिये, जिससे एक छात्र श्री राकेश राय का कपड़ा फट गया और वह गिर गया। घटना के गवाहान ने **देखा व बीच बचाव किय ` यदि गवाहान बीच बचाव न करते तो अभियुक्तगण मुस्तगीस को जान से मार डालते। मुस्तगीस ने अपनी चोटों का डाक्टरी मुआइना विवेकानन्द स्मारक राजकीय अस्पताल भेलूपुर में कराया** और घटना की रिपोर्ट थाना लंका में किया। **और ऐक्सरे शिवप्रसाद गुप्त अस्पताल में कराया** पुलिस अभियुक्तगण से मिली हुई है जिससे उनके विरूद्ध आज तक कोई कार्यवाही नहीं की जिससे न्यायालय में मुकदमा कर रहा है।''

"The complainant is a first year student of the law faculty of Kashi Hindu Vishwavidyalaya (BHU) and president of the National Students' Organisation, BHU, under whose leadership demonstrations etc. against the accused 1 and others were held demanding action against them; because of which the accused 1 sustained ill feeling against the complainant and had issued threats of destroying the latter's life. The complainant was appearing at the examination being held in the multi-purpose hall of the university from 8:00 am on 17.08.1992. On the aforesaid place, date and time, the security personnel caught hold of a student and proceeded to take him out of the hall, which act was opposed by the complainant saying, "All of you shall leave the examination hall and let the student talk to the professors who are conducting the examination." On my saying only this much, the chief security officer caught hold of me by grabbing my shirt and started beating me, and another security officer, to whom I know by his title 'Pathak Ji', also thrashed me. On being called by Omkar Nath Singh, around 10 security personnel standing there carried the complainant out of the hall and started beating him with sticks and staves. Shri Omkar Nath Singh assaulted the complainant with a stick. On being assaulted by the accused persons, the complainant sustained injuries. Meanwhile, other students reached there and started protesting this act of the accused persons, whereupon accused Omkar Nath Singh and his accomplices shoved them as well, resulting in the shirt of a student Rakesh Rai getting torn and his falling down. The occurrence was witnessed by witnesses and they mediated into it. Had the witnesses not mediated into the occurrence, the accused persons would have killed the complainant. The complainant got his injuries examined at the Vivekanand Smarak Government Hospital, Bhelupur, lodged a complaint-report at the Lanka Police Station and got X-ray conducted at the Shivprasad Gupta Hospital. The police is colluding with the

accused persons; that is the reason no action has been taken against them as yet, being aggrieved whereby I am filing a case in Court." (English translation by Court)

19. As per own case of complainant examination was going on in the multipurpose hall of University when security personnel came, caught a student and got him outside the examination hall. Student was someone else not the complainant. Complainant however protested of such act of security personnel and said that they should go outside the examination hall and allow examinee, who was being taken away, to talk with Professors. Thereupon Applicant-1, Onkar Singh, i.e., Chief Proctor, who was present thereat caught Kurta of complainant and started beating him. Simultaneously another Security Officer, P.N. Pathak (Applicant-2) also started beating him. Thereafter on the call of Applicant-1, Onkar Singh, about 10 security personnel present in the hall, caught complainant, brought him outside the hall and beat complainant with Lathi. Due to beating by accused persons complainant sustained injuries. Some other students present thereat sought to protect but Applicant-1, Onkar Singh and his companions repelled them and in this process clothes of one student, Rajesh Rai got torn and he fell down.

20. On his own, Complainant got his injuries examined in Vivekanand Memorial Rajkiya Hospital, Bhelupur and got X-ray conducted in Shiv Prasad Gupt Hospital. Injury report by Medical Officer of aforesaid Government Hospital reads as under:

*"(1) **Contusion** 6 cm x 2 cm on inner aspect of **right shoulder region**, 5 cm away from **top of right shoulder** and 7 cm away **from root of right side of neck.***

*(2) **Contusion** 5 cm x 1.5 cm **on back of root of left side of neck,** 2 cm away from midline.*

*(3) **Contusion** 6 cm x 1.5 cm **on upper part outer aspect of left upper arm,** 4 cm below top of left shoulder.*

*(4) **Abrasion** 1.5 cm x 1 cm **on inner aspect of proximal part of left ring finger** 3.5 cm above tip of left ring finger. **Bleeding present.***

*(5) **Contusion** 10 cm x 1.5 cm on **back upper part of right side of chest extending medially upto** mid line and 7 cm below right shoulder web.*

*(6) **Contusion** 3 cm x 2 cm **on palmer aspect of proximal side of left ring finger half cm below root of left ring finger.***

*(7) **Abrasion** 1/2 cm x 1/2 cm **on ventral aspect inner side of root of left big toe.***

*(8) **Complaint of pain in hand.***

*All the injuries are fresh. According to doctor all the **injuries were simple** and **might be caused by blunt objects and frictions."***

21. X-ray report shows a crack fracture. The X-ray report reads as under:

***"Crack fracture. Distal end of middle.** Phalynx of fourth finger left hand with OM changes."*

22. Complainant's statement recorded by Magistrate under Section 200 Cr.P.C. and certified copy has been placed before this Court in which he has made statement about the act of Applicant-1, Onkar Singh as under:

"दिनांक 19.8.92 को मल्टीपरपज हाल में जहाँ परीक्षण चल रही थी करीब सवा दस बजे

दिन आपने साथियों श्री पाठक सुरक्षाधिकारी एवम् दस अन्य सुरक्षा कर्मियों के साथ आए और ***एक छात्र को हाल से बाहर ले जाने लगे जिनका मैंने विरोध किया*** *और* ***कहा कि आप लोग अध्यापकगण से बात कर लें*** *इसी बात पर पहले की रंजिश को लेकर अभि0 ओंकार नाथ सिंह* ***मेरे कुर्ता को पकड़ कर खींच कर मारने लगे*** *और उन्हीं के कहने पर* ***पाठक जी ने भी मारने को और ललकारने पर दस सुरक्षाकर्मी लाठी से मारे*** *अभि0* ***ओंकार नाथ सिंह ने मुझे डन्डे व लात घूसों से मारा*** *उन लोगों के मारने से* ***मुझे काफी चोटें आयी*** *घटना को राजेश राय, राजेन्द्र प्रसाद, प्रवीण कुमार ने देखा बीच बचाव किया राजेश राय की शर्ट भी ओंकार नाथ सिंह व उनके साथियों ने फाड दिया था।''*

"On 19.08.1992 at around 10:15 am, Shri Pathak, Security Officer, along with 10 other security guards, came into a multipurpose hall where examination was being conducted, and started taking one of the students out of the hall; protest to which was made by me and I asked them to talk with teachers. On this, the accused Onkar Nath Singh, out of old enmity, began to catch hold of my Kurta, drag and beat me. Only on his instance, Shri Pathak instigated 10 security guards and they struck me with lathis. The accused Onkar Nath Singh thrashed me with sticks and lathis. I sustained multiple injuries being beaten by them. Rajesh Rai, Rajendra Prasad and Praveen Kumar witnessed the incident and intervened in the matter. Onkar Nath Singh and his accomplices tore Rajesh Rai's shirt as well."

(English translation by Court)

23. PW-1 in his statement has also said as under:

''मेरी परीक्षा ला की 19.8.92 ई0 8 बजे 11 बजे तक थी। इस दिन बी0एच0यू0 मल्टी परपज हाल में परीक्षा के दौरान करीब सबा दस बजे ओंकार नाथ सिंह, (मुख्य सुरक्षा अधिकारी) पाठक जी, सुरक्षा अधिकारी और दस अन्य सुरक्षा कर्मी जिन्हें मैं देखकर पहचान सकता हूँ ***एक परीक्षार्थी को पकड़कर बाहर ले जाने लगे जिस पर अतुल मिश्रा ने कहा कि आप लोग अध्यापकगण से बात पर*** *ओंकार नाथ सिंह ने अतुल मिश्रा का* ***कुर्ता पकड़ कर खीचना शुरू किये जिससे उनका कुर्ता फट गया*** *ओंकार नाथ सिंह पाठक जी,* ***डन्डे लात मुक्के से मारने लगे*** *और ओंकार सिंह के ललकारने पर* ***सुरक्षाकर्मी भी उनके मारने से*** *अतुल मिश्रा को चोट लगी।''*

"My law examination was scheduled for 19.08.1992 from 8 to 11 o'clock. On that day at around 10:15 am, Onkar Nath Singh (Chief Security Officer), Pathak Ji, Security Officer and 10 other security guards, whom I can identify on seeing, started taking one of the students out of the BHU multipurpose hall during examination. On this Atul Mishra asked them to talk with teachers. On this, Onkar Nath Singh started dragging Atul Mishra by grabbing his Kurta as a result of which his Kurta got torn. Onkar Nath Singh and Pathak Ji started beating with sticks and giving kicks and fist blows. Atul Sharma sustained injuries being beaten by security guards on the instance of Onkar Singh."

(English translation by Court)

24. Aforesaid statement virtually shows that Applicant-1, Onkar Singh, had not entered examination hall to do anything with complainant. He is/was admittedly an "Officer of University" responsible for maintaining discipline among the students. He alongwith other security personnel entered examination hall at 10.15 am on 17.08.1992 to catch a student (other than complainant). While taking the said student away from examination hall, they were intercepted by complainant who was a Student Union Leader. He interrupted in their discharge of official function/duties. It is his own case that he interrupted and said that security personnel as well as Chief Proctor, Applicant-1, should go outside

examination hall and student who was being taken away by them should be left to have a talk with Invigilating Professor. Obviously and apparently, Applicant-1 and other security personnel were in the process of discharge of their official duties and complainant has no business to interrupt such discharge of official duties of Applicant-1. The entry in examination hall of Applicant-1 and his companions has nothing to do with complainant or alleged bias, malice or enmity with complainant. It is uncalled for intervention of complainant which resulted in the incident causing injuries to him. With regard to beating, statement of complainant in complaint is different than what he has said in oral deposition. In the complaint he said that when he interrupted in the function of Applicant-1, Onkar Singh and other security personnel, Applicant-1, Onkar Singh caught his Kurta and started beating. Thereafter on the call of Applicant-1, Onkar Singh other ten security personnel present in examination hall caught complainant and brought him outside the hall and then beat him with Lathi and Danda. Applicant-1, Onkar Singh also beat him with Danda. However, in the statement under Section 200 Cr.P.C. he has said that when he protested, Applicant-1, Onkar Singh caught complainant's Kurta and started beating him. He has not said anywhere that he was brought outside of examination hall and thereafter he was beaten by Applicant-1 and security personnel beat him with Lathi and Danda, which he has stated in complaint. Further, in FIR which he has lodged, he has not said anywhere that Applicant-1, Onkar Singh, beat him with Lathi or Danda but has said that inside the hall applicants beat him and thereafter he was brought outside the examination hall by about 10 security personnel and then he was beaten by them with Lathi and when he fell down security personnel beat him with boots. By then Applicant-1 also came outside the examination hall and started beating complainant. The allegation of beating by Applicant-1, Onkar Singh by Danda or boot or legs is an improvement in oral deposition under Section 200 Cr.P.C. though it is not the allegation in complaint itself.

25. The order passed by Magistrate shows that he did not found any truth in the complaint made against alleged ten security personnel and that was rejected. Reading entire complaint and statement it cannot be said that alleged injuries were caused by Applicant-1, Onkar Singh when complainant himself said that he was beaten by Lathi, Danda and boots by ten security personnel but against them complaint has been rejected. Moreover, in the complaint, complainant gave names of witnesses which included Doctor and Radiologist, who allegedly examined complainant in respect of his injuries but they had not been produced for deposition under Section 202 Cr.P.C. and, therefore, alleged medical reports remain unproved.

26. The above facts clearly show that neither there is any allegation nor any evidence that applicant and, in particular, applicant-1 caused any hurt or grievous hurt to Informant/complainant as defined in Sections 321 and 322 IPC for the reason that in order to constitute "voluntarily causing hurt" or "voluntarily causing grievous hurt", the accused must intend to cause or known himself to be likely to cause hurt or grievous hurt. In order to attract Section 322 IPC i.e. "voluntarily causing grievous hurt" explanation is relevant that in order to cause grievous hurt, accused must act with intention and

knowledge. Here the applicants and other security personnel entered the examination hall in respect to another student. The complainant intervened in their official duties and created a situation in which there was a scuffle or altercation and since he admits that he protested against all the applicants and other security personnel in taking away the students from examination hall the entire incident occurred. It shows that incident in question, as per own case of complainant, was a result of momentary passion arose on the spot due to uncalled and unwarranted interference by complainant since applicants and other security personnel were discharging their official duties and that too in respect to another student and not complainant. Complainant interfered in their action, protested and with the heat of moment incident took place. Therefore, the intention of "causing hurt or grievous hurt" is clearly lacking and that brings in inapplicability of offences under Sections 321 and 322 IPC punishable under Sections 323, 325 IPC respectively which are apparently not attracted in the case in hand. Looking into entire facts as discussed above, it cannot be said that Applicant-1, Onkar Singh initially caused any hurt or grievous hurt voluntarily with an intention to cause hurt or grievous hurt to complainant and, therefore, offences under Sections 323, 325 IPC are not made out.

27. So far as offence under Section 426 IPC is concerned, it is with regard to a "mischief". Section 426 IPC reads as under:

"426. Punishment for mischief.--*Whoever* ***commits mischief*** *shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."*

28. "Mischief" is defined under Section 425 IPC and reads as under:

"425. Mischief.--*Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the* ***destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".***

Explanation 1.--It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. ***It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.***

*Explanation 2.--****Mischief may be committed by an act affecting property belonging to the person*** *who commits the act, or to that person and others jointly."*

29. Having gone through the entire complaint and statement of complainant recorded under Section 200 and PW-1 under Section 202 Cr.P.C. I could not find as to how Section 426 IPC is attracted in the case in hand. When questioned, Sri Dinesh Pathak, Advocate appearing for complainant, could not explain as to how Section 426 IPC is attracted. Thus it cannot be said that any offence under Section 426 IPC is made out.

30. Now the last Section under which Applicant-1, Onkar Singh has been summoned is Section 147 IPC, which reads as under:

*"**147. Punishment for rioting.**--Whoever is **guilty of rioting,** shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

31. "Rioting" is defined under Section 146 IPC and reads as under:

*"**146. Rioting.**--Whenever **force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly,** every member of such assembly is guilty of the offence of rioting."*

32. In order to bring in "rioting", as defined under Section 146 IPC, there must be first of all an unlawful assembly. Term "unlawful assembly" is defined under Section 141 IPC and reads as under:

*"**141. Unlawful assembly.**--An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is--*

First -- To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second -- To resist the execution of any law, or of any legal process; or

Third -- To commit any mischief or criminal trespass, or other offence; or

Fourth -- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth -- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.--An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

33. Learned counsel appearing for complainant could not explain as to how presence of Applicant-1, Onkar Singh in his capacity as Chief Proctor of University and responsible to maintain discipline among students, alongwith security personnel can be said to be an unlawful assembly under Section 141 IPC particularly when they had gone to nab another student appearing in examination. They had nothing to do with complainant. It is the complainant who interrupted them in official discharge of duties. In that process complainant when was resisted by security personnel etc. suffered some injuries.

34. In **Roy Fernandes vs. State of Goa, 2012(3) SCC 221** Court has said that to see the circumstances in which the incident has taken place, the conduct of members of assembly including weapon of offence they carried or used on spot is necessary to be examined.

35. In the complaint as well as in the statement it has not been said anywhere that, Applicant-1, Onkar Singh and other security personnel when entered examination hall, caught and tried to take away another student from examination hall, they had any weapon with them including Lathi or Danda.

36. The complainant said, when he interrupted in discharge of duties by

Applicant-1, Onkar Singh, he caught Kurta of complainant and started beating him. If by one hand Applicant-1 had caught Kurta of complainant he could not have beaten complainant by another hand if he was holding Danda in his second hand. The complaint nowhere shows that in examination hall Applicant-1, Onkar Singh, beat complainant with Danda. Similarly he has said that security personnel brought him outside the examination hall and started beating with Lathi and Danda, and when he fall down, also with their boots. This part of complaint has not been found correct. Therefore, complaint in respect of other ten security personnel has been rejected. With regard to beating by Danda, I have already discussed that statement of complainant is not consistent and trustworthy. Therefore, there was no "unlawful assembly" in terms of Section 141 IPC and that being so there could not have been any offence under Section 147 IPC. Court below has erred in law in summoning applicants under Section 147 IPC.

37. Prima facie this Court, therefore, is satisfied that no offence under Sections 147, 323, 325, 426 IPC is made out and that being so summoning of Applicant-1, Onkar Singh under aforesaid Sections was patently illegal. Court below has passed orders without application of mind and has clearly erred in law.

38. In the result, application is allowed. Orders dated 26.02.1998 and 02.07.1998 as well as further proceedings in Case No. 1277 of 1995, under Sections 147, 323, 325, 426 IPC are hereby quashed.

(2020)1ILR 659

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.07.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Application U/S 482 Cr.P.C. No. 24521 of 2018

Rajendra Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Akhilesh Kumar, Sri Ajay Kumar Srivastava

Counsel for the Opposite Parties:
A.G.A., A.S.G.I.

A. Prevention of Money Laundering Act, 2002 ("PMLA, 2002") - Section 45 (1) - Sections 13 (2) read with 13 (1) (e) of Prevention of Corruption Act, 1988 - Sections 120 B, 406, 409, 420, 467, 468, 471 of IPC-Retrospective operation of Penal Statutes-It is settled law that if even one of the offences under which the charge is found to have been made out, then it cannot be denied that cognizance could have been taken by the Court concerned for having committed an offence under PMLA of 2002- If offence under certain other sections of I.P.C. or P.C. Act are found not made out in respect of the present accused during the period in question due to penal provision not being available then the said fact may be taken into consideration by the Trial Court at the time of trial and take appropriate decision in that regard-Offence under Section 467 was punishable under PMLA of 2002 with effect since 1st July, 2005-Other offences imputed against the applicants incorporated by the Amendment Act 2009 in Part–B of the PMLA,2002-Subsequently by the Act No. 2 of 2013 the offences

were included in Part –A in Paragraph 1 of the Act. (Para 11 & 12)

Criminal Application u/s 482 Cr.P.C rejected. (E-3)

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

(1) This Criminal Misc. Application u/s 482 Cr.P.C. has been moved with a prayer to quash the Impugned Summoning Order dated 02.04.2018 passed by the Learned Sessions Judge, Allahabad in Complaint Case No. 4 of 2018, Assistant Director Vs. Rajendra Singh & others along with all consequential proceedings of the said complaint case pending in the above Court and simultaneously prayer is also made to stay the proceedings of the case.

(2) The facts of the case as narrated in the affidavit filed in support of the application are that complaint had been filed by opposite party no. 2 on 27.03.2018 against the applicant & others under Section 45 (1) of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "PMLA, 2002"), in the court of learned Sessions Judge, Allahabad with a prayer that cognizance of offence of money laundering for violation of Section 3 of the said Act, may be taken against the accused persons and they may be punished under Section 4 of the said Act and also for issuing order for confiscation of the property attached under Section 5 of the Act (PMLA) and confirmed under Section 8 of the Act in terms of Section 8(5) of the Act. The said complaint was registered as Complaint Case No. 4 of 2018 (Assistant Director Vs. Rajendra Singh & others). It is further mentioned that Special Investigation Team (S.I.T.), U. P. had registered a Case Crime No. 7 of 2010 on 27.08.2010 in pursuance of the order dated 03.12.2010 passed by Lucknow Bench of this Court in Writ Petition No. 10503 of 2009 (Vishwanath Chaturvedi Vs. Union of India & others) against the 36 accused persons. The allegation made by S.I.T. was that during the period 2004-05 and 2005-06, the food grains for Public Distribution System (in short PDS) were diverted to black market, which caused a huge loss to the Government exchequer to the tune of Rs. 80.64 lakhs and corresponding wrongful gains to the accused persons. Subsequently the case was taken up by Central Bureau of Investigation by registering FIR No. RC0062010A0025 on 14.12.2010, and investigation was conducted, thereafter charge sheet was submitted on 01.05.2012 against the present accused/applicant along with two others namely, Ram Murat Yadav, the then godown incharge and Shiv Bux Singh (now deceased) under Sections 120B, 406, 409, 420, 467, 468, 471 I.P.C. and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act (in short P.C. Act) for the offence said to have been committed during the period from December 2004 to June 2006. The role assigned to the applicant is that initially late Shiv Bux Singh had issued 16 bearer cheques amounting to Rs. 71.84 lakhs from his own account No. SF-160 in Punjab National Bank, Nawabganj Branch, Gonda in favour of the applicant Rajendra Singh. Thereafter, the applicant collected the 16 bearer cheques by late Shiv Bux Singh and the same were received in cash as per the details given in the table mentioned in the affidavit. Thereafter the applicant started making banker's cheques/demand drafts in favour of different kotedars of Block Godown, Nawabganj, Gonda and submitted the

same to Food Corporation of India, Gonda and lifted the PDS foodgrains and in connivance with Late Shiv Bux Singh and others, he sold the same into black market during the year 2004-06. He also used different bank accounts of Subhash Singh, Dinesh Kumar Yadav, Bhim Singh and Kamlawati for preparing the banker's cheques/demand drafts in bulk in the name of the different kotedars for lifting PDS foodgrains and subsequently by selling the same in black market in connivance with other co-accused for wrongful gains to themselves and causing wrongful loss to the Government exchequer. The offence is committed by the applicant under Sections 120B, 420, 467, 471 being scheduled offence as mentioned in Part - A of the schedule of PMLA, 2002. On the basis of C.B.I. Case No. RC0062010A0025, a case has also been registered under ECIR. No. ECIR/05/PMLA/VSZO/2011 on 28.02.2011 and the relevant documents which were called for from C.B.I. revealed the role of the accused in offence of Money Laundering. As regards the role of Rajendra Singh (present applicant), it is further mentioned that he was a kotedar attached with Blcok Godown, Nawabganj, Godna who in connivance with the late Shiv Bux Singh, Ram Murat Ydav and Uday Pratap Singh got prepared banker's cheques/demand drafts in favour of various kotedars and lifted the food grains from Food Corporation of India, Gonda and diverted the same into black market illegally for wrongful gain to himself and causing wrongful loss to the Government exchequer. He made expenditures towards purchase of five trucks and two plots situated at Parao, New Cold Storage Chauraha, Nawabganj, District Gonda and also constructed a Godown on the plots situated at Parao, which are not in conformity with his legal known sources of income and hence could be directly attributed to the wrongful gains acquired by him by diversion and selling the PDS foodgrains in black market. He projected the proceedings of crime as untainted in his statement recorded under Section 50 of PMLA and admitted that out of Rs. 3.63 crores (aproax.) received from late Shiv Bux Singh, he prepared banker's cheques/drafts in favour of different kotedars for an amount of Rs. 2.53 crores and 92 lakhs was returned by him to Late Shiv Bux Singh and rest of the amount, i.e., Rs. 18 lakhs was retained by him as commission and out of this money he used 4 lakhs to purchase a plot at Parao, during 2005 and the rest amount had been used by him for purchasing 5 trucks and paying the installments of those trucks. He also admitted that he had constructed a godown on the purchased plot during the year 2005-06 by taking loan amounting to Rs. 17 lakhs from one Atma Prakash Singh in piece-meal and the said godown was mortgaged as collateral security with the Bank of Baroda, Faizabad in lieu of the said loan. The said plot and the godown have been provisionally attached under Section 5 (1) of PMLA, 2002 by mentioning that these properties were procured from the proceeds of the crime which he committed in the form of illegal diversion and sale of PDS foodgrains in the black market. The Adjudicating Authority in its confirmation order dated 01.09.2017 has recorded that the accused has committed the Scheduled Offences and upheld the attachment of the properties of the accused. It is also mentioned that the C.B.I. has shown recovery of articles in the charge sheet that is 4 ATY cards, 5 Quota Cards, 3 Bank Cheques, 10 Counter Foils of demand draft, 8 Photocopy of the demand draft/banker's cheques, 74 Carbon copies

of the TD slips, Pass-Book of Account No. 2982, 190 Sheets of daily demand draft and 119 Sheets of demand draft and on the basis of aforesaid material he has been made accused in the aforesaid scam, although this material does not indicate any commission of crime. It is further mentioned that the applicant/accused was not shopkeeper/kotedar at the relevant time i.e. the year 2004-05 to 2005-06, the period when he is alleged to have diverted foodgrains from the godown for black marketing. The only charge that is appearing against him is that he prepared number of banker's cheques from his account in the name of several kotedars for the purpose of lifting foodgrains and the said money was given by the co-accused Late Shiv Bux Singh by cheques. This allegation is wholly unreliable because no shopkeeper/kotedar is alleged to have raised any objection for a period of two years, moreover no card holder came forward with any compliant before any authority in this regard. The applicant being a private person could not be charge sheeted for the offence punishable under the provisions of P.C. Act. It is further mentioned that initially applicant's name did not appear in the FIR but he has been made accused during further investigation by C.B.I. He is alleged to have received illegal benefit of Rs. 30-35 lakhs (approx.) which is being alleged to be proceeds of crime (P.O.C.) which is alleged to have been revealed in his admission made in statement under Section 50 of PMLA, 2002 on 15.09.2016 and the statement of Late Shiv Bux Singh made on 20.09.2016. It is further mentioned that the applicant has preferred an appeal under Section 26 of PMLA of 2002 challenging the order of the Adjudicating Authority dated 01.09.2017 whereby his properties were attached along with an application for condonation of delay. Further it is mentioned that in the case filed by C.B.I. against him, he has got himself bailed out, however, his discharge application was rejected by C.B.I. Court vide order dated 25.01.2016, against which he has preferred a Criminal Revision No. 208 of 2016 before Lucknow Bench, which is still pending and stay order has been passed therein. Further it is mentioned that the learned trial Court has failed to appreciate the fact that applicant had borrowed Rs. 17 lakhs from one Mr. Atma Prakash Singh and thereafter he took loan from the Bank and the loan taken from Atma Prakash Singh was returned. Further it was also ignored by the Trial Court that whatever money was deposited in the account of the applicant, the same was given as demand draft to the said authority and that the applicant had never mis-utilized the said fund for personal use. It is also ignored that the attachment order passed by the Adjudicating Authority has been appealed against which is pending before the Appellate Court at New Delhi and, therefore, the complainant ought to have waited.

(3) Further it is mentioned that it was evident that the offences alleged to have committed by the applicant, belong to the period prior to 01.07.2005, when admittedly PMLA, 2002 was not in force. Even after the enforcement of the said Act on 01.07.2005, the offences under I.P.C. alleged to have been committed by him were included in the scheduled offence with effect from 01.06.2009 in as much as Scheduled Offences mentioned in Paragraph-1, (offences under the Indian Penal Code) given in Part A, have come into force with effect from 01.06.2009, as such when the offences alleged to have been committed by him fall during the

period of year 2004 to 2006, the Scheduled Offences covered under I.P.C. which came into effect, w.e.f., 01.06.2009, could not have been treated to have committed by him. The PMLA is a penal statute, therefore, it can have no retrospective or retroactive operation, as the same would be in teeth of the provision made in Article 20 (1) of Constitution of India. No person can be inflicted penalty greater than what could have been inflicted under the law at the time when the offence was committed, is settled position of law. Thus, in above conspectus the impugned order is absolutely against the provisions of law which needs to be quashed.

(4) Learned counsel for the applicant has vehemently argued on the point that in view of the proceedings of the C.B.I. Court having been stayed by this Court and the order dated 1.9.2017 attaching the property, passed by the Adjudicating Authority having been challenged in appeal which is pending before the Appellate Authority, and also in the face of fact that on the date when the offence is alleged to have been committed by the applicant, the said offences were not part of the schedule appended to the PMLA, 2002 hence could not have been treated punishable under PMLA, 2002, the applicant could not have been prosecuted under the PMLA of 2002 and, therefore, the impugned order deserves to be quashed.

(5) Learned counsel for the applicant has relied upon the judgment and order dated 13/07/2017 passed by the High Court of Judicature at Madras in Cri. O.P. Nos.10497 and 10500 of 2017, Shri Ajay Kumar Gupta and 3 Others vs Adjudicating Authority (PMLA) and 2 Others, in which in the first petition prayer was made to call for the records in Provisional Attachment Order No. 09/2017 dated 07/04/2017 in ECIR/CEZO/08/2015, Chennai Zone passed by the second respondent and quash the same, while in the other petition prayer was made to call for records in Original Complaint O.C. No. 855 of 2017 filed by the second respondent before the Hon'ble Chairperson Adjudicating Authority, the first respondent under the Prevention of Money Laundering Act, 2002, and quash the same.

(A) The facts of the above case were that the first petitioner was working as Asstt. Commissioner of Customs and Central Excise, Chennai, who resigned from service w.e.f. 14/4/2014. While he was working as an appraiser in Customs House, Chennai, Deputy Superintendent of Police, CBI had filed an F.I.R. No. RCMA 1/2005 A/0031 on 29/06/2005 for alleged possession of assets and pecuniary resources in the name of first petitioner and his family members for alleged commission of offences under sections 13 (2) read with 13 (1) (e) of Prevention of Corruption Act, 1988. The final report was submitted under sections 173 (2) Cr. P.C. on 13/01/2009 by third respondent before the Principal Special Judge for CBI cases, Chennai, in C.C. No. 18 of 2009 for offences punishable under sections 13 (2) read with sections 13 (1) (e) of the Prevention of Corruption Act, 1988 against first petitioner and under sections 109 of IPC read with 13 (2) read with 13 (1) (e) of Prevention of Corruption Act, 1988 against 2nd petitioner. Check period was shown as from 01/05/1997 to 30/06/2005. The 3rd and 4th petitioners were not arrayed as accused in the above C.C. No. 18 of 2009. The trial was under progress in the court of 14th Additional

Special Judge, CBI cases and presently investigating officer, PW 74 was being cross-examined by the defence. In the meantime, after 6 years of the aforesaid alleged offence of Prevention of Corruption Act, which is a scheduled office under the Prevention of Money Laundering Act, the 2nd respondent registered an Enforcement Case Information Report and also sent summons to petitioners 1 and 2.

(B) The contention made before the court by the petitioners was that as per charge sheet the offences were committed between 01/05/1997 to 30/06/2005 and during this period Prevention of Money Laundering Act, 2002 did not come in force as the same was made enforceable w.e.f. 01/04/2005.

(C) It was observed by the High Court of Madras that at the time of the alleged commission of offences by the 1st and 2nd petitioners i.e. prior to 01/07/2005, the Prevention of Money Laundering Act was not in force. Even after 01/07/2005, the offences were not included in the scheduled offences till 01/06/2009. The charge sheet is dated 13/01/2009, even on that date, Prevention of Corruption Act was not included in the scheduled list of offences. Therefore, it was held that if retrospective effect is given to any statute of penal nature, that will directly be in conflict with fundamental rights of the citizen enshrined in Article 20 (1) of the Constitution of India. It was further held that admittedly, the 2nd respondent filed the case only based on the charge- sheet of the CBI, which had not conducted an enquiry on its own. In fact, when all original documents were in custody of CBI court, there could not be any reason to believe that the properties would be dealt with in any other manner; therefore the attachment officer had passed an order without any reason to believe that proceeds of crime were likely to be transferred or disposed. In the absence of any sufficient reason, arriving on such a conclusion by merely reproducing words "reason to believe", it could not be stated that order has been passed after considering the entire gamut of material and therefore the attachment was held to be not maintainable.

(D) It was further held that the charge sheet was filed under Section 13 of the Prevention of Corruption Act on 13/01/2009, while the said Section was included in the list of scheduled offences under the Prevention of Money Laundering Act on 01/06/2009, therefore subsequent amendment could not be given retrospective effect. It was also mentioned in this judgment that it was settled principle of law that the provisions of law cannot be retrospectively applied, as Article 20 (1) of the Constitution bars the ex post facto penal laws and no person can be prosecuted for any alleged offence which occurred earlier, by applying the provisions of law which have come in force after the alleged offence.

A close scrutiny of the above case would reveal that in this case the matter involved commission of an offence under Section 13 of the Prevention of Corruption Act which came to be added in the scheduled offences of Prevention of Money Laundering Act only on 01/06/2009, while the offence related to the period between 01/05/1997 to 30/06/2005, therefore the facts of this case are distinguishable from the facts in case on hand because in the present case apart from the offences under Prevention of Corruption Act, offences under sections 120 B, 406, 409, 420, 467, 468, 471 of IPC are also there, under which the proceedings have been drawn. As far as

the offence under sections 467 IPC is concerned, the said offence was already included in Part B of the schedule appended to PMLA which had come in force w.e.f. 01/07/2005, and the period during which offence is being alleged to have been committed relates to from 2004 to 2006. Therefore, it is apparent that some period of commission of offence falls when the scheduled office under Section 467 IPC was already in existence. Therefore, it would be in the domain of the trial court to see as to which scheduled offences might have been committed by the accused - applicant for which he may be finally punished, if found proved.

(6) Per contra learned counsel for the C.B.I. has vehemently opposed the argument stating that the provisions of I.P.C. which have been violated by the applicant/accused were earlier in Part-B of the schedule appended to the PMLA, 2002 which have subsequently been, by amendment, made part of Part-A of the schedule appended to the said Act. Therefore, the argument of the learned counsel for the applicant that he could not be tried for committing offence under PMLA, 2002 would not sustain.

(7) As regards law the argument of the C.B.I. that section 120B of I.P.C. relating to criminal conspiracy was earlier in Part B of the schedule to the PMLA , 2002 and was subsequently made part of Part A of the said schedule, hence it could not be said that the cognizance could not have been taken by the Trial Court in the present matter under the aforesaid section, we scrutinized the position of law and we find that the said section came into effect w.e.f. 01.06.2009 and was included in Part B of the schedule but subsequently the said section was taken out from there and was placed in Part A of the said schedule appended to the PMLA of 2002 by amendment Act 2 of 2013. This argument does not make it clear as to how the provision of Section 120B would be treated to be applicable for an offence committed during the period 2004-2006, as this provision was made punishable under PMLA of 2002 after 01.06.2009 by its inclusion in the said Part B of the schedule appended to the PMLA, 2002.

(8) First of all, we would like to take up the objection raised by the learned counsel for the applicant that the offences which were alleged to have been committed by the applicant/accused were not made punishable under the PMLA, 2002 because the offences under the I.P.C. allegedly committed by the applicant were not part of either schedule A or schedule B of the aforesaid Act. According to him these sections were made punishable under the PMLA of 2002 in the year 2009, w.e.f. 01.06.2009.

(9) We have gone through the entire provisions. The PMLA, 2002 was promulgated/came into force on 01.07.2005, vide G.S.R. 436(E), dated 1st July, 2005, published in the Gazette of India, Extra,, Pt. II, Sec. 3(i), dated 1st July, 2005. Therefore, the following was position, as on 1st July, 2005 as regards inclusion of offences in Part A or Part B of the schedule appended to the PMLA, 2002. (Only such sections are being taken into consideration of I.P.C. and P.C. Act, which are alleged to have been committed by applicant/accused).

(10) In Part B of the schedule, one of sections of I.P.C. in question only i.e.Section 467 I.P.C. which pertained to forgery of a valuable security will or

authority to make or transfer any valuable security, or to receive any money etc. was made punishable under PMLA, 2002.

(11) In view of the above, it is apparent that the offence **under Section 467** was punishable under PMLA of 2002 with effect since 1st July, 2005 while the allegations against the present accused relate to the period 2004-05 and 2005-06, hence the argument of the learned counsel for the applicant that the cognizance taken against the accused applicant could not have been taken for his having committed offence **under Section 467 I.P.C.** does not hold water as the same was already made punishable under the PMLA of 2002 way back in 2005. It is settled law that if even one of the offences under which the charge is found to have been made out, then it cannot be denied that cognizance could have been taken by the Court concerned for having committed an offence under PMLA of 2002. If offence under certain other sections of I.P.C. or P.C. Act are found not made out in respect of the present accused during the period in question due to penal provision not being available then the said fact may be taken into consideration by the Trial Court at the time of trial and take appropriate decision in that regard.

(12) Thereafter an amendment was brought in PMLA, 2002 by the Prevention of Money Laundering (Amendment Act; 2009) (in short no. 21 of 2009, 6th March, 2009) whereby, in Part B Section 120B (criminal conspiracy) was added and the same was made punishable under the PMLA, 2002 under Section 3/4 of PMLA. Apart from that Section 471 - using as genuine or forged record, was also placed in Paragraph 1 under Part B of the said Act hence this offence also became punishable under the PMLA, 2002 with effect from 06.03.2009. Further in Paragraph 5 under Part B the Section 13 of P.C. Act - criminal misconduct by public servant was added, and was made punishable under the PMLA, 2002. Thereafter, by Prevention of Money Laundering Act, 2012 (in short 2 of 2013) which came into effect from 3rd July, 2013 the above offences of I.P.C. included in Part - B, were made part of Part - A in Paragraph 1.

(13) As regards other objections that the appeal against the attachment of the properties of the applicant/accused was pending before a Appellate Authority and that the order passed by the learned Judge of C.B.I. Court had been stayed by the High Court, Lucknow Bench hence the cognizance under PMLA ought to have postponed by the learned Trial Court till final decision in that case, does not hold good as there is no legal bar to initiating proceedings under PMLA under such a situation.

(14) In view of the above, we are of the view that impugned order does not suffer from any infirmity and the application is liable to be dismissed and it is, accordingly, dismissed.

(2020)1ILR666

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 41674 of 2019

Smt. Kumud Dhall ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Krshna Kant Tiwari

Counsel for the Opposite Parties:
A.G.A., Sri Randhir Singh

A. Code of Criminal Procedure - Section 482 - Complaint-Offence of conspiracy for commission of fraud by returning money in account of accused persons by the Applicant (Branch Manager)-Nothing more than that in complaint regarding conspiracy. Applicant had returned money in compliance of request made by concerned Bank, from which that amount were transacted, and after knowledge of alleged fraud, the same money was got returned back and is kept under freezed account-No conspiracy or malice on the part of accused applicant except her routine performance of duty-Summoning of accused applicant is apparently without any evidence on record amounting to misuse of process of law. (Para 5)

Criminal Misc. Application u/s 482 Cr.P.C allowed. (E-3)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 Cr.P.C. has been filed with a prayer for quashing the order dated 04.09.2019, passed by Chief Judicial Magistrate, Ghaziabad including entire proceeding of Complaint Case No. 32560 of 2018, under Sections 420, 467, 468, 471, 120-B I.P.C. Police Station Indrapuram, District Ghaziabad.

2. Learned counsel for applicant argued that applicant was Branch Manager in Punjab and Sind Bank, Branch Kaushambi, District Ghaziabad. An amount was transferred from account of Rohit Sharma, Rahul Sharma and Smt. Urmila in account of Kamleshwaranand, being maintained in above Bank. Subsequently, a request from those persons, through whom this amount was transacted, was received that it was an erroneous transfer and that amount be returned back. This Branch Manager complied above request and returned above amount, for which there was no guilty mind. Subsequently, this came into her notice that there had been some criminal litigation regarding alleged fraud committed by Rohit Sharma, Rahul Sharma and Smt. Urmila with Kamleshwaranand. The amount was further remitted to this branch of Punjab and Sind Bank, of which applicant is Manager. Still that amount is lying in a freezed account and there is no malice nor any mens rea on the part of Branch Manager in a transaction in between Kamleshwaranand, Rohit Sharma, Rahul Sharma and Smt. Urmila, but vide impugned summoning order, this applicant too has been summoned for offences punishable under Sections 420, 467, 468, 471, 120-B I.P.C., which is apparently erroneous and misuse of process of Court. Hence, this application with above prayer.

3. Learned counsel for complainant Kamleshwaranand argued that account of Kamleshwaranand was with above branch of Bank concerned, in which applicant was Branch Manager. Kamleshwaranand entered into agreement to sell of his own flat and in lieu of consideration that money was transacted in account of Kamleshwaranand through RTGS and once it was there the same may not be returned back to those accused persons against whom summoning is there, but it was conspiracy of Branch Manager, who returned above money and it was against the guidelines of Reserve Bank of India enumerated in Paras 3, 4 and 5 of Central Government Act Section 23 in the Payment of Settlement System Act, 2007 wherein Reserve Bank of India has given

direction. Hence, trial court has rightly passed impugned summoning order and this application is to be rejected.

4. Learned A.G.A. also vehemently opposed the aforesaid prayer.

5. From the perusal of material placed on record, it is apparent that complaint was filed by Kamleshwaranand against Rohit Sharma, Rahul Sharma, Smt. Urmila Sharma, Smt. Kumud Dhall (present applicant) and two others at Police Station Indrapuram, District Ghaziabad. The contention was that complainant being a senior citizen of 66 years was owner of flat No.III-A/50, First Floor, Rachna Vaishali, Ghaziabad and he entered in an agreement to sell with Smt. Urmila for Rs.50,00,000/-, out of which on 28.03.2018 Rs.5,00,000/-, on 09.04.2018 Rs.2,00,000/-, on 25.06.2018 Rs.10,00,000/- and on 26.06.2018 Rs.23,65,000/-, in all Rs.33,65,000/- were paid. Rest Rs.9,35,000/- were said to be paid subsequently before getting sale deed executed, but the amount which was transacted on 25.06.2018 and 26.06.2018 was got returned back by way of an application with incorrect fact by those accused persons and this came into notice of complainant through SMS. Thereafter, complainant enquired into the matter and took above steps. Meaning thereby, regarding applicant accusation is that she being Branch Manager of Punjab and Sind Bank, Branch Kaushambi returned back money to those accused persons in view of their request for getting same returned back and this has been said to be under conspiracy. Hence, complaint itself is for offence of conspiracy for commission of fraud by returning money transacted on 25.06.2018 and 26.06.2018 in account of accused persons by above Branch Manager. Nothing more than that is there in complaint regarding this conspiracy. Applicant herself has admitted that she had returned above money in compliance of request made by concerned Bank, from which that amount were transacted, and after knowledge of alleged fraud, the same money was got returned back and is kept under freezed account. Hence, apparently, there is no conspiracy or malice on the part of accused applicant except her routine performance of duty. The summoning of accused applicant for above offences is apparently without any evidence on record. Hence, it is misuse of process of law.

6. Accordingly, this application is **allowed**. The impugned summoning order dated 04.09.2019, passed by Chief Judicial Magistrate, Ghaziabad including entire proceeding of Complaint Case No. 32560 of 2018, under Sections 420, 467, 468, 471, 120-B I.P.C. Police Station Indrapuram, District Ghaziabad is hereby quashed, but it will not effect the summoning regarding other accused persons.

(2020)1ILR 668

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.

Application U/S 482 Cr.P.C. No. 43297 of 2019

Ramayan Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Imran Ullah, Sri Mohammad Khalid

Counsel for the Opposite Parties:

A.G.A., Sri Anil Kumar Mishra

A. Code of Criminal Procedure - Section 197 - Forgery- Criminal act of forging documents cannot be in any manner said to be an act in discharge of official duty- Trial Court to decide question of sanction and reasonable nexus of the incident with discharge of official duty -The said issue of sanction can be taken from stage to stage and even at the conclusion of the trial at the time of judgment. (Para 12)

Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. Devinder Singh & ors. Vs. St. of Punj. thru C.B.I. (2016) 4 SCC (Cri.) 15.

2. Amal Kumar Jha Vs. St. of Chhattisgarh & anr. (2016) 3 SCC (Cri.) 160

3. N.K. Ganguly Vs. CBI, New Delhi (2016) 2 SCC 143

4. Devendra Prasad Singh Vs. St. of Bih. & anr. 2019 Lawsuit (SC) 1007

(Delivered by Hon'ble Ramesh Sinha, J.)

1. Today, Sri Anil Kumar Mishra has filed vakalatnama on behalf of opposite party no. 2 which is taken on record.

2. Heard Sri Imran Ullah, learned counsel for the applicant, Sri Anil Kumar Mishra, learned counsel for opposite party no. 2, Sri Gaurav Pratap Singh, learned A.G.A. for the State and perused the record.

3. By means of present 482 Cr.P.C. application, the applicant has prayed for quashing of the entire proceedings of case crime no. 263 of 2018 under sections 419, 420, 467, 468, 471, 506, 201, 120-B I.P.C., police station Jahanganj, District Azamgarh.

4. The brief facts of the case are that an F.I.R. was lodged by opposite party no. 2 Smt. Asha Devi on 11.12.2018 at police station Jahanganj, District Azamgarh for the offence under sections 419, 420, 467, 468, 471, 506, 201, 120-B I.P.C. with an allegation that the applicant had helped the father of the accused of a case of rape by changing the date of birth of her minor daughter, namely, Km. Shikha Singh. It is alleged that on 13.5.2018, one Arvind @ Kallu had committed rape of the daughter of the complainant for which an F.I.R. was lodged by her which was registered as case crime no. 116 of 2018. It seems that the father of the accused, in order to save his son from criminal prosecution, in collusion with the applicant, has done fraud with the official papers and have issued a transfer certificate showing her date of birth as 8.2.2000, thereafter, it was signed by the Block Education Officer and Basic Education Officer. The said certificate was filed in the bail application of Kallu before this Court. It is alleged that when she came to know about the said fact through her counsel various complaints were made by her against the applicant on which on 27.9.2018, the applicant was given charge-sheet by the Department and in the meanwhile he was suspended. It is also alleged that before his suspension, the applicant in order to save his suspension, had stolen certain papers from the file. It is further alleged that after rejection of bail, the accused Arvind Singh started threatening him due to which, she is terrorized.

5. After investigation, the investigating officer submitted charge-sheet against the applicant on 14.7.2019 and the learned Magistrate on the basis of the charge-sheet took cognizance of the offence on 12.10.2018 and summoned the applicant to face trial.

6. Learned counsel for the applicant submits that the applicant is posted as Principal of a Primary Education Institution and the cognizance which has been taken on the basis of charge-sheet is absolutely wrong as no sanction for prosecution of the applicant under section 197 Cr.P.C. has been obtained from the competent authority and without sanction the proceedings against the applicant is liable to be quashed. He submits that the applicant in discharge of his official duty had issued the transfer certificate of the daughter of the informant wherein her date of birth has been mentioned as 8.2.2000 which was endorsed in the admission register of primary school Gambheervan-I, Rani ki Sarai, district Azamgarh where the daughter of the informant studied upto Class-III and she did not turn up in the said school and finally on 25.8.2017, she left the school and a transfer certificate was prepared on 12.10.2017. He further submits that the date of birth which was mentioned in the school register of the minor daughter of the opposite party no. 2 was on the information given by the grand mother of the minor daughter of opposite party no. 2 at the time of her admission. He next submitted that at the most the negligence on the part of the applicant is that he had issued the transfer certificate to a person, who was not authorized to get the same issued except the opposite party no. 2 or any of the family member of Km. Shikha Singh. He pointed out that a departmental proceedings with respect to the same allegation is going on, hence the present proceeding is liable to be quashed. In support of his argument, he has placed reliance on the judgment of the Apex Court in the case of ***Devinder Singh and others vs. State of Punjab through C.B.I. reported in (2016) 4 SCC (Cri.) 15.***

7. For ready reference, para-39 of the case of ***Devinder Singh and others vs. State of Punjab through C.B.I. (Supra)*** is quoted hereinbelow:-

"39. The principles emerging from the aforesaid decisions are summarized hereunder :

39.1 Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

39.2 Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed narrowly and in a restricted manner. III.

39.3 Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under section 197 Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

39.4 In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under Section 197 CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply.

39.5. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.

39.6 Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

39.7 Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

39.8 Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

*39.9 In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to add*uce evidence. Question of good faith or bad faith may be decided on conclusion of trial."

8. Learned counsel for the applicant has further placed reliance on the judgment of the Apex Court in the case of ***Amal Kumar Jha vs. State of Chhattisgarh and another reported in (2016) 3 SCC (Cri.) 160*** and drawn the attention of the Court towards ***paras-13 and 14 of the case of Amal Kumar Jha vs. State of Chhattisgarh and another (Supra)*** which are quoted hereinbelow:-

" 13. In State of Madhya Pradesh v. Sheetla Sahai & Ors. 2009 (8) SCC 617, this Court has laid down thus :

"59. For the purpose of attracting the provisions of Section 197 of the Code of Criminal Procedure, it is not necessary that they must act in their official capacity but even where public servants purport to act in their official capacity, the same would attract the provisions of Section 197 of the Code of Criminal Procedure. It was so held by this Court in Sankaran Moitra v. Sadhna Das (2006) 4 SCC 584. The question came up for consideration before this Court in Matajog Dobey v. H.C. Bhari AIR 1956 SC 44 wherein it was held: (AIR pp. 48-49, para 17)

"17. Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code; "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty'. But the difference is only in language and not in substance.

The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it

was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits.

What we must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation. In Hori Ram Singh v. Crown 1939 FCR 159 Sulaiman, J. observes:

"The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction.'

The interpretation that found favour with Varadachariar, J. in the same case is stated by him in these terms at p. 56:

"There must be something in the nature of the act complained of that attaches it to the official character of the person doing it.'

In affirming this view, the Judicial Committee of the Privy Council observed in Gill case : AIR 1948 PC 128 (IA pp. 59-60)

"A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. ... The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.'

Hori Ram case 1939 FCR 159 is referred to with approval in the later case of Lieutenant Hector Thomas Huntley v. King Emperor 1944 FCR 262 but the test laid down that it must be established that the act complained of was an "official' act appears to us unduly to narrow down the scope of the protection afforded by Section 197 of the Criminal Procedure Code as defined and understood in the earlier case. The decision in Albert West Meads v. R. AIR 1948 PC 156 does not carry us any further; it adopts the reasoning in Gill case "

60. The said principle has been reiterated by this Court in B. Saha v. M.S. Kochar (1979) 4 SCC 177 in the following terms: (SCC pp. 184-85, paras 17-

"17. The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected with his official duty

will require sanction for prosecution under the said provision. As pointed out by Ramaswami, J. in Baijnath v. State of M.P. AIR 1966 SC 220 : (AIR p. 227, para 16)

16. ... It is the quality of the act that is important, and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted'.

18. In sum, the sine qua non for the applicability of this section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him."

14. In view of the aforesaid discussion, it is clear that the omission complained of due to which offence is stated to have been committed, was intrinsically connected with discharge of official duty of the appellant, as such the protection under section 197 Cr.PC from prosecution without sanction of the competent authority, is available to the appellant. Thus, he could not have been prosecuted without sanction. It would be for the competent authority to consider the question of grant of sanction in accordance with law. In case sanction is granted only then the appellant can be prosecuted and not otherwise. Resultantly, the impugned orders are set aside, the appeal is allowed."

9. Learned counsel for the applicant also cited the judgment of the Apex Court in the case of ***N.K. Ganguly vs. Central Bureau of Investigation, New Delhi reported in (2016) 2 SCC 143*** and has drawn the attention of the Court towards para-35 of the case of ***N.K. Ganguly vs. Central Bureau of Investigation, New Delhi (Supra)*** which is reproduced hereinbelow:-

"35. From a perusal of the case law referred to supra, it becomes clear that for the purpose of obtaining previous sanction from the appropriate government under Section 197 of CrPC, it is imperative that the alleged offence is committed in discharge of official duty by the accused. It is also important for the Court to examine the allegations contained in the final report against the Appellants, to decide whether previous sanction is required to be obtained by the respondent from the appropriate government before taking cognizance of the alleged offence by the learned Special Judge against the accused. In the instant case, since the allegations made against the Appellants in the final report filed by the respondent that the alleged offences were committed by them in discharge of their official duty, therefore, it was essential for the learned Special Judge to correctly decide as to whether the previous sanction from the Central Government under Section 197 of CrPC was required to be taken by the respondent, before taking cognizance and passing an order issuing summons to the appellants for their presence."

10. Per contra, learned counsel appearing for opposite party no. 2 and learned A.G.A. have vehemently opposed the prayer for quashing of the entire proceedings and the impugned order on the ground which has been argued by learned counsel for the applicant and submitted that the act of the applicant in indulging in a criminal act by issuing a forged transfer certificate by wrongly mentioning the age of the minor daughter of the opposite party no. 2, cannot be said to be an act in discharge of official duty, hence no sanction is required for such act before prosecuting the applicant. In this

regard, reliance has been placed on the judgment of the Apex Court in the case of **Devendra Prasad Singh vs. State of Bihar & another reported in 2019 Lawsuit (SC) 1007** and submitted that in view of the same, the order taking cognizance of the offence does not suffer from any illegality, perversity, hence the present application is liable to be rejected.

11. Having considered the rival submissions of learned counsel for the parties and perused the record.

12. Admittedly, the applicant is the Principal of the Primary Education Institution under whose signature the transfer certificate of the minor daughter of opposite party no. 2 was issued a copy of which has been annexed as annexure-7 to the affidavit filed in support of the present application and the same was counter signed by the Block Development Officer and Basic Shiksha Adhikari Azamgarh. The opposite party no. 2 has claimed that the date of birth of her minor daughter which has been mentioned in the transfer certificate issued by the applicant was a wrong one as her daughter's date of birth is 7.8.2006 which was mentioned in the admission register at serial no. 1392 of primary school Gambheervan-II, district Azamgarh -II where she studied upto class-III. It is alleged by her that though her daughter was admitted in the primary school but as she fell seriously ill, she did not go to study in the said school. It further reveals from the record that the medical examination of the victim girl was also conducted in a case which was registered against the accused Kallu as case crime no. 116 of 2018 for the offence under section 376, 452, 506 I.P.C. and 3/4 POCSO Act by opposite party no. 2 against Arvind Singh @ Kallu wherein as per the ossification test which was conducted, it was opined in the report dated 18.5.2018 by the C.M.O., Azamgarh that the victim is aged about 14 years which goes to show that the victim was a minor girl. On the complaint which was made by the opposite party no. 2 to the District Basic Shiksha Adhikari, Azamgarh vide complaint dated 16.8.2018, a departmental enquiry has been ordered and the applicant has been suspended till pendency of the enquiry. In the enquiry, the applicant has given some explanation for issuance of the disputed transfer certificate wherein the date of birth of the victim girl has been mentioned as 8.2.2000. The contention which has been raised by learned counsel for the applicant that the transfer certificate which was issued by the applicant in the name of the victim girl showing her date of birth 8.2.2000 in place of 7.8.2006 which is alleged to be a forged documents issued under the signature of the applicant and counter signed by the Block Development Officer and Basic Shiksha Adhikari Azamgarh, was an act done in discharge of his official duty is not at all acceptable as a criminal act of forging documents cannot be in any manner said to be an act in discharge of official duty. The sanction required for the prosecution of the applicant before taking cognizance by the Magistrate on the basis of charge-sheet submitted against him as has been argued by learned counsel for the applicant vitiates the proceedings against him, is also not sustainable in the eyes of law. The case law which has been relief upon by the applicant cannot be made applicable in the facts and circumstances of the present case as in the case which has been relied upon by learned counsel for the applicant, i.e., ***Devinder Singh & others vs. State of Punjab through C.B.I. (Supra),*** the Apex Court after going through its earlier

decisions has held that public servant is not entitled to indulge in criminal activities and in such case sanction under section 197 is not required and to that extent Section 197 has been construed narrowly and in a restricted manner and it further observe that some times certain questions about requirement of sanction under section 197 Cr.P.C cannot be decided without evidence. Such questions like good faith or bad faith of public servant can be decided on conclusion of trial. In the present case also it would be expedient in the interest of justice that the trial court is at liberty to prima facie proceed as per prosecution version and the applicant be given opportunity to adduce evidence in his support and if at later stage it comes to the notice of the Court that there was reasonable nexus of incident and discharge of official duty, the Court shall re-examine the issue of sanction and take decision as per law. The said issue of sanction can be taken from stage to stage and even at the conclusion of the trial at the time of judgment.

13. In view of the above settled principle of law as has been referred above, I do not find any infirmity or illegality in the order taking cognizance, the prayer for quashing the impugned order as well as the entire proceedings based on the charge-sheet is refused.

14. The present 482 Cr.P.C. application lacks merit and is, accordingly, dismissed.

(2020)1 ILR 675

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 43786 of 2019

Bhallu @ Hari Narayan & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Devesh Kumar

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

A. Code of Criminal Procedure- Section 204- Summoning order- Section 482 - Statements made in application u/s 155(2) of Cr.P.C., was having recital of facts and reiterated in the statement recorded u/s 200 of Cr.P.C.-Corroborated by witnesses in enquiry u/s 202 of Cr.P.C.-Impugned summoning order was passed on the basis of evidence collected by the Magistrate in his enquiry- Under Section 204 of Cr.P.C. Magistrate is not expected to make analytic analysis of evidences-Only to be seen as to whether there is existence of a prima facie case or not on the basis of enquiry and complaint - High Court in exercise of inherent power under Section 482 of Cr.P.C., is not expected to make meticulous analysis of factual aspects because the same is a question to be gone into during course of trial by the Trial court. (Para 6 & 7)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 29

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Supplementary affidavit, filed, today, by learned counsel for applicants, is taken on record.

2. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants, Bhallu @ Hari Narayan and three others, with a prayer for setting aside impugned summoning order, dated 27.4.2019, passed by court of Additional Chief Judicial Magistrate, Bhadohi, at Gyanpur, in Criminal Complaint Case No.960 of 2016, Rakesh Kumar Yadav, vs. Bhallu @ Hari Narayan and others, under Sections-323, 504, 506, 452 and 427 of IPC, Police Station-Gyanpur at Bhadohi.

3. Learned counsel for applicants argued that initially a Non-Cognizable Report was filed. Thereafter, an Application, under Section 155(2) of Cr.P.C., was filed for a direction for investigation of above NCR case. It was treated as a complaint case and therein, a summoning order was passed, which was challenged in revision before the Sessions Judge and it was allowed. The matter was remanded back. Subsequently, after hearing, summoning order has been passed by the Magistrate, again, for offences, punishable, under Sections 323, 504, 506, 452 and 427 of IPC, which is in misuse of process of law. Accused persons are uncles and family members of the complainant. There is a dispute regarding demarcation of land in between them and this false case was got lodged. There is material contradiction in the statement made and the contentions in Non-Cognizable Report. Hence, for avoiding abuse of process of law and for ensuring ends of justice, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

4. Learned AGA, representing State of U.P., has vehemently opposed this Application.

5. Having heard learned counsel for both sides and gone through materials on record, it is apparent that an occurrence occurred for which a Non-Cognizable Report was instantly got lodged. It was very well known. Subsequently, it was said that the same was not recorded as per statements, made before the Police, then, application, under Section 155(2) of Cr.P.C. was moved for a direction for investigation. Magistrate, in a case of Non-Cognizable Report, even after submission of chargesheet, has to take recourse of complaint case because the same chargesheet, which is for non-cognizable offence, is to be treated as a complaint case. Hence, this was said to be malicious prosecution and, accordingly, a prayer was made for setting aside it.

6. Statements, made in application, moved under Section 155(2) of Cr.P.C., was having recital of facts, as was said, and reiterated in the statement, recorded, under Section 200 of Cr.P.C., which stood corroborated, by statements of witnesses, in the enquiry, made by the Magistrate, under Section 202 of Cr.P.C. and as such impugned summoning order was passed on the basis of evidence, collected by the Magistrate, in his enquiry. Hence, at that juncture of summoning, under Section 204 of Cr.P.C., Magistrate, was not expected to make analytic analysis of evidences,

rather, it is to be seen that as to whether there is existence of a prima facie case or not on the basis of enquiry and complaint, which, in present case, was very well there. Hence, impugned summoning order was passed, in accordance with the provisions of law.

7. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make meticulous analysis of factual aspects because the same is a question, to be gone into, during course of trial, by the Trial court.

8. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844**, has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296,** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

9. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

10. Meaning thereby, exercise of inherent jurisdiction under Section 482

Cr.P.C. is within the limits, propounded as above.

11. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

(2020)1ILR 678

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE
THE HON'BLE RAM KRISHNA MISHRA, J.

Application U/S 482 Cr.P.C. No. 44378 of 2019

Nahar Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Vipin Chandra Pandey

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

A. Code of Criminal Procedure - Section 482-In exercise of inherent power, under Section 482 of Cr.P.C., High Court is not expected to make a meticulous analysis of factual aspect because the same is a question to be gone into, during course of trial, by the Trial court. (Para 5)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants, Nahar Singh, Manmohan @ Teetu, Deepu @ Devendra and Manoj, with a prayer for setting aside summoning order, dated 19.9.2019, passed by the Judicial Magistrate, Sadabad, Hathras, and, thereby, entire criminal proceeding, in Complaint Case No. 164 of 2018, Shashi Prabha vs. Nahar Singh and others, under Sections-452, 323 and 354 of IPC, Police Station-Sahpau, District-Hathras

2. Learned counsel for applicants argued that a civil suit was filed for cancellation of sale deed, which was got executed by the complainant and as a result of the same this malicious prosecution, in misuse of process of law, wherein, there is no medico legal report of any injury, but, even this, summoning order has been passed. Hence, for avoiding abuse of process of law, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From perusal of the complaint, it is apparent that the reason for lodging this complaint has been said in it, i.e., alleged

sale deed, which was got executed on 25.5.2017 from Ranvir Singh, whereupon, accused persons did encroach over the land, claiming it to be of theirs, for which some proceeding before Sub Divisional Magistrate, concerned, was taken, thenafter, this assault was made on 11.4.2018, with occurrence, reported, was committed by those accused persons, by way of committing criminal trespass in the house of the complainant. This fact has been narrated and reiterated, in the statement, recorded, under Section 200 of Cr.P.C., as well as under Section 202 of Cr.P.C., in the enquiry made by the Magistrate and the impugned summoning order has been passed, on the basis of above evidence, collected by the Magistrate, which was perfectly well, in accordance with law.

5. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make a meticulous analysis of factual aspect because the same is a question, to be gone into, during course of trial, by the Trial court.

6. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844**, has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296,** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

7. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for*

interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

8. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

9. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

10. For a period of 30 days from today, no coercive action shall be taken against the applicants.

11. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)1ILR 680

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 44383 of 2019

Saleem Khan & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Zafar Abbas, Sri Faheem Ahmad

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

A. Code of Criminal Procedure-Section 482-Previous litigation, in between the parties, may be a malice for filing criminal complaint or may be a cause for occurrence, but all these are questions of fact to be seen by the Trial court, during course of trial, and this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon such factual aspects-Impugned summoning order passed on the basis of evidence collected by the Magistrate, during his enquiry requires no interference. (Para 4 & 5)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. St., Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants,Saleem Khan, Alim Khan, Rizvan Khan, Kamer Khan and Mazhar Alam, with a prayer for quashing of the complaint and the impugned summoning order, dated 4.9.2019, passed by Civil Judge (Junior Division)/ Judicial Magistrate, Hasanpur, District Amroha, in Complaint Case No. 456 of 2019, under Sections-354A, 323 and 506 of IPC, Police Station-Hasanpur, Distric-Amroha.

2. Learned counsel for applicants argued that the applicants had given their house for residence, for a limited period to Saira, present complainant, who did not vacate it, rather, a civil suit was filed by her, which is pending. Thenafter, a Non-Cognizable report was got lodged, wherein, proceeding was subsequently stayed by this Court, in a proceeding, under Section 482 of Cr.P.C. Thereafter, this false complaint, with false accusation, has been got filed, wherein, impugned summoning order has been passed, but, no such occurrence ever occurred and it was misuse of process of law. Hence, for avoiding abuse of process of law and for securing ends of justice, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. Previous litigation, in between the parties, may be a malice for filing present criminal complaint or may be a cause for occurrence, but all these are questions of fact to be seen by the Trial court, during course of trial, and this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon such factual aspects.

5. From very perusal of the complaint, it is apparent that occurrence, dated 3.5.2019, at about 6.00 PM, has been said by the complainant in her statement, recorded, under Section 200 of Cr.P.C., which was in reiteration of contention of complainant. Same has been said by the witnesses, Hasin Khan and Taira, who were examined, under Section 202 of Cr.P.C., in the enquiry made by the Magistrate. It has been said that on 3rd May, 2019, at about 6.00 PM, when the complainant was present at her residence, accused persons, Salim Khan, Alim Khan, Rizwan Khan, Kamar Khan and Mazhar Alam, came in her house and as there was a previous litigation, in between them, they asked to enter into a compromise, which was not conceded by her. Then, they did assault upon her. Hence, impugned summoning order is there, on the basis of evidence, collected by the Magistrate, during his enquiry. Accordingly, this Application lacks merits and is liable to be dismissed.

6. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844,** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent judgment, in the case

of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296,** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

7. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

9. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

10. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

11. For a period of 30 days from today, no coercive action shall be taken against the applicants.

12. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)1ILR 683

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.12.2019

BEFORE
THE HON'BLE RAJENDRA KUMAR-IV, J.

Application U/S 482 Cr.P.C. No. 45053 of 2019

Smt. Neha Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Santosh Kumar Giri

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

A. Code of Criminal Procedure - Section 482-Power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice-From perusal of allegations made in the FIR, statement of witnesses during investigation, charge sheet submitted by Investigating Officer, it cannot be said that no offence is made out against the accused-applicant and charge sheet has been wrongly submitted-Disputed question of fact, cannot be adjudicated upon by this Court in exercise of power conferred under Section 482 Cr.P.C.

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

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

2. Popular Muthiah Vs. State rep. by Insp. of Police (2006) 7 SCC 296

3. Hamida Vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474

4. Dr. Monica Kumar & Anr. Vs. St. of U.P. & Ors. (2008) 8 SCC 781

5. M.N. Ojha & Ors. Vs. Alok Kumar Srivastav & Anr. (2009) 9 SCC 682

6. St. of A.P. vs. Gourishetty Mahesh & Ors. JT 2010 (6) SC 588

7. Iridium India Telecom Ltd. Vs. Motorola Inc. & Ors. 2011 (1) SCC 74

8. St. of Kar. Vs. L. Muniswamy & ors. 1977 (2) SCC 699

9. Priya Vrat Singh & ors. Vs. Shyam Ji Sahai, 2008 (8) SCC 232

10. Fakhruddin Ahmad v. St. of Uttaranchal (2008) 1 SCC 157

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. By means of this application under Section 482 Cr.P.C., applicant Smt. Neha Gupta approached this Court for quashing the Charge Sheet No.564 of 2018, dated 22.12.2018 submitted in Case Crime No.744 of 2018 (Session Trial No.51 of 2019) under Sections 302, 323 and 504 IPC, Police Station Shahabad, Distirct Rampur and entire proceedings thereof.

2. Brief facts giving rise to the present application are that Informant Abhinav Gupta submitted an application in Police Station Shahabad, Distirct Rampur stating that he was married to Neha Gupta one and half years back. After some days relation between husband and wife became strained due to rude behaviour of his wife. Often she used to abuse his mother and after one and half years about she left his house and started living in her maternal house and so many false complaints have been lodged by her against him and his mother. On 26.10.2018 at about 02:00 PM

accused-applicant Neha Gupta came to his house with one Sub Inspector Sunder Lal and she abused him, tried to quarrel before Sub Inspector. Sub Inspector Sunder Lal went away from there but Neha stayed there. At about 07:00 PM her family member i.e. her mother Kiran Devi, father Narendra and brother Anand came to his house and started beating him and his mother with intention to kill; they poured kerosene oil on his mother and set her fire, on hearing noise his neighbour Monu came there, he admitted his mother in Shahabad Hospital where from she was referred to District Hospital Rampur, later on to Ishan Hospital Bareilly. On the application of Abhinav Gupta a case under Sections 307, 323 and 504 IPC was registered as Crime No.744 of 2018 agianst Neha, Kiran Devi, Narendra and Anand.

3. Victim Asha Rani succumbed to death due to burn injury, in dying declaration she made statement in support of prosecution. Matter was investigated and charge sheet was submitted against four persons including present applicant.

4. Feeling aggrieved with the charge sheet, accused-applicant filed present application under Section 482 Cr.P.C. for quashing the same as well as entire proceedings.

5. I have heard Sri Santosh Kumar Giri, learned counsel for applicant, learned AGA for State and perused the material available on record.

6. It is submitted by learned counsel for applicant that no case is made out against the applicant. She has falsely been implicated for the purpose of harassment and humiliation. Investigating Officer did not investigated and collected material properly in the matter and submitted charge sheet without any sufficient evidence. He further submitted that admittedly Neha Gupta is legally wedded wife of Informant and there was a matrimonial dispute between both which are still pending in respective Courts. She did not committed any offence. Investigating Officer of the case is interested persons. He showed some papers, statement of witnesses in favour of his contention.

7. Learned Counsel for the applicant made a long debate showing and reciting the statement of witnesses.

8. Learned AGA for State vehemently opposed the prayer for quashing the charge sheet and submitted that on the fateful day accused persons along-with present applicant came to the house of Informant; started quarrel and poured kerosene oil on victim Asha Rani who sustained serious burn injuries and succumbed to death. Victim has given a dying declaration, showing the conduct of accused persons, before her death. Investigating Officer, correctly, conducted investigation and found sufficient evidence against the accused persons submitted charge sheet in the Court concerned.

9. I have considered the rival submissions made by the parties and perused the records.

10. Before I enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 Cr.P.C. vested in the High Court. Section 482 Cr.P.C. saves the inherent power of the High Court to make such orders as may be necessary to give

effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

11. It is settled that the power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice.

12. Time and again, Apex Court and various High Courts, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preampt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. I need not go into various aspects in detail but it would be suffice to refer a few recent authorities dealing all these matters in detail, namely, **State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335, Popular Muthiah Vs. State represented by Inspector of Police (2006) 7 SCC 296, Hamida vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474, Dr. Monica Kumar and Anr. vs. State of U.P. and Ors. (2008) 8 SCC 781, M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr. (2009) 9 SCC 682, State of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.**

13. In **State of Karnataka v. L. Muniswamy and others,** reported in, **1977 (2) SCC 699,** the Court held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed.

14. In **State of Haryana and others v. Bhajan Lal and others, 1992 Supp (1) SCC 335,** Court has elaborately considered the scope and ambit of Section 482 Cr.P.C. Although in the above case Court was considering the power of the High Court to quash the entire criminal proceeding including the FIR, the case arose out of an FIR registered under Section 161, 165 IPC and Section 5(2) of the Prevention of Corruption Act, 1947. Court elaborately considered the scope of Section 482 Cr.P.C./ Article 226 of the Constitution of India in the context of quashing the proceedings in criminal investigation. After noticing various earlier pronouncements of Court, Court enumerated certain Categories of cases by way of illustration where power under Section 482 Cr.P.C. can be exercised to prevent abuse of the process of the Court or secure ends of justice. Paragraph 102 which enumerates 7 categories of cases where power can be exercised under Section 482 Cr.P.C. are extracted as follows:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

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

15. In **Priya Vrat Singh and others vs. Shyam Ji Sahai, 2008 (8) SCC 232,** Court observed that the inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima-facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary

jurisdiction of quashing the proceeding at any stage.

16. In **Fakhruddin Ahmad v. State of Uttaranchal,** reported in, **(2008) 1 SCC 157,** the Court held that :

"20. So far as the scope and ambit of the powers of the High Court under Section 482 of the Code is concerned, the same has been enunciated and reiterated by this Court in a catena of decisions and illustrative circumstances under which the High Court can exercise jurisdiction in quashing the proceedings have been enumerated. However, for the sake of brevity, we do not propose to make reference to the decisions on the point. It would suffice to state that though the powers possessed by the High Court under the said provision are very wide but these should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the Courts exist. The inherent powers possessed by the High Court are to be exercised very carefully and with great caution so that a legitimate prosecution is not stifled. Nevertheless, where the High Court is convinced that the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused or where the allegations made in the F.I.R. or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, the powers of the High Court under the said provision should be exercised."

17. Present case does not appear to be covered in any category given in **State of Haryana and others vs. Bhajan Lal and others (supra).**

18. From perusal of allegations made in the FIR, statement of witnesses during investigation, charge sheet submitted by Investigating Officer, it cannot be said that no offence is made out against the accused-applicant and charge sheet has been wrongly submitted.

19. All the submissions made at bar raised to the disputed question of fact, cannot be adjudicated upon by this Court in exercise of power conferred under Section 482 Cr.P.C.

20. Application under Section 482 Cr.P.C. is accordingly dismissed.

(2020)1ILR 687

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 45488 of 2019

Rajeev Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Dipak Kumar Tiwari

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

A. Code of Criminal Procedure - Section 482 - Statement of Complainant u/s 200 Cr.P.C fully intact-Reiterated by witnesses u/s 202 Cr.P.C.- Impugned summoning order by application of judicial mind passed against accused on the basis of evidence collected by Magistrate in its inquiry- Previous occurrence may be a motive for subsequent occurrence or it may be a motive for false accusation, but either

way it is a question of fact to be seen by Magistrate-Quashing refused- For a period of four weeks or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants. (Para 6,7 & 11)

Criminal Misc. Application u/s 482 Cr.P.C disposed of. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati and another Vs. State of U.P. 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicants, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the entire proceedings as well as impugned summoning order dated 25.09.2019, passed by learned Judicial Magistrate, Jalaun in Complaint Case No. 811 of 2016, under Sections 323, 504, 506 I.P.C., Police Station Madhaugarh, District Jalaun, pending in the Court of learned Judicial Magistrate, Jalaun, District Jalaun.

2. Heard learned counsel for the applicants and learned A.G.A. representing the State.

3. Learned counsel for applicants argued that it is a counter blast case, filed under misuse of process of law because for an occurrence of 11.04.2016, which occurred at about 15 P.M., report was got lodged on 03.05.2016 for offences punishable under Sections 294, 452, 354, 323, 504, 506 I.P.C. upon report of Rajiv Kumar against Ramsiya and Jitendra. Hence, this application with above prayer.

4. Learned A.G.A. has vehemently opposed the application.

5. From the very perusal of first information report, as above, it is apparent that some occurrence took place on 11.04.2016 at 15 P.M., for which report was got lodged. The occurrence of present complaint case is of same date 11.04.2016, but is of 9 P.M. i.e. previous occurrence may be a motive for this subsequent occurrence or it may be a motive for false accusation, but either way it is a question of fact to be be seen by Magistrate.

6. From the perusal of complaint, it is apparent that it was said that on 11.04.2016 at about 9 P.M., while complainant was on his way for having meal. He was abused by Rajiv Kumar and Sanjiv Kumar. It was protested, then he went to his home, where Rajiv Kumar, Sanjiv Kumar, Rohit and Gaurav Kumar, armed with axe and lathi-danda came there. They did criminal tress-pass and assaulted. On hue and cry, Manoj, Munshi and many others rushed there. Accused

persons ran from spot, while extending threat of dire consequences and this assault was owing to previous enmity in between. Complainant was examined under Section 200 Cr.P.C., where his statement is fully intact. The same is the reiteration by PW-1 Manoj and PW-2 Anek Singh in their statement recorded under Section 202 Cr.P.C. Impugned summoning order by application of judicial mind was passed for offence punishable under Sections 323, 504, 506 I.P.C. against accused. It was on the basis of evidence collected by Magistrate in its inquiry.

7. Moreso, saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".* In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice".* In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

8. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous*

vexatious or oppressive" as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. The prayer for quashing summoning order as well as proceeding of the aforesaid criminal case is refused.

11. However, in the interest of justice, it is provided that if the applicants appear and surrender before the court below within four weeks from today and apply for bail, then the bail application of the applicants be considered and decided in view of the settled law laid by this Court in the case of ***Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290*** as well as judgment passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.***

12. For a period of four weeks from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants.

13. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

14. With the aforesaid directions, this application is finally **disposed of.**

(2020)1ILR 690

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE
THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. I[st] Bail Application No. 50174 of 2019

Udit Kumar Mittal ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Gopal Swarup Chaturvedi, Sri Shishir Tandon

Counsel for the Opposite Party:
A.G.A., Sri Ajay Kumar Pandy, Sri Imran Ullah

A. Criminal Procedure Code, 1973 - Bail - Applicant case that he is bona fide purchaser of the property in question and has been cheated by co-accused Vikas Garg - Possession of property in question has not been handed over by the co-accused Vikas Garg to the applicant despite executing sale deed dated 2.1.2012 in favour of applicant - Proceeding under SARFAESI Act in the matter is still subjudice before D.R.T., Lucknow and no suit for cancellation of sale deeds dated 24.06.2011 and 02.01.2012 has been filed by any person - case of applicant distinguishable from the case of co-accused Vikas Garg, who is main person in this case and is absconding - Fit case for Bail (Para 3)

Crl. Misc. Bail application allowed. (E-5)

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

1. Learned counsel for the informant has filed short counter affidavit dated 24.11.2019. In reply, short rejoinder

affidavit dated 25.11.2019 has been filed by the learned counsel for the applicant.

2. Heard Sri G.S.Chaturvedi, learned Senior Advocate assisted by Sri Shishir Tandon, learned counsel for the applicant, learned Additional Government Advocate on behalf of the State of U.P. and Sri Imran Ullah, Advocate assisted by Sri Ajay Kumar Pandey, learned counsel appearing for the informant/Kotak Mahindra Bank Limited.

3. By means of this application, the applicant, who is involved in Case Crime No.622 of 2018, under Sections 406, 420, 467, 468, 471 & 120-B I.P.C., Police Station Link Road, District Ghaziabad, is seeking enlargement on bail during the trial.

4. Filtering out unnecessary details, basic facts as per prosecution case, which are relevant for the purpose of disposal of this bail application are that the dispute in this case is regarding property situated at C-51, Ramprastha Colony, Ghaziabad measuring about 355 square yards (herein-after referred to as the "property in question"). In the year 1982, said property was purchased by Dr. R.K. Malhotra from one Balwant Singh through registered sale deed dated 04.09.1982. Thereafter, it was sold by Dr. R.K. Malhotra to Bhagwati Rustagi and Rashmi Rustagi through sale deed dated 16.12.1993. On 21.08.1995, Bhagwati Rustagi and Rashmi Rustagi executed a general power of attorney in favour of Swarnlata Sharma, and thereafter, said property was again sold by Swarnlata Sharma in favour of one B.D. Sharma by executing a sale deed dated 23.04.1997. On 16.09.2005, B.D. Sharma executed a sale deed of same property in question in favour of co-accused Vikas Garg, Vinay Garg and Deepika Garg. Thereafter, on 28.11.2007 Vikas Garg, Nidhi Garg W/o Vikas Garg, Vinay Garg and Deepika Garg have taken a total loan of Rs.1,65,80,000/- through loan account Nos. 14013241 and 14081767 (hereinafter referred to as the "first loan") on an interest of 11.5 % per annum from a Non-Banking Financial Company known as M/s Citi Financial Consumer Finance (India) Ltd. New Delhi, mentioning themselves to be the Directors of Tirupati Rice Mills Pvt. Ltd. While taking aforesaid loan, property in question (C-51, Ramprastha Colony, Ghaziabad) was mortgaged by the borrowers with a view to secure the repayment thereof and borrowers were liable to pay aforesaid loan in 180 monthly installments of Rs. 1,93,686/- and two home loan agreements were signed by them on 28.11.2007. Thereafter, installments of said loan were not paid by Vikas Garg, Nidhi Garg, Vinay Garg and Deepika Garg, therefore, M/s Citi Financial Consumer Finance (India) Ltd. started arbitration proceedings against co-accused Vikas Garg, Nidhi Garg, Vinay Garg, Deepika Garg, M/s Tirupati Rice Mills Pvt. Ltd. and M/s Shiv Kumar Agarwal, but they did not participate in arbitration proceedings and claim of M/s Citi Financial Consumer Finance (India) Ltd. was allowed by ex-parte deed of award dated 31.01.2009 directing that the respondents in arbitration proceedings will jointly and severely pay to the claimant a sum of Rs. 1,78,40,626.14 only together with interest on the aforesaid amount at the rate of 18% per annum from 27.09.2008 till the date of realization.

5. Here, it is relevant to mention as argued by Sri Imran Ullah, learned counsel for the informant that Vikas Garg after taking aforesaid loan and mortgaging the

property in question got another sale deed dated 24.06.2011 of the same property prepared fraudulently showing that the same has been executed in his favour by Dr. R.K. Malhotra, S/o D.S.Malhotra. Thereafter, the said property in question has been sold by Vikas Garg mentioning his name as Vikas Gopi Chand, S/o Gopi Ishwar Chand to Udit Kumar Mittal and his wife Mrs. Neetu Mittal through a registered sale deed dated 02.01.2012 after receiving sale consideration of an amount of Rs.1,66,00,000/-. It is pointed out that Udit Kumar Mittal and his wife Nitu Mittal had purchased the said property (C-51, Ramprastha Colony, Ghaziabad) after taking loan of Rs.1,42,000,00/- (hereinafter referred to as the "second loan") from Citi Bank and mortgaging the same property with City Bank also on 31.12.2011. Thereafter, M/s Citi Financial Consumer Finance (India) Ltd. has sold/assigned the loan taken by Vijay Garg, Nidhi Garg, Vinay Garg and Deepika Garg to Kotak Mahindra Bank Ltd. under the deed of assignment on 09.04.2013 executed between M/s Citi Financial Consumer Finance (India) Limited and Kotak Mahindra Bank Ltd. As such, after 09.04.2013, Kotak Mahindra Bank Ltd. came into picture. On 10.01.2014, Kotak Mahindra Bank Ltd. has issued notices under section 13(2) SARFAESI Act, 2002 to Vikas Garg, Nidhi Garg, Vinay Garg, Deepika Garg, M/s Tirupati Rice Mills Pvt. Ltd. and M/s Shiv Kumar Agarwal for payment of aforesaid amount of loan (first loan), but said amount was not paid by them, therefore, Kotak Mahindra Bank Limited has started proceedings under Section 13(4) SARFAESI Act, 2002 for taking possession of the property in question, and accordingly, issued possession notice dated 16.07.2014 to Vikas Garg, Vinay Garg and Deepika Garg. On receiving the said possession notice dated 16.07.2014, same was challenged by Vikas Garg, Vinay Garg and Deepika Garg on 28.08.2014 before Debts Recovery Tribunal, Lucknow by means of application under section 17 of SARFAESI Act, 2002 being S.A. No.393 of 2014.

6. Before the Debts Recovery Tribunal, Lucknow a legal issue was raised on behalf of the co-accused (borrowers) that under the facts of the case proceedings under SARFAESI Act is not maintainable, because M/s Citi Financial Consumer Finance (India) Limited had assigned the loan to Kotak Mahindra Bank Limited on 9.4.2013. After assignment of loan to Kotak Mahindra Bank Limited, the Kotak Mahindra Bank Limited had stepped into shoes of M/s Citi Financial Consumer Finance (India) Limited, and as such, Kotak Mahindra Bank Limited is now secured creditor of loan, therefore, Kotak Mahindra Bank Limited is not competent to take SARFAESI action for recovery of dues, as loan has been assigned by financial institution (M/s Citi Financial Consumer Finance (India) Limited) to Bank (Kotak Mahindra Bank Limited). Before the Tribunal a judgment dated 16.07.2015 passed by Bombay High Court in Writ Petition No 722 of 2015 (Kotak Mahindra Bank Limited Vs. Trupti Sanjay Mehta and others) was cited by the borrowers, wherein Bombay High Court framed the following issues:-

"Whether the Bank to whom a debt has been assigned by the Non-Banking Financial Corporation (NBFC) is entitled to adopt proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002 (SARFAESI Act)?"

7. The Bombay High Court had considered the aforesaid issues and answered in negative. In reply to the said argument, it was contended on behalf of Kotak Mahindra Bank Limited that the said order of Bombay High Court was assailed before the Apex Court through Special Leave to Appeal (C) No. 20885 of 2015, in which the Apex Court stayed the order dated 16.07.2015 of Bombay High Court vide order dated 22.09.2015, and thereafter, on 8.10.2015 another order was passed by the Apex Court directing that interim order passed on the earlier occasion shall remain in force till the pronouncement of judgment. The Debts Recovery Tribunal, Lucknow considering the facts and circumstances of the case as well as submissions raised in the matter directed the parties concerned to maintain status quo by interim order dated 30.07.2018.

8. It is also pointed out on behalf of the applicant that M/s Citi Financial Consumer Finance India Limited had also filed execution petition No. 993 of 2016 before District Judge, Ghaziabad, but the same was dismissed in default. Apart from arbitration proceedings and proceedings under SARFAESI Act, M/s Citi Financial Consumer Finance India Limited filed complaint under Section 138 of Negotiable Instrument Act against co-accused Vikas Garg on account of dishonour of cheque, in which by judgment dated 17.10.2011 and order of sentence dated 21.10.2011 passed by Metropolitan Magistrate, Dwarka Courts, New Delhi, co-accused Vikas Garg has been convicted for the offence punishable under Section 138 of Negotiable Instrument Act and sentenced to undergo simple imprisonment for a period of one year apart from payment of compensation of Rs. 1,85,09,000/- to M/s Citi Financial Consumer Finance India Limited within six months and in default thereof he shall further undergo simple imprisonment for a period of six months. The said order of conviction was challenged by co-accused Vikas Garg in Criminal Appeal No. 24 of 2015 under Section 374 of Code of Criminal Procedure, which has been allowed by the judgment and order dated 29.02.2016 of Special Judge CBI, (P.C. Act)-06, Tis Hazari Court Delhi, setting aside the judgment and order dated 17.10.2011 and order of sentence dated 21.10.2011 and acquitted the co-accused Vikas Garg on the charge under Section 138 of Negotiable Instrument Act.

9. It has also brought to the notice of the Court that after purchasing the property in question by Udit Kumar Mittal and his wife Smt. Neetu Mittal, possession of the property in question was not handed over to them by Vikas Garg, therefore, Udit Kumar Mittal and Smt. Neetu Mittal jointly filed Suit No. 840 of 2018 against Vikas Gopi Chand before the Civil Judge (Senior Division), Ghaziabad on 10.09.2018, which is still pending. Thereafter, Kotak Mahindra Bank Limited moved an application under Section 156 (3) Cr.P.C. dated 9.10.2018 seeking direction to S.H.O., P.S. Link Road, Ghaziabad to lodge FIR against the accused persons of this case. The said application dated 9.10.2018 has been allowed by the Additional Chief Judicial Magistrate, Court No. 8, Ghaziabad by order dated 12.10.2018 directing the S.H.O., Link Road, Ghaziabad to lodge FIR in appropriate sections in the matter and investigate the case. In the aforesaid

background, on 26.10.2018 FIR of Kotak Mahindra Bank Limited was registered against eight accused persons, namely Vikas Garg, Smt. Nidhi Garg, Vinay Garg, Smt. Deepika Garg, M/s Shiv Kumar Agarwal, M/s Tirupati Rice Mills Private Limited, Udit Kumar Mittal and Smt. Neetu Mittal, under Sections 406, 420, 467, 468, 471 and 120B IPC as case crime No. 0622 of 2018 at Police Station Link Road, District Ghaziabad. The applicant moved his bail application before the concerned court below, which has been dismissed vide order dated 24.10.2019 of Additional District and Session Judge/Special Judge SC/ST Act, Ghaziabad.

10. Sri G.S. Chaturvedi, learned Senior Advocate after placing the aforesaid facts submitted that:-

(i) Applicant is bona fide purchaser of the property in question after paying the sale consideration amount.

(ii) For purchasing the said property in question, the applicant and his wife have taken a loan of Rs. 1,42,00,000/- (Rupees one crore forty two lac only) from Citi Bank, but till date Citi Bank neither initiated any proceedings nor lodged FIR against the applicant.

(iii) Informant Kotak Mahindra Bank Limited has no concern with the second loan amount of Rs. 1,42,00,000/- given by Citi Bank to the applicant.

(iv) The responsibility of payment of second loan is upon the applicant and his wife Smt. Neetu Mittal, which is not subject matter of impugned FIR dated 26.10.2018 lodged by informant Kotak Mahindra Bank Limited.

(v) It has been vehemently urged that in fact Udit Kumar Mittal, who is distant relative of Nidhi Garg has been cheated by Vikas Garg, Vinay Garg, Deepika Garg and Nidhi Garg by not mentioning the correct fact that said property was already mortaged by them in lieu of loan taken by them and creating a forged sale deed on 24.06.2011 for the property in question and by selling the said mortgaged property.

(vi) In the sale deed dated 2.1.2012, it has clearly been mentioned that the said property in question is clean and clear and the same has neither been mortgaged nor any loan has been taken on the said property.

(vii) It is submitted that in case aforesaid second loan is not paid by the applicant, the same can be recovered only by Citi Bank in accordance with law, and not by Kotak Mahindra Bank Limited.

(viii) Matter under SARFAESI Act against the co-accused is sub-judice before Debts Recovery Tribunal, Lucknow, in which interim order dated 30.07.2018 of status quo has been passed.

(ix) It is also submitted that in the present case required permission has not been obtained by R.B.I., therefore, jurisdiction under SARFAESI Act cannot be invoked unless and until permitted by R.B.I. It is vehemently urged that merely on the basis of deed of assignment dated 9.4.2013, by which first informant claims to have purchased the debts is illegal and no right can be claimed on the basis of said deed of assignment dated 9.4.2013. The loan amount involved in the matter cannot be recovered otherwise in due course of law.

(x) The applicant is not party in the S.A. No.393 of 2014 before Debts Recovery Tribunal, Lucknow.

(xi) There is no statutory bar that mortgaged property cannot be sold out.

(xii) So far as issue regarding forged sale deed dated 24.06.2011 is

concerned, the same was prepared by Vikas Garg showing the property in question was purchased by Vikas Gopi Chand S/o Gopi Ishwar Chand from Dr. R.K. Malhotra S/o D.S. Malhotra. The applicant considering the said forged registered sale deed dated 24.06.2011 to be genuine has purchased the property in question from Vikas Garg after paying total sale consideration amount of Rs. 1,66,00,000/- to him.

(xiii) Offence as alleged against the applicant is purely civil in nature and nothing attracts a criminal offence against the applicant.

(xiv) Admittedly, first loan amount of Rs. 1,65,80,000/- was taken by co-accused Vikas Garg, Nidhi Garg, Vinay Garg, Deepika Garg from M/s Citi Financial Consumer Finance India Limited, New Delhi on 28.11.2007. The applicant came in light after purchasing the property in question by registered sale deed dated 2.1.2012, therefore, there is no entrustment of the aforesaid first loan amount to the applicant.

(xv) It is further submitted that since applicant is bona fide purchaser, therefore, there is no evidence of cheating inducing any person to deliver any property to him. It is also submitted that there is no evidence that applicant has committed any forgery with any document, because applicant has purchased the property in question through genuine registered sale deed dated 2.1.2012, as such essential ingredients to constitute offence under Sections 406, 420, 467, 468, 471 and 120B IPC are lacking in this case so far as applicant is concerned. Apart from aforesaid submissions, it is also argued by Sri G.S. Chaturvedi that considering the allegations against the applicant in the matter, the case against the applicant will not travel beyond the offence under Section 422 IPC, which is bailable. Section 422 IPC is reproduced as under:-

"422. Dishonestly or fraudulently preventing debt being available for creditors.--Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

(xvi) The allegations against the applicant are false. Informant Kotak Mahindra Bank Limited on becoming unsuccessful in proceeding before Debts Recovery Tribunal, Lucknow and on filing civil suit no. 840 of 2018 by the applicant on 10.09.2018 got the FIR dated 26.10.2018 registered through an application under Section 156(3) Cr.P.C. dated 9.10.2018.

(xvii) It is also submitted that purchasing any property, filing any suit or availing any statutory remedy by the applicant cannot be said to be an offence.

(xviii) Lastly, it is submitted that the applicant is neither previously convict nor involved in any other case and he is languishing in jail since 10.10.2019, therefore, applicant is liable to be released on bail. The applicant undertakes that in case he is released on bail, he will not misuse the liberty of bail and will cooperate in trial.

11. Per contra, learned Additional Government Advocate for the State of U.P. as well as Sri Imran Ullah, learned counsel appearing on behalf of first informant vehemently opposed the bail by contending that:-

(i) All the accused persons were in collusion with each other and under the pre-planned manner, the co-accused Vikas Garg sold the mortgaged property in question to Udit Kumar Mittal and his wife Smt. Neetu Mittal, who are relative of Vikas Garg on the basis of forged sale deed dated 24.06.2011 showing that same has been executed by Dr. R.K. Malhotra to him, while the said property was already sold by Dr. R.K. Malhotra to Bhagwati Rustagi and Rashmi Rustagi through sale deed dated 16.12.1993, which was later on already purchased by Vikas Garg, Vinay Garg and Deepika Garg by registered sale deed dated 16.09.2005.

(ii) Much emphasis has been given on behalf of the informant that sale deed dated 24.06.2011 is forged document. Dr. R.K. Malhotra has not executed any sale deed. It is also submitted that name and old photographs of Dr. R.K. Malhotra has been used by the co-accused Vikas Garg in collusion with other accused in preparing forged sale deed dated 24.06.2011.

(iii) It is next submitted that till date possession of property in question is with co-accused Vikas Garg.

(iv) It is next submitted that co-accused Vikas Garg, Nidhi Garg, Vinay Garg and Deepika Garg are responsible for payment of first loan amount of Rs. 1,65,80,000/- alongwith interest and other charges threreon and Udit Kumar Mittal and his wife Neetu Mittal are also responsible for payment of second loan amount of Rs. 1,42,00,000/- alongwith interest and other charges thereon.

(v) It is also submitted that till date neither aforesaid loan has been paid nor possession of said property, which has been mortgaged in lieu of first loan dated 28.11.2007 has been handed over to Kotak Mahindra Bank Limited, who has purchased the debt by deed of assignment dated 9.4.2013 from M/s Citi Financial Consumer Finance India Limited.

(vi) It is also pointed out that the main accused Vikas Garg is still absconding, therefore, bail application of applicant is liable to be rejected.

12. After hearing the rival submissions of the learned counsel for the parties, I find that applicant as well as informant both have come up with the stand that sale deed dated 24.06.2011 of the same property (C-51, Ramprastha Colony, Ghaziabad) has been prepared fraudulently by co-accused Vikas Garg changing his name as Vikas Gopi Chand. It is also admitted to the parties that legally sale deed dated 24.06.2011 in question could not be executed by Dr. R.K. Malhotra because, said property was already sold by Dr. R.K. Malhotra by sale deed dated 16.12.1993 to Bhagwati Rustagi and Rashmi Rustagi, and subsequently, said property was purchased by co-accused Vikas Garg alongwith Vinay Garg and Deepika Garg on 16.09.2005 and taken loan of Rs. 1,65,80,000/- from M/s Citi Financial Consumer Finance India Limited mortgaging the said property, therefore, main accused in this case is Vikas Garg, because he despite knowing the fact that the said property in question has already been mortgaged against loan of Rs. 1,65,80,000/- given by M/s Citi Financial Consumer Finance India Limited, New Delhi, has prepared forged sale deed dated 24.06.2011 of the same property in question showing it to be sold by Dr. R.K. Malhotra in his favour mentioning his name as Vikas Gopi Chand S/o Gopi Ishwar Chand and, thereafter, concealing the aforesaid fact of taking loan and mortgaging the said property further

executed the registered sale deed dated 2.1.2012 in favour of applicant only with a view to escape from his liability to pay the said loan.

13. It is also admitted fact that possession of the said property in question has not been handed over by the co-accused Vikas Garg to the applicant despite executing sale deed dated 2.1.2012 in favour of applicant. Though, it is alleged by the prosecution that applicant was also in connivance with other co-accused, but could not show anything on record before this Court that applicant was having knowledge prior to sale deed dated 2.1.2012 that said property in question had already been mortgaged by co-accused Vikas Garg. Inference in this regard has been drawn by the prosecution only on the basis that applicant is relative of co-accused Vikas Garg, while applicant has come with the stand that applicant is bona fide purchaser of the property in question and applicant has also been cheated in this case by co-accused Vikas Garg. There is no dispute that proceeding under SARFAESI Act in the matter is still subjudice before D.R.T., Lucknow and no suit for cancellation of sale deeds dated 24.06.2011 and 02.01.2012 has been filed by any person. Kotak Mahindra Bank Limited and Citi Bank are free to avail statutory remedy available to them in the matter. In view of above, I find that case of present applicant is distinguishable from the case of co-accused Vikas Garg, who is main person in this case and is absconding.

14. Considering the facts and circumstances of the case, keeping in view the nature of the offence, evidence, complicity of the accused, submissions of the learned counsel for the parties, I am of the view that the applicant has made out a fit case for bail. Hence, the bail application is hereby allowed.

15. Let the applicant **Udit Kumar Mittal**, be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

i) The applicant will not tamper with prosecution evidence and will not harm or harass the victim/complainant in any manner whatsoever.

ii) The applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) The applicant will not indulge in any unlawful activities.

(iv) The applicant will not misuse the liberty of bail in any manner whatsoever.

16. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail and send the applicant to prison.

17. It is clarified that anything said in this order is limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. It is further clarified that the trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything said in this order.

(2020)1ILR 698

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Appeal No. 1294 of 1985

Aftab Ahmad & Ors. ...Appellants (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri Mukhtar Alam, Sri T. Rathore, Sri M.D. Singh, Sri S.R. Ullah, Sri S.K. Sharma, Sri N.I. Jafri

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

Criminal Law - Indian Penal Code - Sections 147, 323/149, 307/149 & 302/149 - Appeal against conviction.

It is well settled by a catena of decisions that it is the duty of the prosecution to prove, and, if necessary, by examining an expert, that the particular injury has been caused in the manner alleged by the prosecution, otherwise, the accused may be entitled to the benefit of doubt. (para 43)

The injured witnesses do not leave the real culprits and falsely implicate innocent persons but at the same time, there may be cases where the injured persons have themselves committed wrong and out of fear of disclosure about their own wrong doing, they twist the real facts to demonstrate their innocence by introducing incorrect version of the incident. (para 53)

The possibility of the accused forming an unlawful assembly to plough their own field becomes doubtful. Secondly, injuries from hard and blunt object found on the body of the deceased has no explanation. Thirdly, the gun shot injury found on the body of the deceased could not have been from a gun, as alleged, but might have been from country-made pistol. Fourthly, the deceased had suffered hard and blunt object injuries of which there was no explanation in the prosecution evidence. (para 55)

Appeal is allowed. (E-2)

List of cases cited: -

1. St. of U.P. Vs. Ballabh Dass, AIR 1985 SC 1384

2. Woolmington Vs. Director of Public Prosecution, 1935 AC 462

3. Sharad Birdi Chand Sharda Vs. St. of Mah., AIR 1984 SC 1622

4. Mohinder Singh Vs. State AIR 1953 SC 415

5. Laxmi Singh Vs. St. of Bihar (1976) 4 SCC 394

6. Dashrath Singh Vs. St. of U.P. (2004) 7 SCC 408

7. Vadivelu Thevar Vs. St. of Madras AIR 1957 SC 614

8. Gautam Lal Vs. St. of U.P. (1981) CrlJ 1187

9. Balak Ram Vs. St. of U.P. (1975) 3 SCC 219

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This appeal has been preferred by appellants, namely, Aftab Ahmad, Laiq Ahmad, Imtiaz Ahmad @ Addey, Sukha, Afzal Ahmad, Chootey Mian @ Afsar Ahmad, Chhutawa @ Sakeel Ahmad and Bullar @ Abdul Sattar against the judgment and order dated 14.05.1985 passed by VIth Additional District and Sessions Judge, Bareilly in Sessions Trial No. 144 of 1982 arising out of case crime no. 231 of 1979, police station Bhojipura,

District Bareilly, whereby all the appellants have been convicted under section 147, 323/149, 307/149 and 302/149 Indian Penal Code and the appellant nos. 1, 2, 3 and 6 have also been convicted under section 148 IPC. The appellants have been sentenced for life imprisonment under section 302/149 IPC and with respective lesser punishments for other offences mentioned above and all the sentences were to run concurrently.

2. According to the prosecution version, the incident in question is alleged to have taken place on 16.12.1979 at about 01:30 P.M., for which the first information report is alleged to have been lodged on the same day at about 03:30 P.M. by Jamal @ Jamaluddin, who also received injuries in the incident. The prosecution case as narrated in the first information report is that the first informant was having litigation regarding his land with one Sagir Ahmad S/o Abdul Rahim, resident of his village, in which the informant succeeded and was in possession of the land. On account of this, Sagir Ahmad and his family members bore a grudge with the informant and his family members and they wanted to grab possession of the land illegally. On the date of incident, at about 01:30 P.M., when the first informant Jamal (Jamaluddin) and his sons Khairuddin (the deceased), Ashfaq (PW2) and Riyazuddin (PW1) were plowing their field, the accused persons, namely, Sagir Ahmad S/o Abdul Rahim (died during trial), Aftab Ahmad S/o Iqbal Ahmad (Appellant no.1), Chhotey Mian S/o Sagir Ahmad (Appellant No.6), Addey S/o Sagir Ahmad (Appellant No.3), Laeeq Ahmad S/o Jamil Ahmad (Appellant No.2) armed with guns and Afzal Ahmad S/o Sagir Ahmad (Appellant No.5), Chhutawa S/o Khaleel Ahmad (Appellant No.7), Sukha S/o Jamil Ahmad (Appellant No.4), Bullad S/o Nazir Azmad (Appellant No.8), armed with lathis, came to the field and started abusing and threatening informant side and started plowing the field with their tractor. When Khairuddin (the deceased) tried to stop them, accused Sagir Ahmad shouted that this Khairuddin is posing himself more than what he actually is and, thereafter, fired upon him from his gun, due to which Khairuddin sustained injuries, fell on the spot and died. Other accused Chhotey Mian, Laeeq Ahmad, Aftab Ahmad started firing upon Ashfaq from their guns causing him injuries. The other accused persons assaulted the first informant and his son Riyazuddin by lathi. It is alleged that the accused persons after killing Khairuddin and causing injuries to first informant and his sons Riyazuddin and Ashfaq ran away towards village along with their tractor, whereas the dead body of Khairuddin was lying in the field. It is stated in the first information report that as the condition of Ashfaq was serious, the first informant took Ashfaq and Riyazuddin to Bareilly Hospital whereas the written information to the police station was being sent through Mohd. Ayub @ Doctor S/o Mohd. Jahur Ahmad, who lodged the first information report at police station Bhojipura on the same day, at 03:30 P.M., giving rise to case crime no. 231 of 1979, U/s 147 , 148, 149, 302 ,307,323 IPC. In the first information report, it is also stated that the aforesaid incident was witnessed by Habib Ahmad S/o Khaleel Ahmad, Abdul Kareem S/o Mohd. Raza, Rafeeq Ahmad S/o Abdul Haq and few others.

3. The record further reveals that after registration of the first information report, the investigation commenced and the Investigating Officer went to the spot,

prepared inquest report, recovered blood stained soil and empty cartridges etc, from the spot and prepared memo of recoveries and also prepared site plan. After inquest, the dead body was sent for post mortem examination which was conducted on 17.12.1979 at District Hospital, Bareilly by Dr. J.N. Bhargava (C.W.-2), the then Medical Officer, Bareilly and in his report (Ex. Ka-16) noted following ante mortem injuries on the person of the deceased: -

"1. Gun shot wound of entry 0.5 cm x 0.5 cm x skin deep on right cheek 3.5 cm below lateral & of right eye;

2. Contusion 6 cm x 2 cm on right side of chest upper part 8 cm below tip of right shoulder;

3. Contusion 8 cm x 2 cm on right side of chest 5 cm below right nipple;

4. Multiple gun shot wounds of entry in an area of 30 cm x 27 cm on front lower part of mid of abdomen pelvic region and front and outer aspect of right thigh 11 cm above knee joint. Blackening present. Average size 0.4 cm x 0.4 cm. Skin muscle and cavity deep 14 shots were recovered from thigh region.

5. Abraded contusion 10 cm x 6 cm in front of right leg upper part 8 cm below right knee joint underneath. Both bone fractured."

The doctor noticed that peritoneum was punctured under injury and in the cavity 1 litre fluid was present with fecal material present. In all 25 shots/pellets were recovered. The cause of death of the deceased was mentioned on account of shock and haemorrhage due to ante mortem injuries.

4. The record also reflects that medical examination of the injured persons namely, Ashfaq (PW2), Jamaluddin (informant) and Riyazuddin (PW1) was also conducted on 16.12.1979 at District Hospital, Bareilly and as per medical examination report (Ex.Ka-13), following injuries were noticed on the body of the injured Ashfaq:

"1. Lacerated wound 5 cm x 1/2 cm x Bone deep on Rt. Side scalp 8 cm above Rt.-ear.

2. Abraded contusion with traumatic swelling 7 cm x 4 cm on Lt. Side forehead.

3. Multiple gunshot wounds of entries with inverted margins, in the area of 12 cm x 24 cm x U/o on Lt. Upper lateral hip, Lt. flank, Lt. lower lateral chest wall. No blackening and tattooing present over the wounds. Disbursement is about 2.5 cm, oozing of blood present.

4. Four gunshot wounds of entries with inverted margins, on Lt. post elbow in the area of 8 cm x 7 cm x 11.0, no blackening & Tattooing present over the wounds. Disbursement is about 2.5 cm, oozing of blood present from the wounds.

5. Contusion 13 cm x 3.5 cm on Lt. back in the middle.

Opinion- Injury no.5 is simple, Injury nos. 1, 2, 3 and 4 kept under observation and advised for X-ray. Injury nos. 1, 2 and 5 were caused by blunt object and injury nos. 3 and 4 were caused by fire arm. Duration was reported to be fresh."

5. In the X-ray report (Ex.Ka-18) of Ashfaq Ahmad, following opinion has been expressed by the Radiologist: -

"No bony abnormality is seen. One small radio-opaque shadow of metallic density in the injuries of abdomen left side and four similar shadows in the same side, probably due to pellets. X-ray: left elbow shows three small radio-opaque shadow of metallic density, in the region of

elbow, probably due to pellets. X-ray left hip shows multiple small radio-opaque shadows of metallic density in the region of hip and toe region. Probably injuries due to pellets."

6. As per the medical examination report (Ex.Ka-14) of the injured Jamaluddin (informant), following injuries were found:

"1. Lacerated wound 1.5 cm x 0.3 cm x scalp on Rt-side and Scalp, 5 cm above Rt. eye brow.

2. Lacerated wound 0.6 cm x 0.3 cm x skin on Lt. eye brow.

3. Lacerated wound 2 cm x 0.8 cm x skin on Lt. fore-arm, on lateral side, 5 cm above wrist joint.

4. Contusion 3 cm x 2 cm on Rt. hip.

5. Contusion 4 cm x 2 cm on Rt. posterior shoulder.

Opinion: - All injuries are simple, caused by blunt object. Duration fresh"

7. As per the medical examination report (Ex.Ka-15) of the injured Riyazuddin (PW1), following injuries were found on the body of the injured: -

"1. Lacerated wound 2 cm x 1 cm bone deep on Lt. Side scalp 6 cm above Lt. ear.

2. Lacerated wound 1.5 cm x 0.3 cm x scalp on Lt. Side ant. Scalp, 8 cm above Lt. eye brow.

3. Lacerated wound 0.5 cm x 0.5 cm x skin on the root of Lt. middle finger on posterior side.

4. Abrasion 1/2 cm x 0.2 cm on Lt. thumb posterior side.

5. Contusion 11 cm x 5 cm on Lt. thigh lateral side in the middle.

6. Contusion 4 cm x 1.5 cm on Lt. hip.

7. Contusion 10 cm x 4 cm on Lt. upper arm on Lat. Side.

Opinion:- injury no.1 was kept under observation and injury nos. 2 to 7 are simple in nature. All injuries have been caused by blunt object."

8. Upon completion of the investigation, the Investigating Officer submitted charge-sheet bearing No. 42 dated 15th March, 1980 against all the accused persons i.e. appellants herein under Sections 147, 148, 323/149, 307/149 and 302/149 I.P.C., upon which cognizance was taken by the concerned Magistrate and thereafter, the case was committed to the Court of Sessions giving rise to Sessions Trial No. 144 of 1982. The trial court vide order dated 25.02.1983 framed charges against all the accused appellants under sections 147, 323/149,307/149 and 302/149. The accused Sagir Ahmad (since deceased), Aftab Ahmad, Chhotey Mian, Adday and Laeeq Ahmad, who were armed with guns, were charged under section 148 IPC also. The record further reveals that the accused persons were charged separately in the following manner:-

"i. Accused Afzal Ahmad, Sukha, Chhutwa @ Shakeel Ahmad and Buller were also charged with section 323 IPC simplicitor.

ii. Accused Chhotey Mian, Laeeq Ahmad and Aftab Ahmad were charged with section 307 IPC for having fired and caused injuries to Ashfaq Ahmad with their guns.

iii. The deceased accused Sagir Ahmad in addition to the foregoing charges was also separately charged with

section 302 IPC simplicitor for having caused murder of Khairuddin."

9. The prosecution in support of its case produced two witnesses of facts namely, P.W.1 Riyazuddin, who is injured and is brother of the deceased; and P.W.2 Ashfaq Ahmad, who is also injured and is brother of the deceased. Apart from these two witnesses of fact, the prosecution examined P.W.3 Janardan Arora, Sub-Inspector, the second investigating officer who submitted charge sheet. The record reflects that the genuineness of injury reports and post mortem reports were accepted by the defense under section 294 Cr.P.C. However, the trial court summoned three persons as court witnesses, namely, C.W.1 Abdul Gafur, the scribe of the first information report, who proved the written report as having been dictated by the first informant Jamaluddin, C.W.2 Dr. J.N. Bhargava who conducted post mortem on the cadaver of deceased and proved the post mortem report and C.W.3 Om Prakash Saxena, the Executive Magistrate, Tehsil Bareilly who recorded statement of injured Ashfaq Ahmad on the date of the incident at about 07:45 P.M. as a dying declaration. But since P.W.2 Ashfaq Ahmad survived, it has been utilized by the trial court as his previous statement.

10. Apart from the oral testimony, the prosecution also relied upon documentary evidence, which was exhibited. The police papers regarding initial investigation by first investigating officer Sangram Singh were exhibited as Ext. Ka.-1 to Ext. Ka.-11 at the instance of the second investigating officer Janardan Arora as the first investigating officer Sangram Singh had died. He also proved that part of the investigation, which was done by him as also the charge sheet submitted by him (Ext. Ka-12).

11. In addition to above, the prosecution also relied upon some documentary evidence to prove the possession and title of first informant over the land in dispute. The same are catalogued herein-below:

"Ext. Ka-19, copy of the judgment of the Asst. Collector/Tehsildar, Bareilly dated 16th March, 1970 directing the name of Jamaluddin to be mutated over the land in dispute;

Ext. Ka-20 copy of the extract of Khatauni mutating the name of Jamaluddin over the land in dispute and expunging the name of Smt. Raqiban;

Ext.Ka-21 copy of the judgment of the Board of Revenue dated 28th February, 1981 rejecting the revision of Smt. Raqiban; and

Ext. Ka-22 copy of the search application, which shows that Jamaluddin filed an appeal against the order dated 27th January, 1984 passed by A.C.O. Fatehganj, wherein stay order has been passed."

12. The accused persons in their statements recorded under section 313 Cr.P.C. denied their involvement in the crime and stated that they have been falsely implicated due to old enmity between the parties regarding land dispute. They denied that the first informant Jamaluddin, since deceased, was in possession of the land in dispute and that they went to take forcible possession over the land in dispute on 16.12.1979. The accused persons further stated that they were in possession over the land in dispute since much before the incident.

13. The accused Imtiaz Ahmad @ Addey in his statement under Section 313 Cr.P.C. further stated that the land in dispute was in their possession and on the date of the alleged incident, when he and Afsar @ Chhotey Mian were ploughing their field, Jamaluddin, Khairuddin, Ashfaq Ahmad, Akhlaq Ahmad and Riyazuddin armed with country made pistol and lathi came on the spot and assaulted them. His brother Afsar defended himself by using lathi and they lodged the report of the incident and the trial is pending. The accused persons also relied on documents which they filed as Ext. Kha.-1 to Exhibit Kha-21 and examined two defense witnesses i.e. D.W.1 (Dr. Vinod Sahgal), who had examined the accused Imtiaz Ahmad @ Addey and Afsar Ahmad @ Chhotey Mian for their injuries, and D.W. 2 (Damodar Sahai), the then Peshkar of Chief Judicial Magistrate, Bareilly, who proved the alleged dying declaration i.e. previous statement of Ashfaq Ahmad recorded by Executive Magistrate.

14. The accused also filed the certified copy of their first information report (Ext. Kha-7) to show that Jamaluddin, Riyazuddin, Khairuddin, Ashfaq came to the disputed field armed with country made pistol and lathis on 16.12.1979 at about 2.00 P.M. to prevent the informant side (accused herein) from ploughing their agricultural field by tractor. It is alleged that these persons fired with their pistol, with intention of causing death, as a result, Imtiaz, who was ploughing the field with his tractor, sustained injuries. It was stated in the first information report (Ext. Kha-7) that they (accused persons of case in hand) took shelter behind the tractor and ran towards the village but Ashfaq (P.W.-2) fired from his pistol, as a consequence whereof, a pellet hit Imtiaz's leg. Another brother of accused Imtiaz, namely, Afsar @ Chhotey Mian, was also beaten with lathis. That first information report (Ext. Kha.-7) was lodged by Imtiaz on 16.12.1979 at 4.30 P.M., in which the time of occurrence was alleged to be 02.00 P.M., at the same place of occurrence, where the incident of the case in hand took place. The accused also relied upon the injury reports of Afsar Ahmad and Imtiaz Ahmad, which were marked as Ext. Kha-1 and Ext. Kha-2. These injury reports were proved by Dr. Vinod Sehgal (D.W.1), Medical Officer in District Jail, Bareilly, with the help of the register maintained in District Jail, by stating that in his register, dated 18.12.1979, at serial no. 1312, Afsar Ahmad S/o Sagir Ahmad accused was examined by him at 04:05 P.M. and one simple injury on his person was found to be caused by some blunt object. At the time of medical examination, the injury of Afsar Ahmad was about 2 and ½ days old. He placed its copy as Ext. Kha-8. Besides this, Dr. Vinod Sehgal DW-2 stated that at serial no. 1313, the injuries of Imtiaz Ahmad S/o Sagir Ahmad are also mentioned showing four injuries on his person, out of which, three were simple and regarding injury no.4, X-Ray was advised.

15. In addition to above, the accused also filed certified copy of the injury report (Ex. Kha-8) obtained from the cross-case, which is the injury report relating to accused Afsar Ahmad @ Chhotey Mian S/o Sagir Ahmad, who was examined by Dr. G.S. Gangapangi on 16.12.79 at 10:10 P.M. at P.H.C., Bhojipura. The injuries noticed therein were as follows:-

"1. Lacerated wound 6cm x 0.5 cm scalp over 13 cm above Rt. ear obliquely placed.

2. Swelling over Rt., wrist of outer medical surface.

No signs of dislocation and fracture.

Nature- simple, caused blunt object

Duration half day old."

16. The same Medical Officer also examined the injuries of Imtiaz Ahmad on the same date at 10.35 P.M., which was noticed in Ext. Kha -9 as follows:-

1. Abrasion 11 x 0.5 cm over the dorsal surface of Rt. ring finger extending from base of nail obliquely placed.

2. Abrasion 0.5cm x 0.6 cm over the dorsal surface of Rt. middle finger extending from base of nail.

3. Abrasion 0.5cm x 0.2 cm over dorsal surface Rt. thumb extending from basis of Rt. thumb.

4. Rounded lacerated wound 0.5 cm x 0.5 cm muscle deep over the posterior part of Lt. thigh 13.5 cm above knee joint.

Nature: Injuries No. 1, 2 and 3 simple and injury no.4 under observation advised X-Ray, Lt. thigh for presence of any foreign body from District Hospital, Bareilly.

Cause: Blunt object

Duration: About half day. Sd/- 15.12.79"

17. Lastly, the defense relied upon the alleged dying declaration (Ext. Kha-3) purporting to have been made by (P.W.2) Ashfaq Ahmad at District Hospital, Bareilly before the Executive Magistrate Sri O.P. Saxena C.W. 3, who was examined as court witness under section 311 Cr.P.C. He claimed to have recorded Ext. Kha.3 at 7.45 P.M. on 16.12.1979. The defense relied/utilized the same as previous statement of PW2 to demonstrate contradictions in the prosecution case with the case taken in the first information report (Ext. Ka- 1) as well as the prosecution evidence led during the course of trial. This document was produced by one Damodar Sahai (D.W.-2), reader to the Chief Judicial Magistrate, Bareilly, who stated that it (Ext. Kha -3) was received in the court of Chief Judicial Magistrate, Bareilly on 17.12.79 along with the copy of G.D. No. 41, dated 16.12.1979, at 6.30 P.M. (Ext. Kha-5) from police station Kotwali. The intimation slip (Ex. Kha-4) of the Medical Officer at Civil Hospital, Bareilly, was also relied by the defense in order to show that Ashfaq Ahmad (P.W.-2) was mentally fit for recording his declaration. Sri Om Prakash Saxena, Tehsildar (C.W.-3) stated that Sri P.L. Verma, SDM, Bareilly ordered him to record the dying declaration (Ext. Kha- 3).

18. The accused Laeeq Ahmad raised a plea of alibi by filing mark-sheet and the scheme of his B.A.M.S. examination held by the Kanpur University between December, 1979 and January, 1980. The mark-sheet (Ext. Kha-17) disclosed that accused Laeeq Ahmad was permitted to appear again in B.A.M.S. examination as a supplementary candidate.

19. In order to show their possession over the land in dispute, the defense relied on following documents:-

i. Ext, Kha.-6, which is the certified extract of Khasra disclosing that Sagir Mohd. was recorded in cultivatory possession of Khasra nos. 415,466,467,493,495 to 499 and 555 to 561 in 1386 fasli

ii. Ext. Kha- 1, which is an extract of khatauni from 1383 to 1388 fasli disclosing that name of Jamaluddin

(deceased-informant) along with others was recorded over the said plots and in place of names of Mohd. Ismail and Smt. Raqiban, the name of Sagir Ahmad (accused) had also been mutated on 18.4.78.

iii. Ext. Kha- 11 is a certified copy of an order of Naib Tehsildar dated 14.4.79, whereby he directed that the name of Smt. Raqiban be struck off and that of accused Sagir Ahmad be mutated.

20. The accused after closing of evidence of court witnesses (C.W.-1, C.W.-2 and C.W.-3) filed certified extracts of khasra for the years 1386 fasli to 1388 fasli, which was marked as Ext. Kha-16 indicating therein that Sagir Ahmad deceased-accused was also recorded as co-tenure holder of certain plots with deceased Jamal i.e. Jamaluddin.

21. The trial court after considering the evidence on record came to the conclusion that the prosecution witnesses are wholly reliable; the accused party was aggressor; and the injuries of accused persons are superficial in nature for which no explanation was required. The trial court found accused persons guilty for the charges framed against them, as they constituted an unlawful assembly and were liable as members thereof.

22. The accused Sagir Ahmad died during trial, whereas appellant no.3 Imtiaz Ahmad @ Adday S/o Sagir Ahmad, appellant no.5 Afzal Ahmad S/o Sagir Ahmad; appellant no.6 Chhotey Mian @ Afsar Ahmad S/o Sagir Ahmad; and appellant no.8 Bullar @ Abdul Sattar S/o Nazir Ahmad, died during the pendency of the appeal and their appeal stood abated vide separate orders dated 21.01.2019 and 08.05.2019. Thus, this appeal survives qua appellant no.1 (Aftab); appellant no.2 (Laeeq Ahamd); appellant no.4 (Sukkha); and appellant no.7 (Chhuttwa).

23. Learned counsel for the surviving accused-appellants has strenuously contended that they have been falsely implicated in the crime in question and the prosecution version is not proved beyond reasonable doubt and in this regard, following contentions have been put forth:-

(a) The prosecution has miserably failed to prove its case beyond reasonable doubt, inasmuch as it has failed to prove that the incident occurred in the manner alleged.

(b) The prosecution witnesses are partisan/inimical to the accused and the independent eye-witnesses named in the FIR have not been produced and have been purposely withheld.

(c) The medical evidence is in conflict with alleged eye witness account and it materially affects the reliability of witnesses.

(d) Material improvements have been made by the prosecution witnesses at every stage of the case, which make them wholly unreliable.

(e) The injuries suffered by the accused persons have not been explained by the prosecution and the manner, origin and motive of the quarrel has been suppressed by the prosecution.

(f) The trial court did not appreciate the evidence in correct legal perspective and misread the evidence.

(g) In the alternative, it is submitted that in the peculiar facts and circumstances of the case, the prosecution had miserably failed to prove that formation of an unlawful assembly with a common object to commit murder and as

such, the accused appellants can therefore be held liable only for their individual act, if at all it is proved beyond doubt.

24. On the other hand, the learned Additional Govt. Advocate has supported the prosecution case and has submitted that the time and place of the incident is admitted to the defense and that the defense has impliedly admitted the presence of accused persons on the spot by setting up their own case that they were attacked by the informant's party while they were ploughing their field. The prosecution was not obliged to explain the injuries of the accused persons, as they were superficial in nature. Moreover, the accused persons constituted an unlawful assembly, inasmuch as they were more than five in number and were armed with weapons of assault including firearms, which were used in causing injuries to the deceased, as well as other persons, therefore, it cannot be said that the common object of the unlawful assembly was not to commit murder. The learned A.G.A. submitted that the prosecution has fully established its case beyond the pale of doubt and the trial court's findings are well discussed, which calls for no interference.

25. In the light of the above noted rival submissions, this court proceeds to examine the evidence available on record. P.W.1 (Riyazuddin) is an injured witness. He has stated about the close relationship of the accused persons inter se. He has stated about informant party's possession and title over the land in connection with which the incident occurred, though he admitted about litigation pending in court. Regarding incident, he has stated that on 16.12.1979, he along with his elder brother Khairuddin, younger brother Ashfaq Ahmad and father Jamaluddin were ploughing a field of Sumere Kurmi which they had taken on lease (batai) and which was located at a distance of just about 100 to 150 paces from the field in dispute. At about 01:30 P.M., all the named accused persons came with tractor to plough the disputed land. While accused Sagir Ahmad, Aftab Ahmad, Chhotey Mian, Laeeq Ahmad and Addey had guns in their hands, the other named accused persons had lathis. Upon seeing this Khairuddin went to that field and stood in front of the tractor and asked them to stop ploughing the field. P.W.1 (Riyazuddin), his father Jamaluddin and younger brother Ashfaq also reached there. At this juncture, accused Addey, who was driving the tractor, asked Khairuddin to move aside, otherwise he would be a victim but Khairuddin refused to budge, whereupon accused Sagir Ahmad by stating that Khairuddin is posing himself to be a wrestler and will not remove himself, fired upon Khairuddin, who died instantaneously, as a result of the gun shot. Upon which, P.W.1 (Riyazuddin) and his brother Ashfaq Ahmad and father Jamaluddin came towards Khairuddin. Seeing that, accused Aftab Ahmad, Chhotey Mian and Laeeq Ahmad, by their respective guns, fired upon Ashfaq Ahmad, who fell on the spot after receiving gunshot injury. Thereafter, P.W.1 (Riyazuddin) and his father Jamaluddin were assaulted by accused Afzal Ahmad, Chhutwa, Bullar and Sukhha with lathis causing injuries to them. Thereafter, co-villagers Rafeeq Ahmad, Habib Ahmad, Abdul Karim and others arrived on the spot and rebuked the accused persons, who ran away with their tractor. He further stated that his father (Jamaluddin) got the first information report of this case written at the house of

Abdul Gafur Master and sent it to the police station through Mohd. Ayub @ Doctor for lodging the same. Thereafter, P.W.1, his father Jamaluddin and brother Ashfaq Ahmad came to Sadar Hospital, Bareilly where they were medically examined. Ashfaq Ahmad remained in the hospital as indoor patient for about 20-21 days.

26. In the cross examination, P.W.1 (Riyazuddin) admitted that prior to this incident, his father filed two criminal complaints against the accused persons, one against accused Sagir Ahmad, Afzal Ahmad, Adday, Chhotey Mian, Bhura and Khalifa for maarpeet and another criminal complaint against accused persons Sagir Ahmad, Afzal Ahmad and Adday for causing mischief by dismantling the mendh (boundary marks). He has further admitted in the cross examination that the name of Smt. Rafikan was mutated on the land in dispute about six years back and thereafter the name of Sagir Ahmad was mutated in place of Rafikan and since 16.12.1979, the name of Sagir Ahmad was continuing in revenue records for the land in dispute. He has denied possession of Sagir Ahmad over this land, however, he has admitted that during consolidation operations, Sagir Ahmad won the case from subordinate consolidation court, resulting in carvation of Chak in favour of Sagir Ahamd, though a revision has been filed by P.W.-1. He has further stated in cross examination that he was ploughing the field of Sumere Kurmi which his brother Khairuddin had taken on lease (batai). He has stated that his father Jamaluddin wrongly mentioned in the first information report that he (Jamaluddin) and his sons Khairuddin, Ashfaq Ahmad and Riyazuddin were ploughing the land in dispute and he cannot say as to how this mistake occurred in the first information report. When his statement was taken on next day by police Inspector, first information report was read out to him but he did not inform the police Inspector that the above mentioned facts were wrongly written in the first information report. He was also cross examined on the manner of assault, according to which he had initially stated that at the time of actual shooting deceased Khairuddin was standing in front of tractor almost touching it and other accused persons were standing 1-2 paces behind the tractor, however subsequently he modified his statement to the effect that other accused persons were standing 4-5 paces behind the tractor and they fired from that position. He reiterated that the deceased Khairuddin had received one gunshot injury and died instantaneously. The accused persons were armed with gun and lathi only and no one was having Ballam. P.W.1 and his family members neither had weapon nor they caused injury to any of the accused persons and that he did not see any injury on the person of any accused and he cannot say as to how the accused persons received injuries. He however denied possession of accused person on the land in dispute and also denied the suggestion that he and his family members went to the place of incident armed with lathi and country made pistol. He further stated that at the time of assault no other person was there. According to the record, this witness was recalled on 02.05.1984, when he proved the written report by stating that on 16.12.1979, his father Jamaluddin dictated the report in his presence to Abdul Gafur and then Abdul Gafur read out his report to his father (Jamaluddin) and thereafter his father put his thumb impression on the written report.

27. P.W.2 (Ashfaq Ahmad) is also an injured eye witness. He is son of first informant Jamaluddin and is brother of P.W.1 Riyazuddin. He allegedly received

gunshot injuries and other blunt weapon injuries in the aforesaid incident. His statement on oath was recorded on the date of the incident itself at about 07:45 P.M. by the Executive Magistrate after obtaining the certificate from the doctor that the injured is in a fit state to give statement and this statement is on oath. The aforesaid statement which is now to be treated as a previous statement reads as under:-

"अशफाकअहमद पुत्र जमाल उददीन आयु 25 वर्ष निवासी– धौरू टांज, थाना मोजीपुरा, जिला बरेली ने सशपथ बयान किया कि आज करीब दोपहर 1.30, 2 बजे अपने खेत पर काम कर रहा था फिर लाला जी सगीर अहमद पुत्र हाजी अब्दुल रहीम, अफजाल पुत्र सगीर अहमद छोटे मियॉ पुत्र सगीर अहमद, अड्डेपुर सगीर अहमद, पहलवान बुल्हड़ पुत्र नजीर अहमद, शकील अहमद उर्फ घुटवा पुत्र हाजी खलील मिस्टर आये फिर एक आफताब पुत्र इकबाल बताया आये। इन सब में से आफताब, अफजाल और बुहल्ड़ पहलवान के पास दोनाली बन्दूक थी एवं और भी थी। अफजाल ने गोली चलाई जो मेरे कुहनी और कोख पर छर्रे लगे। गोली और भी चली लेकिन मैं बेहोश हो गया मुझे नही पता कि किस किस ने चलाई। 3 आदमियों पर भाले और लाठी थी। खेत पर मेरे अलावा मेरे 2 भाई और एक बाप थे भाईयों का नाम खैर उददीन और राजउददीन है। इन लोगो के भी छर्रे लगे है। पहले बेहोश हो गया था जब होश आया तब भागा भागते समय दीखा की भाई वही पड़े हुये थे। हमारा इन से मुकदमा चल रहा था। हम नायब साहब के यहॉ से जीत गये, और फिर कलेक्टर साहब के यहॉ से भी जीत गये इसी रंजिश की वजह से इन्होने मेरे व मेरे घर वालो के गोली मारी है।

बयान सुनकर तस्दीक किया।

O.P. Saxena

Executive Magistrate

Certified that above mentioned pt. named Asfaq Ahmad

is in full sense to record his dying declaration

SD.-
10-5-86

28. During his examination in Court, P.W.2 (Ashfaq Ahmad) has corroborated the statement of P.W.1 Riyazuddin in each and every material aspect of the matter including manner of assault. Regarding manner of assault, he has corroborated P.W.1 Riyazuddin and has stated that when he and his family members reached the land in dispute, about 2-3 Biswa of the land had been ploughed by the accused persons with the help of the tractor. He stated that Khairuddin stood in front of the tractor about 6-7 paces away and accused persons were about 1-2 paces behind the tractor. He stated that Khairuddin received only one gunshot injury and died on account of that injury and that no other injury was received by him.

29. Upon being confronted with his previous statement, he stated that he does not remember as to whether he had given any statement to Magistrate in the hospital or to the police inspector. The statement recorded by the Magistrate was put to him to contradict his statement in Court but he expressed his inability to explain the contradictions and stated that he could not say as to how those contradictions occurred in his statement. He stated that first information report was dictated by his father in his presence at about 02:30 P.M. He denied the suggestion that informant side had caused injuries to accused persons. He stated that no accused had received any injuries in front of him.

30. It is relevant to mention here that the statement of P.W.2, which was recorded on 16.12.1979 itself, at about 07:45 P.M., by the Executive Magistrate in the shape of dying declaration, on oath,

was withheld by the prosecution. From the judgment of the learned trial court, it transpires that the stand of the prosecution before the trial court was that this statement is fabricated and was never given by the witness P.W.2. But, this statement was relied by the defense to question the reliability and genuineness of ocular testimony of P.W.2 (Ashfaq Ahmad) by showing various contradictions and improvements therein. The trial court summoned and examined the Executive Magistrate Sri Om Prakash Saxena as C.W.3 to prove the aforesaid statement of P.W.2 Ashfaq Ahmad and thus, it was exhibited as Ext.-C1. The defense also examined D.W.2 (Damodar Sahai), the then Peshkar of Court of learned C.J.M., Bareilly where the aforesaid statement was sent in a sealed cover.

31. P.W.3 Sub-Inspector Janardan Arora, the then Station Officer of police station Bhojipura has been examined by the prosecution regarding investigation part of the case. He was second Investigating Officer and had submitted the charge sheet. The first Investigating Officer Sub Inspector Sangram Singh had died and thereafter, the investigation was handed over to P.W.3 Janardan Arora. He has proved the police papers including various recovery memos prepared by first Investigating Officer by stating that he was acquainted with his signature and hand writing. He has proved Ext. Ka 2 to Ext. Ka 13. Apart from his formal evidence, he has stated in cross examination that he had investigated the issue regarding alibi of Sagir Ahmad and had interrogated various persons in this regard. However, after obtaining legal advice, he submitted charge sheet against Sagir Ahmad also. He has stated that in the site plan, about one fourth of total area of the land in dispute was found to be ploughed. He was confronted with the statement of PW1 Riyazuddin and PW2 Ashfaq Ahmad recorded under section 161 of Cr.P.C., upon which he stated that in their statement, it was mentioned that *"Taeed FIR karte hue bataya"* and in the statement of Ashfaq Ahmad recorded under section 161 Cr.P.C. that *"Maine ek bayan Magistrate Sahab ko bhi aspatal mein jakhmi halat mein diya"*.

32. The trial court also summoned and examined the scribe of the first information report, namely, Abdul Gafur as C.W.1, who stated, in his examination-in-chief, that Jamaluddin had dictated the first information report to him and he wrote exactly the same as was dictated by Jamaluddin. After writing the written report, he read it over to Jamaluddin and thereafter Jamaluddin put his thumb impression on it. In his cross examination, he has stated that first informant Jamaluddin and Ashfaq (injured witness) had come for writing the first information report and he did not see Riyazuddin, Khairuddin and Akhlaq as they did not come. He has also stated that neither he went to the police station nor police approached him thereafter.

33. The trial court further examined Dr. J.N. Bhargava, C.W.2, who has proved the post mortem report and has stated about the ante mortem injuries mentioned in the post mortem report. He has stated in his cross examination done by State Counsel that injury nos. 2,3 & 5 are not possible from fire arm and they could be caused by collusion with some heavy object, such as lathi or butt of a gun. With regard to fire arm injury i.e. injury no.4, he has stated that this injury had blackening and could have been caused by gun shot

fire from within a distance of 4 feet, while injury no.1 could have been caused from a much greater distance. He also could not tell whether injury no.4 was caused by fire from country-made pistol or gun, which according to him, could be told by Ballistic Expert. He has denied the suggestion that injury no.5 may be possible by wheel of some vehicle.

34. The trial court further examined C.W.3 Om Prakash Saxena, Executive Magistrate, who had recorded the statement of injured Ashfaq Ahmad as dying declaration. He stated that the aforesaid statement was recorded on 16.12.1979 at about 07:45 P.M. Before recording the statement he had asked the doctor as to whether the injured is in fit state of giving statement and he had also obtained the certificate of the Emergency Medical Officer on duty in this regard and only then, he recorded the statement of Ashfaq Ahmad. He has also stated that the statement was recorded by him as was stated by the injured and at the time of recording of statement, no other person except him and injured were present. He has denied the suggestion of the state counsel that the aforesaid statement was concocted by him with the help of doctor.

35. Now, in the light of the aforesaid material, the court proceeds to examine the prosecution case and the submission made by defense as well as by the learned Addl. Govt. Advocate. The first submission of the learned counsel for the accused appellant is that both the prosecution witnesses are wholly partisan and are inimical and the independent persons who are named in the first information report as eye witnesses have been withheld and, therefore, in these circumstances, the tainted evidence of P.W.1 and P.W.2 is liable to be rejected. In order to appreciate this plank of submission, the position of law which is now well settled by a catena of decisions of Hon'ble Apex Court may be recapitulated through the observations of their Lordships of Supreme Court in the case of **"State of U.P. vs. Ballabh Dass"** , *AIR 1985 SC 1384,* which are as under:

"There is no law which says that in the absence of any independent witnesses, the evidence of interested witnesses should be thrown out at the behest or should not be relied upon for convicting an accused. What the law requires is that where the witnesses are interested, the court should approach their evidence with care and caution in order to exclude the possibility of false implication. We might also mention that the evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence. It may also be mentioned that in a faction ridden village, as in the instant case as mentioned by us earlier, it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable witnesses".

36. Without burdening this judgment by citing further case-laws, suffice to say that statement of a prosecution witness, whether independent or related to first informant or deceased, has to be tested on its own strength in the light of evidence available on record.

37. In the present case both the parties, first informant as well as the accused, have sought to demonstrate that they were ploughing their own field. The

defense case is that the informant's party was the aggressor and the incident did not occur in the manner alleged by the prosecution. On the other hand, the prosecution case is that time and place of occurrence and the presence of accused-appellants are not only proved but also admitted and the injuries of the accused persons are superficial in nature and, therefore, the prosecution has fully proved its case against the accused. The trial court has concluded that the first informant was in possession of the land in dispute and the accused persons were aggressor. In the above backdrop, the evidence has to be considered and analyzed by this court.

38. At the very outset, it may be noticed that the law with regard to burden of proof is well settled that the initial burden is upon the prosecution to prove its case beyond reasonable doubt and it never shifts. This burden has to be discharged in totality and the prosecution cannot take shelter of any weakness of the defense case. It is useful to quote the observations made in the case of ***Woolmington v. Director of Public Prosecution", 1935 AC 462,*** which is as follows:-

"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exceptions. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge and where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

39. In the case of ***Sharad Birdi Chand Sharda v. State of Maharashtra, AIR 1984 SC 1622,*** their Lordships of the Supreme Court observed as follows:-

"It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this : where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case the same could be cured or supplied by a false defense or a plea which is not accepted by a court."

40. First of all, the court proceeds to examine the origin, motive and manner of assault as stated by both the prosecution witnesses. In this respect, the prosecution case as well as defense of accused persons revolves around the issue of possession of the land in dispute and the right and entitlement of the parties to defend it. In the first information report, it was specifically stated by the first informant Jamaluddin that he and his sons including the deceased Khairuddin were ploughing their field (land in dispute) and at that time the accused persons came and started ploughing the field with their tractor. This

fact was reiterated by P.W.2 in his previous statement recorded by Executive Magistrate. However in their statement recorded during trial, the P.W.1 and P.W.2 started saying that the first informant and his sons including the P.W.1 and P.W.2 were ploughing the field of Sumere Kurmi, which was taken by them on lease (batai) and this field is situated at a distance of about 100-150 paces from the field in dispute. In this regard, a specific question was put to P.W.1 in his cross examination, upon which he stated that the fact that his father and they were ploughing the field in dispute is wrongly mentioned in the first information report and he cannot say as to how this mistake occurred. He even stated that, on the next day of the incident, when his statement was recorded by the Investigating Officer, under Section 161 Cr.P.C, the first information report was placed before him but he did not disclose to the Investigating Officer that this fact was incorrect. On the other hand, from the statement of Investigating Officer P.W.3 (Janardan Arora), it is clear that P.W.1 had made his statement under Section 161 Cr.P.C. approving the version of first information report. P.W.-1 further stated in his re-examination that the first information report was dictated and written in his presence and thereafter it was read over by the scribe Abdul Gafur (C.W.1) to the first informant in his presence. From the above discussion, it is obvious that this deviation is deliberate and intentional and has not been explained by P.W.1 in any plausible manner. It assumes importance when this court peruses the statement of P.W.1 (Riyazuddin), in his cross examination, that on two earlier occasions, his father Jamaluddin had filed two criminal complaints against Sagir Ahmad and other co-accused but both were dismissed and that the land in dispute was initially mutated in the name of Smt. Rafikan and thereafter name of Sagir Ahmad was mutated in her place and the same continues. He has further admitted that during consolidation operation the land in dispute was allotted to Sagir Ahmad and Chak was also carved out in his name though he had filed revision against the orders passed by sub-ordinate Consolidation Courts. After this admission by P.W .1, the claim of the first informant and the prosecution witnesses that they were in possession of the land in dispute and the case was decided in their favour becomes extremely doubtful because when it is admitted that Chak has been carved out in favour of the accused, it would be deemed that the accused entered into exclusive possession. Unfortunately, the trial court did not consider and discuss the statement of prosecution witnesses properly while deciding the issue of possession in favour of first informant. After examining the documentary evidence filed by the prosecution i.e. Exhibit Ka-19, Ka-20, Ka-21 & Ka-22 read with the admission of prosecution witnesses in their cross examination, it is very difficult to conclude that the first informant was in possession of the land in dispute at the time of incident. Ext. Ka-19 is a certified copy of the order of the Asst. Collector/Tehsildar, Bareilly dated 16th March, 1970 directing the name of Jamaluddin to be mutated over the land in dispute. However perusal of the aforesaid order shows that in his cross examination in the aforesaid case of mutation, the P.W.1 Jamal (first informant Jamaluddin) admitted at internal page no.2 that he did not move any application for expunction of the name of Illias @ Mohammad Ismail during consolidation operation. Similarly P.W.2 of that mutation case Mohd. Ismail

also admitted in his cross examination, which has been discussed in internal page no.3, that the applicant did not file objection during consolidation operation. The aforesaid admission of the prosecution witnesses Jamaluddin and Mohd. Ismile made in those proceedings reflecting that consolidation operations had already started and were going on and the informant had not claimed any right or title on the land in dispute in consolidation operations is of great significance.

41. Ext. Ka-22 is the copy of the search application, which shows that Jamaluddin filed an appeal against the order dated 27th January, 1984 passed by A.C.O. Fatehganj, wherein stay order was passed. This also shows that the order passed by ACO, Fatehganj was in favour of Sagir Ahmad against which Riyazuddin etc. had filed an appeal before the Settlement Officer Consolidation,Bareilly. P.W.1 has admitted in his cross examination that the land in dispute was initially mutated in the name of Rafikan and thereafter name of Sagir Ahmad was mutated in her place and the same is still continuing. He has further admitted that during consolidation proceeding, the land in dispute was allotted to Sagir Ahmad and Chak was also carved out in his name and he filed revision against the order passed by Subordinate Consolidation Courts. It will not be out of place to mention here that under the consolidation operation, the rights and title in respect of agricultural land falling in the consolidation area have to be decided by the Consolidation Officer and jurisdiction of any other court is barred. Against the order of Consolidation Officer, the appeal lies before the Settlement Officer Consolidation and thereafter a revision lies before Deputy Director Consolidation. Obviously, Sagir Ahmad had won the case in the court of Consolidation Officer therefore revision was filed by the informant party, as admitted. In view of this admission of P.W.1, the claim of the first informant and the prosecution witnesses that the case was decided in their favour and they were in possession of the land in dispute on the date of incident is unworthy of acceptance. Unfortunately, the trial court did not consider and discuss this statement of P.W.1 (Riyazuddin), while deciding the issue of possession of land in dispute and committed error by holding that at least the informant party was in joint possession as co-owner when, otherwise, by carvation of Chak, co-ownership and joint possession ceases. In these circumstances, the prosecution case as set forth in the first information report and in the previous statement of injured P.W.2 (Ashfaq Ahmad), to the effect that they were ploughing their own field in dispute, when accused persons arrived there and assaulted, was changed at the stage of trial, by claiming that they were ploughing the field of Sumere Kurmi. This court is thus of the firm opinion that the prosecution has miserably failed to prove that the land in dispute was in exclusive, actual and physical possession of the first informant. Rather, it appears to us that accused party were in possession and were ploughing their field when the incident occurred.

42. When we examine the statement of P.W.1 with regard to manner of assault, we find that it is in conflict with medical evidence as several blunt weapon injuries have been found on the person of the deceased, which have not been explained at all. In the cross examination of C.W.2, Dr. J.N. Bhargava, conducted by the State Counsel, he has categorically stated in para no.4 of his deposition that injury nos.

2, 3 & 5 are not possible by fire arm and are result of hard and blunt object. None of the witnesses including P.W.1 and P.W.2 have stated that the deceased was assaulted with any blunt weapon. On the other hand, it has been categorically stated that the deceased received only one gunshot injury and died instantaneously. The injury nos. 2, 3 & 5 are not possible by falling down as the place of incident is an agricultural field. Moreover, both the underneath bones in respect of injury no.5 were found fractured. This is possible only by multiple blows of some blunt weapon, that too with full force. Even with regard to gunshot injuries, the witness C.W. 2, Dr. J.N. Bhargava, has categorically stated that injury no.4, which is gunshot injury contains blackening and could have been caused from a distance of four feet, while the P.W.1 has stated that the distance of deceased with the assailants was much more. The deceased was standing in front of tractor, 4-6 paces away, whereas the assailants were few paces behind the tractor. It is also noteworthy that the accused Sagir Ahmad, who allegedly caused fire arm injury to deceased, was allegedly armed with a gun. The dispersal of the pellets in injury no.4 is of such nature and in such area (30 cm x 27 cm) that it is not possible, if the shot is fired from a gun within 4 feet. According to the medical jurisprudence (Modi), the dispersal of the pallets in inches is equal to the distance of fire arm in yards. In these circumstances the gun causing such dispersal should have been fired from a distance of at least 12 yards but in that case blackening would not have been there in the wound, which is possible only when the distance of fire arm would have been few feet away, say about 4 feet, as stated by C.W.2. At this stage, it would be useful to notice the writing of Dr. N.K. Modi in his famous treatise ***Modi's Medical Jurisprudence and Toxicology, 21st Edition,*** at page no. 269, with regard to the effect produced by small shots fired from a short gun and the mode of calculation of distance of fire arm. The relevant portion is extracted below:

"At a distance of one to three feet small shot make a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun, as the shot enter as one mass, but are scattered after entering the wound and cause great damage to the internal tissues. The skin surrounding the wounds is blackened, scorched and tattooed with unburnt grains of powder. On the other hand, at a distance of six feet the central aperture is surrounded by separate openings in an area of about two inches in diameter made by a few pellets of the shot which spread out before reaching the mark. The skin surrounding the aperture may not be blackened or scorched, but is tattooed to some extent. At a distance of twelve feet the charge of shot spreads widely and enters the body as individual pellets producing separate openings in an area of five to eight inches in diameter depending on the choke, but without causing blackening, scorching or tattooing of the surrounding skin. At a distance of about 50 feet a pattern measuring about 14 inches from a fully choked barrel and about 28 inches from an unchoked barrel are produced and at about 100 feet the spread pattern on the target is about 30 inches from a fully choked barrel and 50 inches from an unchoked one. A rule of thumb in long usage is that the diameter of the spread of the shot pattern on the skin in inches is roughly equal to the distance from the muzzle in yards "

43. It is well settled by a catena of decisions that it is the duty of the prosecution to prove, and, if necessary, by examining an expert, that the particular injury has been caused in the manner alleged by the prosecution, otherwise, the accused may be entitled to the benefit of doubt. In the case of ***Mohinder Singh vs. State AIR 1953 SC 415,*** The Hon'ble Court observed as under:-

"In a case where death is due to the injuries or wounds caused by lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of the case. It was found doubtful whether the injuries which were attributed to the accused were caused by a gun or a rifle. It seemed more likely that they were caused by a rifle than a gun, and yet the case of the prosecution was that the accused was armed with a gun and in his examination it was definitely put to him that he was armed with the gun."

44. Now comes another aspect of the case that is with regard to injuries sustained by some of the accused persons and the effect of its non-explanation by the prosecution. The legal position in this regard has been meticulously examined and decided in various pronouncements of the Hon'ble Apex Court. In the case of ***Laxmi Singh vs. State of Bihar (1976) 4 SCC 394,*** the Hon'ble Supreme Court after considering the various earlier cases observed as under:-

12. ....in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

45. In the case of ***Dashrath Singh vs. State of U.P. (2004) 7 SCC 408,*** the Apex Court observed as under:-

"The injuries of serious nature received by the accused in the course of the same occurrence would indicate that there was a fight between both the parties. In such a situation, the question as to the genesis of the fight, that is to say, the events leading to the fight and which party initiated the first attack assumes great importance in reaching the ultimate decision. It is here that the need to explain the injuries of serious nature received by the accused in the course of same occurrence arises. When explanation is

given, the correctness of the explanation is liable to be tested. If there is an omission to explain, it may lead to the inference that the prosecution has suppressed some of the relevant details concerning the incident. The Court has then to consider whether such omission casts a reasonable doubt on the entire prosecution story or it will have any effect on the other reliable evidence available having bearing on the origin of the incident. Ultimately, the factum of non-explanation of injuries is one circumstance which has to be kept in view while appreciating the evidence of prosecution witnesses. In case the prosecution version is sought to be proved by partisan or interested witnesses, the non-explanation of serious injuries may prima facie make a dent on the credibility of their evidence. So also where the defence version accords with probabilities to such an extent that it is difficult to predicate which version is true, then, the factum of non-explanation of the injuries assumes greater importance. Much depends on the quality of the evidence adduced by the prosecution and it is from that angle, the weight to be attached to the aspect of non-explanation of the injuries should be considered. The decisions abovecited would make it clear that there cannot be a mechanical or isolated approach in examining the question whether the prosecution case is vitiated by reason of non-explanation of injuries. In other words, the non-explanation of injuries of the accused is one of the factors that could be taken into account in evaluating the prosecution evidence and the intrinsic worth of the defence version."

46. In this case, P.W.1 has not explained the injuries sustained by the accused persons and on being asked he categorically stated that he saw the accused coming armed with fire arms and lathis but informant party did not pick any lathi or gun and they neither used any weapon in their defense nor caused any injury to any accused.

47. That apart, the Investigating Officer recovered the upper part of Ballam from the place of occurrence and made a memo, which is Ext. Ka- 6. But P.W.-1 has stated that he did not see any accused armed with Ballam. From the above discussion, this court is of the view that even if the presence of P.W.-1 is accepted at the place of occurrence but this witness cannot be wholly reliable, as he appears to be suppressing material facts.

48. Now we proceed to appreciate the evidence given by P.W.2. The statement of P.W.2 is in line with the statement of P.W.1. Like P.W.1, he has deviated from the version of the first information report by stating that he and his brothers including his father were ploughing the field taken on lease from Sumere Kurmi. He also disclosed that Khairuddin was fired upon by Sagir Ahmad from his gun and he died instantaneously after gunshot injury and that the deceased Khairuddin had received only one gunshot injury and no other injury by any other weapon. When he was confronted with his earlier statement recorded by C.W.3, Om Prakash Saxena, Executive Magistrate, he stated that he could not remember as to whether his statement was taken by the Magistrate or not. He could not remember as to whether his statement was recorded in police station or not. He expressed his inability to explain the other contradictions that appeared in his previous statement with the version given in court.

49. In the opinion of this court, feigning ignorance by this witness about

recording his statement by the Investigating Officer and by the Executive Magistrate is deliberate to avoid rendering explanation to the contradictions that appeared in his previous statement with the statement in court. Under the circumstances, this witness is also not wholly reliable inasmuch as he is suppressing facts and is making improvement from his earlier version. In fact, the trial court has noticed this aspect and while discussing the statement of this witness, the trial court had observed, at internal page no. 26 of trial court judgment, as follows:

"Even if P.W.2 is excluded from the evidence due to the said inconsistency, the incriminating evidence of P.W.1 still remains on record who consistently and substantially corroborated the prosecution. The testimony of P.W.1 being an injured witness is enough to sustain the conviction of the accused. Under these circumstances, the inconsistencies in the dying declaration/previous statement of P.W.2 (Ext. Kha-3) and oral evidence of P.W.2 are not so important and material as to throw away the whole prosecution story which is adequately corroborated in material particulars by the reliable evidence of PW1."

50. We are not in agreement with the view of the trial court that PW1 is wholly reliable. Rather, we are of the view that both the prosecution witnesses P.W.1 (Riyazuddin) and P.W.2 (Ashfaq Ahmad) are not wholly reliable as they have lied on material particulars such as: (i) the possession of the land in dispute; (ii) the genesis of the incident; and (iii) the nature of the firearm used and the place from where it was used to inflict firearm injury on the deceased. In addition to that they have not submitted explanation for hard and blunt object injuries found on the body of the deceased and the injuries found on the body of the accused.

51. At this juncture this Hon'ble Court is reminded of the golden rule of appreciation of evidence propounded by the Hon'ble Apex Court in case of ***Vadivelu Thevar v. State of Madras AIR 1957 SC 614,*** in which while classifying the witnesses in three categories, namely (i) wholly reliable, (ii) wholly unreliable, (iii) neither wholly reliable nor wholly unreliable, the Hon'ble Court observed that in the 3rd category of cases the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. In the present case, no such corroboration to the testimony of P.W.1 (Riyazuddin) and P.W.2 (Ashfaq Ahmad) is available from any other independent reliable source or circumstances. It may be noticed that the contents of the first information report which has been used by the trial court for corroboration of the testimony of the witnesses was improper because the informant had not turned up in the witness box and therefore its content could not have been read as substantive evidence, particularly, when it was not demonstrated that it could be admissible in evidence as his dying declaration.

52. In the case of ***Gautam Lal vs. State of U.P. (1981) CrlJ 1187,*** the Hon'ble Court observed as under:-

"11. It is now a well settled principle of criminal law that an accused can be convicted only when on the evidence produced the court is in a position to come to a definite conclusion beyond the possibility of reasonable doubt

that the accused committed the offence with which he stood charged. No conviction can be based on mere possibility. Nor is it permissible for the court to speculate as to what had really happened. If both the parties come to the court with untrue facts and conceal the real truth they have themselves to blame and they cannot expect the court to arrive at any definite conclusion on the unreliable evidence produced either for or against either of the parties. In such a case the court will certainly attempt to separate the grain from the chaff but only if it is possible to do so. In certain circumstances it may be found to be impossible task. That is particularly so when the evidence of both the parties is unreliable and cannot be accepted even in part with safety. In such a case it is not open to the court to make out a third case which is different from the case set up by both the parties. In a situation like this the court can only say that the matter is doubtful in the extreme and it is not possible to arrive at any conclusion one way or the other."

53. Although generally the injured witnesses do not leave the real culprits and falsely implicate innocent persons but at the same time, there may be cases where the injured persons have themselves committed wrong and out of fear of disclosure about their own wrong doing, they twist the real facts to demonstrate their innocence by introducing incorrect version of the incident. Moreover, they may implicate innocent persons too, particularly, where there is old standing enmity. The court is conscious of the fact that the present case is a case of day light incident and there are witnesses who have suffered injuries and therefore their presence at the place of occurrence cannot be doubted in a slipshod manner. However, in the case of ***Balak Ram v. State of U.P. (1975) 3 SCC 219,*** the Apex Court observed that the presence of injuries on the person does not give any guarantee about his truthfulness nor it could be an insurance against the natural human failing of implicating innocent persons along with the guilty. Thus, presence of an injured witness at the place of occurrence may be certified by his injuries but whether the said witness is truthful and his testimony is reliable, would have to be tested on the weight of other evidences/circumstances brought on record.

54. In the present case, the prosecution witnesses have admitted the rivalry and litigation in between the two families. P.W.1 has also admitted in his cross examination that on earlier occasion two criminal complaints were filed by his father Jamaluddin (first informant) against Sagir Ahmad and other accused persons, which were dismissed later. In these circumstances, keeping in mind the various aspects noticed above, which discloses that the prosecution has not been able to satisfactorily establish that the incident had occurred in the manner alleged, as also, the possibility of false implication of some of the innocent persons on account of exaggeration, the Court being not able to separate the grain from the chaff, would have to accord the benefit of doubt to all the surviving appellants, particularly, when we notice that as per the prosecution evidence a solitary gun shot was fired at the deceased which was attributed to Sagir Ahmed, who expired during trial, and three persons, namely, Aftab Ahmed (surviving appellant no1), Chottey Mian @ Afsar Ahmed (who died during appeal) and Laeek Ahmed (surviving appellant no.2), are stated to

have fired at Ashfaq Ahmed (PW2) as against which he had suffered only two gun shot injuries and in his previous statement, which was recorded as dying declaration, PW2 attributed the firearm injury sustained by him to Afzal Ahmed. Rest of the injuries are only of hard and blunt object which may be attributable to the other two surviving appellants along with two others who have expired, but in what manner the incident unfolded, whether lathi blows were exchanged in protection of possession and, thereafter, assailants, with firearms, joined the fray, being not clear from the various shortcomings noticed by us in the prosecution case, all the surviving appellants would be entitled to the benefit of doubt.

55. We may put on record that no doubt, the cross case initiated by the accused persons resulted in acquittal but it will not make any difference as in a criminal case the burden of proof rests upon the prosecution. If the accused establishes that the accused also sustained injuries, in that very incident and the same has not been properly explained by the prosecution, the court may draw an inference that the prosecution witnesses are not coming with clean hands and are lying on a most important aspect of the case adversely affecting their reliability. This court is conscious of the legal position that in each and every case it is not obligatory upon the prosecution to explain even the superficial and simple injuries received by accused persons. But each case turns on its own facts. In the present case, this Court has found that the claim of the informant side that they were in possession of the disputed land appeared doubtful, as it was admitted by prosecution witness that the accused had got a Chak carved out in their favour. Thus, the possibility of the accused forming an unlawful assembly to plough their own field becomes doubtful. Secondly, injuries from hard and blunt object found on the body of the deceased has no explanation. Thirdly, the gun shot injury found on the body of the deceased could not have been from a gun, as alleged, but might have been from country-made pistol. Fourthly, the deceased had suffered hard and blunt object injuries of which there was no explanation in the prosecution evidence. All this throws serious doubt on the truthfulness of the prosecution case with regard to the manner in which the incident occurred and, consequently, it would have material bearing on the liability of each accused, particularly, by invoking the law relating to an unlawful assembly. Further the deviation of the prosecution case, from the first information report and also from the statement recorded during investigation, particularly, the previous statement of P.W.2 recorded by Executive Magistrate, gives rise to a reasonable doubt about the genuineness of prosecution version and throws possibility that initially the accused may have exchanged lathi blows with the informant party to defend possession and, later assailants with firearm joined them to overpower the other side. But as all these aspects could only be speculated upon, the benefit of doubt would have to go to the surviving accused-appellants.

56. In the result, the appeal of surviving appellants, namely, appellant no.1 (Aftab Ahmad); appellant no.2 (Laiq Ahmad); appellant no. 4 (Sukkha); and appellant no. 7 (Chhutwa @ Shakeel Ahmad) succeeds and is allowed. The impugned judgment and order of their

conviction and sentence is set aside. The appellant no.1 (Aftab Ahmad); appellant no.2 (Laiq Ahmad); appellant no. 4 (Sukkha); and appellant no. 7 (Chhutwa @ Shakeel Ahmad) are acquitted of all the charges. If they are on bail, they need not surrender.

57. Let a copy of this order along with record be sent to the court below for information and compliance.

(2020)1ILR 720

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1914 of 1997

Ram Gopal ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri R.B. Sahai, Sri Ajay Vikram Yadav, Sri Raghuraj Kishore, Sri Raja Singh

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

Criminal Law - Indian Penal Code -Sections 302, 380, 411 - Appeal against conviction.

Importance of motive in a circumstantial evidence.

It is only either intention or knowledge on the part of the accused which is required to be seen in respect of the offence of culpable homicide. (para 33)

The cases based on circumstantial evidence, motive plays an important role as it provides additional link to the chain of circumstances. Even absence of any motive or insufficiency of motive may not be relevant where proved circumstances are of such nature that it conclusively determines the guilt of accused. Therefore, motive has to be attached greater importance in cases based on circumstantial evidence, particularly when the circumstances proved are fluctuating in nature and the link sought to be established is not trustworthy or convincing. It is all about to what extent the evidence is able to create confidence in the mind of the court regarding correctness of the prosecution version. (para 34)

The prosecution version based on direct evidence disclosed use of axes and sickle by three accused persons, but the same has not been proved by eyewitnesses. (para 37)

There is not only delay in lodging FIR but also on evidence, the same appears to be ante-timed. The medical evidence also creates doubt with regards to time of death and that further casts doubt on the testimony and presence of the two eye-witnesses at the scene of occurrence.

The circumstances considered to give finding of guilt were not established by cogent and convincing evidence. What to say of missing chain, there was no chain and all the circumstances proposed to be relied upon was completely scattered incapable of leading to the only hypothesis of guilt. (para 42)

The appeal is allowed. (E-2)

List of cases cited: -

1. Pohalya Vs. St. of Mah., AIR 1979 SC 1949

2. Criminal Appeal No. 1482 of 2013, Yogesh Singh Vs. Mahabeer Singh

3. Charan Singh Vs. St. of U.P. AIR 1967 SC 520

4. Deepak Chandrakant Patil Vs. St. of Mah., 2006(3) Supreme 162 (SC)

5. B.A. Umesh Vs. St. of Karn. (2011) 3 SCC 85 412

6. Bhimsingh Vs. St. of Uttarakhand, (2015) 4 SC C 281

7. Bhagwan Dass Vs. State (NCT of Delhi), (2011) 6 SCC 396

8. Badam Singh Vs. St. of M.P.; AIR 2004 SC 26

9. Sheo Shankar Singh Vs. St. of Jharkhand; 2011(74) ACC 159 (SC)

10. Ravinder Kumar Vs. St. of Punj.; 2001 (2) JIC (SC)

11. St. of H.P. Vs. Jeet Singh; (1999) 4 SCC 370

12. Pannayar Vs. St. of T.N. by Inspector of Police; AIR 2010 SC 85

13. G. Prashwanath Vs. St. of Karn.; AIR 2010 SC 2914

14. Jagdish Vs State of M.P.; 2009 (67) ACC 295 (SC)

15. Ujjagar Singh Vs St. of Punjab; AIR 2008 SC (Supp) 190

16. Nagaraj Vs. St., (2015) 4 SCC 739

17. Wakkar Vs. St. of UP, 2011 (2) ALJ 452 (SC)

18. Babu Vs. St. of Kerala, (2010) 9 SCC 189

19. Sanjeev Vs. St. of Hary., (2015) 4 SCC 387

20.Ram Narain PopliVs. CBI, (2003) 3 SCC 641

21.Vallabhaneni Venkateshwara RaoVs. St. of A .P., 2009 (4) Supreme 363

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

1. Heard Sri Ajay Vikram Yadav, learned counsel for the appellant, Sri L.D. Rajbhar (AGA) and Sri Prem Shanker Mishra (AGA) for the State and perused the record.

2. This criminal appeal has been preferred against the judgment and order dated 15.09.1997 of Vth Additional Sessions Judge, Fatehpur, in ST No. 493 of 1993, arising out of Case Crime No. 181 of 1993, under Sections 302, 380, 411 IPC, Police Station Lalauli, District Fatehpur, whereby the accused-appellant Ram Gopal has been convicted and sentenced for the offence under Section 302 IPC for life imprisonment, for the offence under Section 380 IPC for six months rigorous imprisonment and for the offence under Section 411 IPC for three months rigorous imprisonment. The co-accused persons Rakesh Yadav and Jagjeet have, however been acquitted from the aforesaid charges.

3. Brief facts of this case is that the informant Om Prakash on 06.08.1993 at about 4:00 PM lodged a first information report by means of a written report in the Police Station Lalauli for the offence under Section 302 IPC against unknown persons. Accordingly, on 5/6.08.1993 at any time in the night his father Ram Vishal aged about 55 years was sleeping on the pumping set in village Benu for the purpose of security. The informant had gone outside the village in some relation. In the night, certain unknown persons cut the throat of his father and committed his murder. When he came back from the relation and saw the dead body of his father, he got the written report inscribed by Sushil Kumar, resident of Sahbajpur, Police Station Bindki and lodged the first information report. On the basis of first information report, the police started investigation, prepared the inquest report, got the postmortem of the dead body conducted. Statements of the witnesses were recorded. On 06.08.1993, one blood stained towel of the deceased, a piece of blood stained bed sheet, one rope which was 22 feet long and one pliers was taken

into possession by the Investigating Officer and the rope and plier was handed over in the custody of the informant. The Investigating Officer on 09.08.1993 recorded the statement of Balgovind and Kishanpal who stated that they saw in the torch light accused persons Ramgopal Yadav, Jagjeet and Rakesh assaulting the deceased by axes and sickle in the tube well room and thereafter, they went back from there. They saw accused Ramgopal taking tube well band on his shoulder. The IO took into possession the torch from witness Bal Govind and again delivered back to him. On the basis of the statement of the witnesses, on 17.8.1993, accused Ram Gopal Yadav was arrested and he gave confessional statement that with co-accused Rakesh and Jagjeet, on the time, place and date of incident, committed murder of Ramvishal. On his instance, the sickle used as weapon in the murder and a pair of pumping set band was recovered before the witnesses from the sugarcane field of Medh Singh. The sickle was blood stained and one *balist* and six *angul* long (about 12 inches), fixed in a 7 inches wooden butt and the band of pumping set was 57 feet long and on the one end thereof, an iron bolt was fixed. On 22.08.1993, the informant came and disclosed to the police that the rope which was given in his custody on 06.08.1993 belonged to accused Ram Gopal Yadav and therefore, the same was also taken into possession. The Investigating Officer prepared the site map from where the weapon used in the commission of the offence and the tube well band was recovered. He also prepared the site map where the offence was committed. The blood stained earth and plain earth were taken from the place of occurrence. The blood stained earth, piece of bed sheet, towel, sickle, underwear of the deceased were sent for chemical examination to the Forensic Science Laboratory. On the basis of statement of the witnesses, recovery of incriminatory articles on the instance of accused Ram Gopal and finding sufficient evidence against the accused persons, charge sheet was submitted by the police against them for the offence under section 302/380/411 read with section 34, IPC.

4. Charges were framed against all the accused persons, including the convicted appellant, for the offence under Sections 302/34 and 380 IPC and against convicted appellant alone for the offence under Section 411 IPC. The accused persons denied the charges and claimed trial.

5. The prosecution examined as many as seven witnesses. PW-1 Om Prakash is informant of the case, PW-2 Bal Govind and PW-3 Krishna Pal are eye witnesses and PW-4 is Hari Om is witness of motive for the commission of the offence. PW-5 is Dr. R.K. Mishra, who conducted postmortem of the dead body. PW-6 is SI Ram Pyare Mishra, Head Moharrir who has written the chik FIR. and PW-7 is SI J.P. Yadav, who is Investigating Officer of the case. The witnesses have proved the written report Ext. Ka-1, recovery memo of weapon (sickle) used for murder, recovery memo of tube well band Ext. Ka-2, memo of blood stained clothes Ext. Ka-3, recovery memo of rope Ext. Ka-4, delivery memo of the same Ext. Ka-5, delivery memo of torch Ext. Ka-6, post-mortem report Ext. Ka-7, chik FIR Ext. Ka-8, GD report dated 06.08.1993 Ext. Ka-9, inquest report Ext. Ka-10, photo dead body Ext Ka-11, form 13 Ext. Ka-12, letter to CMO Ext. Ka-13, letter to RI Ext. Ka-14, sample seal Ext. Ka-15, recovery memo of blood stained

and plain earth Ext. Ka-16, site map Ext. Ka-6/1, site map recovery of weapon of crime Ext. Ka-6/3, GD report No. 30 of 17.08.1993 Ext. Ka-19, charge sheet Ext. Ka-20 and forensic science laboratory report Ext. Ka-21.

6. The statement of the accused persons was recorded under Section 313 Cr.P.C. who have stated that they were falsely implicated in the present case and the witnesses are giving false statement on account of enmity. They, however, did not give any evidence in defence.

7. After hearing the prosecution and defence, and perusing the evidence available on record, the learned trial court passed the impugned judgment convicting and sentencing the accused-appellant. The learned trial court, however, acquitted the accused persons Rakesh and Jagjeet from the aforesaid charges. Feeling aggrieved by the same, the present criminal appeal has been filed by the convicted-appellant.

8. The accused-appellant Ram Gopal has challenged the impugned judgment of conviction and sentence on the ground that the same is against the weight of evidence on record. No offence is made out against the appellant. The sentence awarded is too severe, therefore, the impugned judgment is liable to be set aside and the appellant is entitled for acquittal.

9. The submission of the learned counsel to the appellant is that the prosecution case was based on direct evidence of PW-2 and PW-3 who were examined as eye-witnesses of the incident, but they turned hostile and did not support prosecution version. Even then placing reliance on their testimony, the learned trial court converted the prosecution case into that of case based on circumstantial evidence and relying on single circumstance of accused coming out from the room of deceased in which the deceased was found dead, the learned trial court convicted and sentenced the accused-appellant. The motive for the offence is missing and there is no corroboration by any other evidence nor the alleged circumstantial evidence was so positive and exclusive on the basis of which a conclusive finding of guilt was possible. The learned counsel has referred to the judgment in **Pohalya v State of Maharashtra, AIR 1979 SC 1949** and has submitted that the chain of circumstances was not complete to lead to the hypothesis of guilt. The learned counsel has also pointed out the discrepancy in the evidence and lapse in investigation On the other hand, the learned AGA has submitted that the circumstance which has been relied upon by the learned trial court amounts to the evidence of last seen seen and the discrepancies are of minor nature having no bearing on the prosecution case. He has further submitted that material witnesses have been examined in support of prosecution case and it is not necessary to examine all witnesses as, what is important is to examine witnesses who render support and not those who are reluctant to give evidence. The learned AGA has referred to the judgment in Criminal Appeal No. 1482 of 2013, **Yogesh Singh v Mahabeer Singh** decided by the Supreme Court by judgment dated 20.10.2016 to support his contention.

10. We went through the evidence on record and perused the impugned judgment. It has to be examined what was the prosecution version, what evidence it proposed to adduce to bring home the charges against the accused, what was the

evidence adduced against the convicted appellant and whether the same was sufficient to hold the accused-appellant guilty beyond shadow of any doubt. Now, before proceeding further, it appears necessary to look at the evidence adduced by the prosecution.

11. PW-1 Om Prakash (informant) has stated that the deceased Ram Vishal was his father who was aged about 55 years at the time of occurrence. He had gone to his sister's home situated in Police Station Mau, where he was informed by the villagers that his father had been killed in the night whereupon he came back to his village. His father was sleeping in the night of 5/6.08.1993 on the pumping set. In the night, some unknown persons caused injuries, cut away his neck from body and killed him. He got the written report inscribed by one Sushil Kumar and signed it after hearing the same. Proving the written report as Ext. Ka-1, he has stated that the pumping set band was also stolen. Ram Gopal was arrested from near Benu who confessed and said that he could get the stolen articles and sickle (weapon of crime) recovered. Thereafter, accused Ram Gopal with him and police reached to the sugarcane field and got the sickle and band set recovered which he had concealed below the grass. The pumping set band was about 57 to 58 feet long. The witness proved the recovered sickle and pumping set band as Material Ext.-1 and Material Ext.-2. He also stated that the said articles were recovered in the afternoon and the recovery memo Ext. Ka-2 was prepared which was read over and he and other witnesses signed over it. He also stated that the Investigating Officer took in possession the blood stained towel and piece of bed sheet Material Exts. 4 and 5 and prepared the recovery memo Ext. Ka-3. He has also stated that a 22 feet long rope was also recovered, the recovery memo of which was prepared by IO on which he put his signature which is Ext. Ka-4 and the same was given to him. He has further stated that the IO recorded his statement firstly in the police station and when sickle was recovered, his statement was again taken by him. The dead body was sealed by police and was sent for postmortem.

12. Explaining the motive, PW-1 stated that before the commission of offence, on 04.08.1993, a quarrel took place between his father and accused persons Ram Gopal, Jagjeet and Rakesh as they were getting his field grazed by their animals and when his father prevented them, they threatened him with dire consequences. At the time of quarrel, Hari Om was present there. He has stated that for this reason, the accused persons killed his father. The accused persons belonged to village Ganeshpur and their field is close to his field. All these three accused persons were friends and he knew them very well.

13. PW-2 Bal Govind (eye witness) has stated that he knew Ram Vishal of his village and accused persons Ram Gopal, Rakesh and Jagjeet of neighboring village Ganeshpur. Accused persons were closely associated with each other, though not relatives. Two and half years before, he and Kishan Pal were sleeping on their tube well and at 1 AM in the mid night, they heard some sound and slow voice from the western side where the tube well of Ram Vishal was situated. They reached to the tube well where they saw in the light of torch that accused Ram Gopal was carrying the tube well band on his shoulder with a sickle in his hand and was

going out from the room of Ram Vishal. The witness has stated that he did not see the accused persons Ram Gopal, Rakesh and Jagjeet causing death of Ram Vishal. He saw that besides Ram Gopal, two more persons were fleeing in a fast speed but he could not recognize them. The witness was declared hostile by prosecution. When he was cross-examined by prosecution, he denied his statement given to IO under Section 161 Cr.P.C. and stated that he had only stated that he saw Ram Gopal taking band and sickle and he also saw the dead body of Ram Vishal. He has stated that he lit the torch towards the tube well of Ram Vishal, the door of the tube well was open and two persons were coming out. Immediately, thereafter, they entered into the room. On the next day, he said about it to Om Prakash.

14. PW-3 Krishna Pal (eye witness) also stated that he did not see the accused persons causing death of the deceased. The incident took place in the mid night at about 01:30 AM and he and his grand father Bal Govind were sleeping on tube well. Hearing some sound, he and his grand father went to the tube well of Ram Vishal and saw Ram Gopal coming out, carrying tube well band and sickle. When they went inside, they found that and Ram Vishal was lying dead and his head was separated from the body from neck. This witness has been declared hostile and on being cross-examined, he has denied his statement given to IO under Section 161, Cr.P.C.

15. PW-4 Hari Om is the witness of motive and has stated that at about 12:00 to 12:30 PM, a day before the incident, when his animals were grazing near the tube well of Ram Vishal, accused Ram Gopal came with his animal and got the animals entered into the field of Ram Vishal, on which he objected, whereupon both started quarreling. Ram Gopal went away threatening Ram Vishal. On the next day Ram Vishal was killed.

16. PW-5 Dr. R.K. Mishra conducted the postmortem of the dead body of Ram Vishal on 07.08.1993 at about 3:00 PM. He has proved the post-mortem report as Ext. Ka-7 and has stated that following injuries were found on the body of the deceased :-

(1) Incised wound 15 cm x 12 cm above the left side of neck extending from front to back and towards upper side. Bones and muscles were cut across the neck and the neck was separated from the body. The third and fours vertivo were cut. The edges of the wound was clean cut and at some places, the cut was zig-zag.

(2) Incised wound 15 cm x 12 cm from right to left. Margin clean cut at some places on the neck which is completely cut from the trunk. The direction is from anterior and posterior and slightly upward at the level of 03-04 when head is set to trunk it completely fit intact.

(3) Incised wound 5 cm x 2 cm, margin clean cut behind left ear, 7 cm behind the mastoid process.

(4) Incised wound, margin clean cut 4 cm x 1 cm, scalp deep. Hair walls were cut.

(5) Incised wound 3 cm x 1 cm, muscle deep and on the middle line of chest from the side of neck 6 cm below.

(6) Incised wound 8 cm x 2 cm x muscle deep behind chest and below the right scapula.

(7) Incised wound 2 cm x 1 cm above the right shoulder. The margins were clean cut.

(8) Incised wound 1 cm x 1/3 cm, behind the chest, 22 cm left from the left scapula.

(9) Incised wound 1 cm x 1/2 cm, behind the chest in the left side.

(10) Incised wound 2 cm x 1/2 cm on the left side of abdomen, 12 cm below from the left nipple.

17. The eyes and mouth of the deceased were closed. He was aged about 55 years. The inner skin of both thighs were defused. The head was separated from the body. The doctor has stated that the injuries were sufficient to cause death, particularly, injuries no. 1 and 2.

18. PW-6 is S.I. Ram Pyare, who has proved the chik F.I.R. Ext. Ka-8, GD report Ext. Ka-9.

19. PW-7 SI J.P. Yadav, IO, has stated that prior to him SI Ram Jagat Singh was investigating into the offence which was registered on 06.08.1993. He conducted and prepared the inquest report and other papers like photo dead body, challan dead body, letter to CMO, letter to RI and sample seal. The dead body was sent for postmortem. SI Ram Jagat was posted with him. As secondary witness he proved Ext. Ka-10 to Ext. Ka-15. The witness has also proved the recovery memos of blood stained and plain earth Ext. Ka-16, blood stained clothes of deceased Ext. Ka-3, site map Ext. Ka-17. The witness has stated that on 09.08.1993, he took over investigation and on the same day, he recorded the statement of Bal Govind, Krishna Pal and Vijay Bahadur Verma. On 17.08.1993, he and SI Ram Jagat and other police persons arrested accused Ram Gopal at 1:10 PM. On examination, he confessed that on 5/6.08.1993 in the mid night, with co-accused Rakesh and Jagjeet committed murder of Ram Vishal and after committing murder, he took away the tube well band. He also stated that he could get the tube well band and sickle recovered and on his instance, from the sugarcane filed, the tube well band and sickle were recovered. On 18.08.1993, the co-accused persons Rakesh and Jagjeet surrendered before the court and their statement was recorded in the District Jail. Other witnesses of recovery were also examined and thereafter charge sheet was submitted to the court. He has also stated that he sent the recovered blood stained and plain earth, piece of bed sheet and sickle for forensic examination.

20. It is clear from the reading of the statement of PW-1 Omprakash (informant) that he lodged FIR only. He is not eyewitness and he was not present in the village on the fateful day. PW-2 Balgovind and PW-3 Krishnapal are two witnesses of fact who have been examined by prosecution as eyewitnesses who saw the accused committing the offence. It is clear from their statement that none has stated that they saw the accused killing the deceased. They have rather stated that they did not see the accused committing murder. It is why they have been declared hostile. In **Charan Singh v. State of U.P. AIR 1967 SC 520, Deepak Chandrakant Patil v. State of Maharashtra, 2006(3) Supreme 162 (SC) and B.A. Umesh Vs. State of Karnataka (2011) 3 SCC 85,** it has been held that conviction can be sustained even if direct witnesses have turned hostile and circumstantial evidence is conclusive in nature. But in such cases, the Court must guard itself against the danger of allowing conjecture or suspicion to take the place of legal proof. Be it the case, the above discussion shows that in

this instant case, the prosecution case based on direct evidence definitely failed. Therefore, it needs to be deeply scrutinized on what circumstantial evidence the learned trial court convicted the accused-appellant.

21. At this stage, it will be appropriate to refer to the law on circumstantial evidence based on certain judgments of the Supreme Court. In **State of Rajasthan Vs. Kheraj Ram, (2003) 8 SCC 224, Vilas Pandurang Patil Vs. State of Maharashtra, (2004) 6 SCC 158, Arun Bhanudas Pawar Vs. State of Maharashtra, 2008 (61) ACC 32 (SC) Vithal Eknath Adlinge Vs. State of Maharashtra, AIR 2009 SC 2067 and Vijay Kumar Vs. State of Rajasthan, (2014) 3 SCC 412,** the Supreme Court has laid down that circumstantial evidence, in order to be relied on, must satisfy the following tests :

1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

2. Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused.

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

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused but should be inconsistent with his innocence- in other words, the circumstances should exclude every possible hypothesis except the one to be proved.

22. In **Bhimsingh Vs. State of Uttarakhand, (2015) 4 SCC 281,** it was laid down that when the conviction is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused in entitled to benefit of doubt. If some of the circumstances in the chain can be explained by any other reasonable hypothesis, then also the accused is entitled to the benefit of doubt. But in assessing the evidence, imaginary possibilities have no place. The court considers ordinary human probabilities.

23. From the perusal of the impugned judgment, it appears that the learned trial court has mainly taken into consideration the circumstance that the two witnesses saw the accused-appellant coming out from the tube well room with sickle and tube well band at the relevant time in which the deceased was found killed. The other circumstance which has been relied upon is the recovery of sickle and tube well band on the instance of accused-appellant. The third circumstance is the quarrel which took place between the deceased and accused a day before which according to the prosecution became the motive for the offence. The fourth circumstance is that blood stains were found on sickle and was chemically examined in FSL. Now the question is that all these circumstances taken together form a complete chain to lead to a conclusive finding of guilt. It is pertinent to mention that it is also required to be looked into whether the witnesses who have been examined by prosecution to prove these circumstances are natural and trustworthy and could be relied upon and whether they have been able to prove the said circumstances. At the same time, it is

also required to assess the probability in view of the lapse and flaws in the prosecution version and evidence.

24. PW-2 Balgovind and PW-3 Krishnpal have stated during trial that they were sleeping in their tube well situating about 50 steps away from the tube well of deceased where the dead body was found. It is noteworthy that the distance of the two tube well has been shown in the site map prepared by the IO Ext. Ka-17 to be 92 steps. The difference between the distance is almost double and it can be said that this has been deliberately decreased to make their testimony natural. This appears to be unusual that slow voice and sound could be heard from a distance of 92 steps in the midnight when the people are in deep sleep. The witnesses have nowhere stated that the sound was a loud cry or shriek to cause alarm to the witnesses. The two witnesses have stated that they did not see the accused killing the deceased. They saw the accused coming out from the tube well of deceased with the tube well band on his shoulder and a sickle in his hand. Here, we find a material discrepancy in the deposition of both, as PW-3 has stated that he saw only accused-appellant coming out and going from there, whereas, PW-2 has stated that with him two unknown persons also came out and went away. He has also stated that he had heard slow voice of deceased when he came out from his tube well. No such statement has been given by PW-3. PW-2 has further stated that on next day morning, he told Omprakash about it. From the reading of the statement of PW-1 Omprakash, it appears that he has nowhere stated that PW-2 told him anything about the incident. PW-1 has stated that these two witnesses live just 5-6 houses away from his house. He has stated that on that day they neither met him nor said anything about the incident. They met him on the next day in the morning on 7.8.1993 at 6 AM. But PW-1 has nowhere stated that these two witnesses told him anything about the incident. It is an important fact and it shows two things, either PW-1 is not speaking truth or, if he is stating correctly, the conduct of PW-2 and PW-3 is very unnatural creating doubt whether both saw the accused coming out from the tube well of deceased. PW-2 has stated that on the next day also he did not say anything about the incident to the Investigating Officer. He has also stated that he did not say those facts to informant Omprakash what he has stated on oath in his statement. He has stated that on the next day he informed about the incident to informant. Nothing as such has been stated by PW-1 in his examination. PW-3 Krishanpal has also not stated that he told to the informant about the incident. He has stated that he told about it to IO on the next day morning. Notably, PW-7 IO has stated that he took statement of PW-2 and PW-3 on 9.8.1993. What they have stated to IO, shall be seen later on. But what is important to be mentioned is that these two witnesses have been declared hostile. They have been cross-examined by prosecution and they have denied their statements given to the IO under section 161 of the Criminal Procedure Code. They have expressly said that they did not give such statement as recorded by the IO.

25. At this stage, it will be appropriate to go through the statements given by these two witnesses to IO. Both appears to have given similar statements to the IO. They have stated that on 5.8.1993, in the night at about 1.30 AM, both were sleeping on their tube well. They got awakened because of loud shout and shriek of Ramvishal. Both went lighting

their torch to his tube well and saw that inside the tube well room, accused Ramgopal with a sickle in his hand and accused Jagjeet and Rakesh with axes in their hand, were assaulting Ramvishal by sickle and axes. Both caused alarm by shouting, but, because of distance from village, none came there. All the three went away. Accused Ramgopal was carrying tube well band on his shoulder. Both the witnesses went inside the room and found Ramvishal dead and his head was cut and lying on cot separated from body and the body was lying on the earth. Both got disturbed and came back to their home. Omprakash, the son of deceased was also not available and on the next day in the night, they told him about the incident.

26. It appears that this statement of witnesses was recorded on 9.8.1993. On the basis of the statement of these two witnesses, the name of accused persons came in light and on 17.8.1993, accused Ramgopal was arrested and thereafter accused Jagjeet and Rakesh surrendered before court. The reading of the statements of these witnesses shows that the prosecution case was based on direct evidence. It also goes to show that both these witnesses turned hostile and denied their statements so given to the IO. Therefore, the important question is that when eyewitnesses did not support the prosecution case, whether on the basis of their statement is was open to the prosecution to convert the whole prosecution version into that of case based on circumstantial evidence and whether the circumstances proved are of such conclusive nature that it would lead to only one hypothesis of guilt of the accused-appellant. In **Bhagwan Dass v. State (NCT of Delhi), (2011) 6 SCC 396,** it has been laid down that the statement recorded before the Police under Section 161 Cr.PC is ordinarily not admissible in evidence in view of Section 162(1) CrPC, but as mentioned in the proviso to Section 162(1), CrPC, it can be used to contradict the testimony. A witness in cross examination confronted with his/her statement to the police who denied that statement. The view is propounded by the court that in such circumstances the statement of the witness to the police can be taken into consideration in view of the proviso to Section 162(1) of the CrPC. In this case PW-2 and PW-3 have been read over the statement, they had given to the IO to which they denied. It means that the prosecution placed reliance on what they stated under section 161 of the Code, and as such the statement can be used against the prosecution to test the credibility of prosecution version and witnesses.

27. The FIR has been lodged after a lapse of about 15 hours from the alleged time of incident. It is pertinent to mention that the FIR was lodged on 6.8.1993 at 4 PM, whereas, as per FIR, the incident took place in the midnight of 5/6. 8. 1993. The explanation for the delay in lodging the FIR has been explained by stating that the informant had gone to some relative and after receiving the information of the incident, he came back and after seeing the dead body, he lodged FIR. He has not specified when he came back from his relatives. He has however stated that he got the FIR inscribed by Sushil on 6.8.1993 at 6 PM and reached the police station at 8 PM and after lodging report, he came back. Thus, there is difference of 4 hours regarding lodging of FIR as FIR shows that it was lodged at 4 PM. In view of the positive statement of PW-1, it is clear that the time of lodging FIR is also

after 4 hours from what has been shown in chick FIR and as such, in our considered view, the same is ante-timed and the same makes the FIR a suspicious document and it will certainly go against prosecution. It is also notable that none has been named in the FIR and it has been lodged against unknown person. It further goes to show that by the time the FIR was lodged, the informant had no knowledge who committed the offence and why? The name of accused persons came in light on the basis of statement of Kishanpal and Balgovind.

28. It looks strange that even though the Police Station is situated only at the distance of 11 km, the police got no information about the incident even though it has been claimed that two eye-witnesses saw the incident in the midnight. In the morning, naturally many more persons must have known that the deceased has been found dead in the tube well. Even village Choukidar did not inform about the incident. This leads to the possibility that nobody could know about the incident unless in the morning someone reached and saw the dead body. Not stating anything about the incident by PW-2 and PW-3 to anyone including police and informant also supports this possibility. In such cases, it is very important to learn who informed the informant and who saw the dead body and when, as both the eyewitnesses kept silent and did not disclose anything prior to lodging of FIR. They kept silent even after the lodging of FIR for a long time and they disclosed the name of accused-appellant and others only when their statement was recorded by IO on 9.8.1993 after 3 days from the date of incident. It is interesting to see what happened in these three days.

29. It is important to note that PW-3 has stated that his father Mahadeo was convicted for attempt to murder of the deceased prior to this incident and the police took him to police station for interrogation in this case also. This fact has been also stated by PW-1 Omprakash, the informant and son of deceased. After this, the statement of the two witnesses PW-2 Balgovind (brother of Mahadeo) and PW-3 Krishnapal (son of Mahadeo) was recorded on 9.8.1993 and then for the first time the name of accused-appellant came in light. Till then these two witnesses kept silent and said nothing about the incident to anyone, not to the informant, even though they live only 5-6 houses away from the house of informant. Why not this should be seen as a measure on the part of these two witnesses to save Mahadeo from being implicated in the case.

30. Another important question is about motive. Since no eyewitness has supported the prosecution version based on direct evidence, therefore, existence of motive and sufficiency of motive is a relevant fact to be proved by prosecution. No motive was alleged in FIR and the same was lodged against unknown person. It has come subsequently in the statement of PW-1 Omprakash (informant) that a quarrel took place between accused persons and deceased a day before the incident as the accused persons were grazing their animals in the field of deceased. He has stated that the accused threatened to kill the deceased. His cross-examination shows that no such incident took place before him as he himself has stated that he did not mention this fact in his written report as he had no knowledge of such quarrel. To prove this quarrel, PW-4 Hariom has been examined who has stated that in his presence, the quarrel took place between accused Ramgopal and

deceased and the accused threatened the deceased. PW-4 Hariom is again son of Mahadeo and brother of PW-3 Krishnapal and it goes to show that all the three independent witnesses belong to the family of a person who was convicted for attempt to murder of the deceased and all of them have been examined by IO after Mahadeo was taken for interrogation by police. As such, we find the credibility of this witness to be highly suspicious.

31. The next question is with regards to motive for the offence. In **Badam Singh v. State of Madhya Pradesh; AIR 2004 SC 26,** it has been remarked by the Court that, even though existence of motive loses significance when there is reliable ocular testimony, in a case where the ocular testimony appears to be suspect, the existence or absence of motive acquires some significance regarding the probability of the prosecution case. In any case, we find with reference to judgments in **Sheo Shankar Singh v State of Jharkhand; 2011(74) ACC 159 (SC), Ravinder Kumar v State of Punjab; 2001 (2) JIC (SC), State of H.P. v Jeet Singh; (1999) 4 SCC 370; Pannayar v State of Tamil Nadu by Inspector of Police; AIR 2010 SC 85** that the legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of the Court. These decisions have made a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye-witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, goes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence.

32. It is pertinent to mention that there may be cases based on circumstantial evidence where absence of motive may become insignificant to establish guilt. In G. **Prashwanath v State of Karnataka; AIR 2010 SC 2914, Jagdish v State of M.P.; 2009 (67) ACC 295 (SC) and Ujjagar Singh v State of Punjab; AIR 2008 SC (Supp) 190,** it has been observed by the Supreme Court that it is true that in a case of circumstantial evidence motive does have extreme significance but to say that in the absence of motive, the conviction based on circumstantial evidence cannot, in principle, be made is not correct. Motive provides foundational material. But absence of motive is not of much consequence when chain of proved circumstances is complete to exclusively lead to the hypothesis of guilt.

33. In the criminal trials based on circumstantial evidence only, the Supreme Court has ruled in **Nagaraj v State, (2015) 4 SCC 739 , Wakkar v State of UP, 2011 (2) ALJ 452 (SC) and Babu v State of Kerala, (2010) 9 SCC 189** that prosecution should prove motive of the accused if its case is based on circumstantial evidence. Again, in **Sanjeev Vs. State of Haryana, (2015) 4 SCC 387,** it was laid down by the court that it is settled principle of law that to establish an offence (murder) by an accused, motive is not required to be proved. Motive is something which prompts a man to form an intention. The intention can be formed even at the place of incident at the time of commission of crime. It is only either intention or knowledge on the part of the

accused which is required to be seen in respect of the offence of culpable homicide. In order to read either intention or knowledge, the courts have to examine the circumstances, as there cannot be any direct evidence as to the state of mind of the accused.

34. Regarding absence, existence and proof of motive, there is no formula and it depends a lot upon the facts and circumstances of each case. But, it has been always a guiding principle that motive generally lacks its importance in case of direct evidence where ocular testimony is trustworthy and reliable. In cases based on circumstantial evidence, motive plays an important role as it provides additional link to the chain of circumstances. Even absence of any motive or insufficiency of motive may not be relevant where proved circumstances are of such nature that it conclusively determines the guilt of accused. Therefore, motive has to be attached greater importance in cases based on circumstantial evidence, particularly when the circumstances proved are fluctuating in nature and the link sought to be established is not trustworthy or convincing. It is all about to what extent the evidence is able to create confidence in the mind of the court regarding correctness of the prosecution version.

35. In the light of above, we have to see whether the motive alleged has been proved and acceptable and it creates confidence in the facts and circumstances of the case for placing reliance. It needs to be mentioned that the deceased has been killed by cutting his neck separate from the body and several injuries were caused on his body. It appears strange that on a quarrel on such trifling issue of grazing field, the crime will be committed in such a brutal way. It was not such kind of dispute and even the informant had no knowledge of such quarrel and it is why it was not mentioned in FIR nor the accused was named. Even stealing a tube well band may not be a good motive for the commission of the offence. It is pertinent to mention that where prosecution version is supported by direct evidence, absence or insufficiency of motive may not be relevant. But where the eye-witnesses have turned hostile, it is important to see whether the motive alleged is of such kind and magnitude which would give rise to such brutal murder. We are of the view that the alleged motive is not adequate and sufficient to create confidence in the prosecution version.

36. Timing of death is also doubtful in this case in view of statement of the doctor and postmortem report. In the postmortem report it has been mentioned that postmortem was conducted on 7.8.1993 at 3 PM and the duration of death has been mentioned to be 1-1/2 days. Meaning thereby that as per postmortem report death must have been caused around 3 AM in the early morning. The doctor has however stated that the injuries were possibly caused on 5/6. 08.1993 in the mid night at 01:30 AM. He has also stated that these injuries were possibly caused by sickle and axe. During cross-examination, he has further clarified that in causing death, two kinds of sharp weapon must have been used. The difference in the timing of death might be of 6 hours in both side. He has further stated that the death must have been caused after the deceased had eased out as his stomach, lever and both intestine have been found empty. It goes to show that it is possible that the deceased might have died in the morning

of 6.8.1993 around 7 AM or in the night of 5.8.1993 around 9 PM. The fact that death occurred after the deceased had eased out also creates doubt with regard to time of death.

37. Moreover, the doctor has stated that the death must have been caused by two weapons and clean cut found on the fatal injuries on vital part and neck shows use of heavy sharp weapon. This also shows that the fatal injuries were not possible by use of a sickle nor it was possible by a single accused. The prosecution version based on direct evidence disclosed use of axes and sickle by three accused persons, but the same has not been proved by eyewitnesses.

38. So far as discovery of sickle and tube well band is concerned, the discovery has been made allegedly on the instance of the accused-appellant on 17.8.1993 when he was allegedly arrested by police. The discovery was made before three public witnesses namely, Govardhan, Nanhku Verma and Omprakash (informant). Only Omprakash has been examined by prosecution out of the three public witnesses. So far has the recovered tube well band is concerned, there is no mention in FIR that any tube well band was stolen away by unknown person. Secondly, PW-1 has not identified the tube well band to be his own which was stolen during his examination before court. Other two public witnesses have not been examined. In absence of positive evidence to show that it was the same tube well band which was stolen, the discovery thereof is insignificant.

39. The recovered sickle has been alleged to be weapon of crime and blood stains have been found thereon. PW-2 and PW-3 who have been said to have seen the accused-appellant carrying when he was coming out from the tube well, have not been asked to identify the sickle or at least to state that the sickle was identical to what they saw in the fateful night in the hand of the accused-appellant. Medical evidence shows that the fatal injuries in view of clean cut of neck being separated from body must have been caused by heavy sharp weapon. The sickle was sent for chemical examination and the FSL report shows that it was not possible to ascertain that there was human blood on it. As such, on the basis of evidence, the recovered sickle can hardly be connected with the offence and the recovery thereof looses its significance.

40. There is yet another reason which makes the whole discovery tainted and suspicious. Accused has stated in his statement under section 313 of the CrPC that the police took him in the police station from his house 8 days before, kept him there, gave third degree treatment and charge-sheeted showing false recovery of incriminatory articles. The police case is that the accused was arrested on 17.8.1993. From the side of defence, a specific suggestion has been given to the IO during cross-examination that the accused was arrested on 9.8.1993 and was detained in the police station till 17.8.1993, tortured him, demanded illegal gratification, and on refusal illegal and false recovery of sickle and tube well band was planted and he was charge-sheeted. The IO has denied this suggestion. On this point, the evidence of informant Omprakash is noteworthy and he has stated on oath that the police came and got the accused Ramgopal arrested on 9.8.1993. it is pertinent to mention that on that very date the statement of PW-2 and

PW-3 was recorded by IO for the first time and on the same day accused was taken to police station. The statement of PW-1 supports that the accused was detained by police on 9.8.1993 and therefore, the remaining defence version gets strength and it creates enough doubt in respect of the discovery theory alleged by prosecution.

41. The learned trial court has omitted to pay attention to the fact that the prosecution case was based on direct evidence of eyewitnesses and if they turned hostile, the prosecution cannot switch over to entirely a different case based on circumstantial evidence. In **Ram Narain Popli vs. CBI, (2003) 3 SCC 641 and Vallabhaneni Venkateshwara Rao vs. State of A.P., 2009 (4) Supreme 363,** it has been laid down that if different stories are projected by prosecution, it is unsafe to convict the accused as introduction of or addition of a new story by prosecution adversely affects and destroys the prosecution case by creating doubt in it and the accused becomes entitled to benefit of doubt.

42. On the basis of above discussion, we find that the learned trial court has not been able to appreciate the evidence on record in the legal perspective and has committed serious error, perversity and illegality in holding the accused-appellant guilty. There was material contradiction and discrepancies in the statements of both the eye-witnesses. All the three witnesses PW-2 Balgovind, PW-3 Krishnapal and Hariom belonged to same family and Mahadeo, the father of two witnesses was not only convicted for attempt to murder of deceased, he was the first suspect for the offence and was put to interrogation by the police. He was set free and only after that all these three witnesses became witness and disclosed the name of accused-appellant. This can also be seen as an effort to save Mahadeo and falsely implicate the accused-appellant. But the two witnesses who were examined as eye-witnesses of the crime, turned hostile and did not support the prosecution case based on direct evidence. Only that portion of their statement that they saw the accused-appellant coming out from the tube well in which the deceased was found dead, could not become a conclusive evidence to establish guilt. It is not an evidence of the circumstance of last seen as the deceased and accused-appellant were not seen alive together. There is no last seen evidence and only presence there may give rise to suspicion and suspicion is not proof of guilt, particularly when the evidence of PW-2 and PW-3 does not inspire confidence for the reasons discussed above. The motive for the offence is inadequate and not convincing at all. There is not only delay in lodging FIR but also on evidence, the same appears to be ante-timed. The medical evidence also creates doubt with regards to time of death and that further casts doubt on the testimony and presence of the two eye-witnesses at the scene of occurrence. The learned trial court appears to have ignored the lapse in evidence and has adopted a very casual approach while considering the evidence on record and balancing the probabilities. The circumstances considered to give finding of guilt were not established by cogent and convincing evidence. What to say of missing chain, there was no chain and all the circumstances proposed to be relied upon was completely scattered incapable of leading to the only hypothesis of guilt. Therefore, we find that the impugned judgment is not sustainable under law and is liable to be set aside.

43. Accordingly, the appeal is **allowed** and the judgment and order dated

15.09.1997 of Vth Additional Sessions Judge, Fatehpur, in ST No. 493 of 1993, arising out of Case Crime No. 181 of 1993, Police Station Lalauli, District Fatehpur, convicting and sentencing the accused-appellant Ram Gopal under Sections 302, 380, 411 IPC is set aside and the accused-appellant is acquitted from the said charge.

44. The accused-appellant Ram Gopal is in jail. He shall be released from jail forthwith.

45. The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance.

(2020)1ILR 735

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.05.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Appeal No. 2408 of 1983
Connected With
Criminal Appeal No. 2315 of 1983

Suresh ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri J.S. Kashyap, Sri S. Chatharji, Sri S.D.N. Singh, Sri S. Hasnain, Sri S.D. Yadav

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

Criminal Law - Indian Penal Code - Sections 147, 302/149 and 404/149 - Appeal against conviction.

The appeal has been preferred against the acquittal of this accused. It may be clarified here that if there are more than one accused involved in a crime and if other co-accused is acquitted on false grounds, it would not be a circumstance in which the other accused would also be allowed to claim parity and acquittal, if the circumstances and the evidence on record reveals that actually both the accused had given effect to this occurrence. (para 59)

We must also keep in mind the rustic background of the witness so as to ignore the discrepancies with respect to distance stated by him from where they state to have seen the occurrence, as they may have little idea about 'furlong' and 'paces' etc. (para 63)

We do not find this to be ground serious enough for animosity so that a false implication would be made of this accused and in view of the strong evidence having come on record that this accused was also involved in causing this occurrence, as is evident from the eye-witnesses', his involvement is found to be there. (para 65)

Appeals rejected. (E-2)

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri S.D.Yadav holding brief of Sri J.S.Kashyap, learned counsel for the appellant and Sri Jai Narain, learned AGA for the State.

2. Criminal Appeal No. 2408 of 1983 has been preferred by accused-appellant Suresh S/o Kallu against judgment and order dated 12.9.1983 passed by Vth Additional Sessions Judge, Mainpuri in S.T. No. 551 of 1983 in which he has been convicted under Sections 147, 302/149 and 404/149 IPC and sentenced to undergo rigorous imprisonment for a period of one year under Section 147 IPC; one year under Section 404 read with Section 149 IPC; and with imprisonment for life under

Section 302/149 IPC and all the sentences are directed to run concurrently.

3. The other Criminal Appeal No. 2315 1983 has been preferred by accused-appellant Menhdipal S/o Bhimsen and Raj Pal S/o Tikam Singh against the same Session Trial, whereby both of them have been convicted under Section 148, 404 read with Section 149 IPC and 302 read with 149 IPC and sentenced to undergo rigorous imprisonment for one year each under Section 148 IPC; rigorous imprisonment for one year each under Section 404 read with Section 149 IPC; life imprisonment each under Section 302/149 IPC and all the sentences are directed to run concurrently.

4. Since both these appeals arise out of the same Session Trial No. 551 of 1983, they are being taken up together for the sake of convenience.

5. In brief, the prosecution case as disclosed from the F.I.R. is that the informant Phool Singh (PW-1) gave written report (Ext. Ka-1) at P.S. Fariha, Sub-district Jasrana, District Mainpuri on 8.8.1982 at 6:15 am with the allegations that on 7.8.1982 at about 10:00 pm, he was smoking *Bidi* sitting on a cot and his wife Surajmookhi was making curd sitting near his cot. The lantern was burning in Chhappar and his daughter Kusuma (deceased) was sleeping on the cot and in front of his house, Mahavir Singh (deceased) and Bhoore Singh (PW-3) were sleeping on Chabutra. Near Mahavir Singh on adjacent cot, Bhoomi Sri and his mother Ganga Sri (deceased) were also sleeping on a cot. In the Chhappar of Mahavir Singh and Bhoore Singh also, lantern was burning. In the meantime, at about 10:30 pm, 10 to 12 persons armed with guns and country made pistols, which included Amrit Singh (A-1) armed with gun of his father, Menhdipal (A-2) armed with Pauna (small country made gun), Bare Lal (A-4), who is son-in-law of Amrit Singh, R/o P.S. Eka, armed with Pauna, Raj Pal (A-3), who is brother-in-law of Menhdipal R/o village Jhapara, P.S. Jasrana, armed with gun, Suresh Yadav (A-5) R/o Pilakhtar Fateh, Khurshid Khan (A-7), Nasuruddin (A-6), both S/o Gaphoor Khan, R/o Barthara and 4-5 other men armed with country made pistols and guns, whose names he did not know but could recognize them if they come in front of him, all came from the side of the house of Amrit Singh and Menhdipal and Amrit Singh exhorted that hear was Phool Singh, let him be caught, at this Phool Singh (informant) fled from there raising alarm that Amrit Singh and his brother Mehndipal had made fire upon his daughter Kusuma and Bare Lal, Raj Pal Singh, Nasuruddin, Khurshid Khan and Suresh made fire upon Mahavir and his mother Ganga Sri, who after hearing the sound of fire, tried to flee from there but they were shot dead near their wall. On the alarm being raised by him and his wife and also hearing the sounds of F.I.R., many villagers reached there raising alarm and then, seeing that lot of villagers had come, all the miscreants fled towards north. They all (informant and his companions) chased miscreants but could not be caught. Informant, his wife Surajmukhi, Bhoore Singh, Bhoomi Sri, Somwati and many other villagers had identified all the miscreants in the light of burning lantern as well as bright light of moon. There was animosity going on between informant and Amrit Singh pertaining to land and giving the evidence. There was also animosity between Amrit Singh and Munni Lal on the one hand and Mahavir and Bhoore

Singh on the other pertaining to partition and because of this animosity Amrit Singh and others had murdered his daughter, his Bhabhi (sister-in-law) and nephew. He prayed that after lodging the F.I.R. the necessary action be taken. It was further mentioned that the miscreants had taken away watch of Mahavir and "Pongni" of his mother.

6. On the basis of written report (Ext. Ka-1), case crime no. 48 of 1982 was registered at P.S. Fariha against seven named accused i.e. Amrit Singh, Menhdipal, Bare Lal, Suresh Yadav, Nasuruddin and Khurshid Khan and 4-5 unknown persons under Section 147, 148, 149, 302 and 404 IPC and chik F.I.R. (Ext. Ka-31) is prepared and entry of this was made in G.D. at report no. 9, time 6:15 am, dated 8.8.1982, which is Ext. Ka-32.

7. The investigation of the case was entrusted to S.I. Sri K.P. Singh (PW-5), who recorded statement of informant Phool Singh on 8.8.1982 at P.S. and after going to the spot told S.I. Kadam Singh, who prepared inquest report, who accordingly prepared inquest reports of the deceased Kusuma, Mahavir and Ganga Sri which are Ext. Ka 5, Ka-6 and Ka-7 respectively. The other necessary documents along with inquest report of Mahavir i.e. Challan Lash, Photo Lash, report C.M.O. and report R.I. were also prepared by S.I. Kadam Singh in his hand writing which were also signed by PW-5 and which are Exts. Ka-8, Ka-9, Ka-10 and Ka-11 respectively. The relevant documents pertaining to the dead body of deceased Kusuma i.e. Challan Lash, Photo Lash, report to C.M.O. report to R.I. were also prepared by S.I. Kadam Singh in his hand writing which were also signed by PW-5 and they are Exts. Ka-12 to Ka-16 respectively. The necessary papers relating to dead body of Ganga Sri i.e. Challan Lash, Photo Lash, report C.M.O., report to R.I. were also prepared by S.I. Kadam Singh and were also signed by PW-5, which are Exts. Ka-16 to Ext. Ka-19 respectively.

8. PW-5 inspected the place of incident and prepared its site plan in his hand writing which is Ext. Ka-2. The informant had showed him lantern which was taken by him in his possession and made its Fard recovery in his hand writing, which is Ext. Ka-21. The cot upon which the deceased Kushma was lying, bedding (dari) of the same, was blood stained, the same was taken in possession by him and its Fard recovery was prepared which is Ext Ka-22. At the place of incident, there was blood lying. Some blood was lying where Kusuma was lying dead. Some blood stained and ordinary soil were collected from there and kept in two separate containers which were sealed there on the spot and its recovery memo was prepared by him which is Ext. Ka-23. The place where Kushma was lying dead, near that place, two blank cartridges of 12 bore was found lying which were taken in possession and recovery memo of the same was prepared by him in his hand writing which is Ext. Ka-24. The place where deceased Mahavir Singh was lying, plain and blood stained soil were collected from there in two separate containers and its recovery memo was prepared by him which is Ext. Ka-25. The place where Ganga Sri was lying dead, the blood stained and ordinary soil were collected by him in two separate containers and recovery memo of the same was prepared by him which is Ext. Ka-26. Near the place where Ganga Sri was lying, three blank cartridges were found lying which

were taken in police custody and its recovery memo was prepared, which is Ext. Ka-27. Bhoomi Sri had a lantern, in the light of which, miscreants are stated to have seen by her and the said lantern was taken by PW-5 in possession and its recovery memo was prepared by him which is Ext. Ka-28. Witness Bhoore Singh (PW-2) had stated to have seen the miscreants in the light of one lantern which was shown by him and the same was taken in possession and its recovery memo was prepared by him which is Ext. Ka-29. He also recorded statements of witness Bhoore Singh (PW-2) and Bhoomi Sri. All the three dead bodies were sealed by S.I. Kadam Singh and were sent along with necessary documents to S.N.M. Hospital, Firozabad, through Constable Khacher Singh, Rajveer Sharma and Biru Singh. Thereafter, PW-5 made raid at the house of Nasuruddin and Khurshid Khan at Barthara but they could not be found and, thereafter, raid was made in village Pilakhtar Fateh at the house of accused Suresh, he could not be found. Thereafter, PW-5 came to the P.S. and deposited all the case property in sealed condition. On 9.8.1982, he again made raids at the houses of Nasuruddin and Khurshid Khan in village Barthara but again they could not be found nor accused Suresh could be found at whose house in Pilakhtar Fateh, raid was conducted. Thereafter taking along S.I. Tej Prakash Sharma of P.S. Aedha, raid was conducted at the house of accused Bare Lal in village Salota but he could not be found. Thereafter taking along S.I. Har Prasad Sharma, from P.S. Jasrana, a raid was conducted at the house of Raj Pal Singh but he could not be found. Thereafter, PW-5 came to village Nagla Dan Sahay, recorded statements of Somwati and returned to P.S. On 10.8.1982, he again conducted raid at village- Barthara at the houses of Nasuruddin and Khurshid Khan but they could not be found nor Suresh could be found in his house nor accused Bare Lal could be found in village Salota. When raid was made again in the house of accused Raj Pal, he could not be found in village- Jhapara. On 11.8.1982, 12.8.1982, and 13.8.1982, search was made for accused persons who could not be found. On 13.8.1982, statements of witnesses of inquest report were recorded. On 14.8.1982, accused Nasuruddin surrendered before court. On 20.8.1982, he recorded statements of accused Nasuruddin Singh and Raj Pal inside jail. On 29.8.1982, he recorded statements of Smt. Surajmukhi and Kr. Rama etc. and on the same day he submitted charge sheet against Menhdipal, Raj Pal, Bare Lal, Nasuruddin and Suresh and in abscondance against Amrit Singh and Khurshid Khan which is Ext. Ka-30. PW-5 has also proved by way of secondary evidence, Chik F.I.R. which is Ext. Ka-31, which he deposed to have been written by Head Mohrrir, Shankar Singh, in his hand writing with which he was conversant and also proved entry of the said case in G.D. by the same Head Mohrrir, which is Ext. Ka-32. PW-5 has proved the blood stained and ordinary soil collected from the place where Kusuma was found dead which was material Ext. 1 and material Ext. 2; proved blood stained and ordinary soil pertaining to Mahavir which is material Ext. 3 and 4; proved blood stained and ordinary soil pertaining to Ganga Sri which is material Ext. 5-6 . He also proved two blank cartridges which were recovered from near the place where dead body of Kusuma was lying which is material Ext. 7 and 8 and also proved three blank cartridges which were recovered near the dead body of Ganga Sri, which are material Exts. 9, 10

and 11. The clothes which were separately sealed of deceased Kushma, Mahavir and Ganga Sri by the doctor in three separate bundles, were also marked as material Exts. 12, 13 and 14 respectively. Certain pallets were extracted by the doctor during post-mortem of the dead body of Kusuma and Mahavir, which was sealed in separate envelopes, which are material Exts. 15 and 16 respectively. The bedding (dari) upon which Kusuma was lying, was also marked as material Ext. 17.

9. After collecting sufficient evidence on record, the charge sheet was submitted against all the accused and on 1.1.1983 charge was framed against five accused namely, Menhdipal, Raj Pal, Bare Lal, Nasuruddin and Suresh in following manner.

10. Against accused- Suresh and Nasuruddin, charge was framed under Section 147 IPC; against Menhdipal, Raj Pal and Bare Lal along with 8-9 other under Section 148 IPC, against all the above named accused along with seven others under Section 302 read with 149 IPC; against all the above named five accused along with seven others under Section 404/149IPC; against Menhdipal under Section 302 IPC; against Raj Pal, Barelal, Nasuruddin and Suresh under Section 302 IPC, to which they pleaded not guilty and claimed to be tried on 1.1.1983.

11. In order to prove its case, from the side of prosecution statements of witnesses, Phool Singh (father of the deceased Kushma) as PW-1, Bhoore Singh as PW-2, Dr. Vinay Kumar Yadav, who conducted post mortem of the deceased as PW-3, Smt. Surajmukhi, wife of the informant as PW-4 and Investigating Officer Sri K.P. Singh as PW-5, were recorded.

12. Thereafter the prosecution evidence was closed and the statements of accused were recorded under Section 313 Cr.P.C.

13. The accused-appellants namely Menhdipal, Raj Pal and Suresh Yadav have stated the entire prosecution evidence to be false and pleaded that they have been falsely implicated due to enmity.

14. The appellant Raj Pal in particular has stated that because of there being land dispute between Phool Singh (PW-1) and Menhdipal (accused-appellant), he has been falsely implicated.

15. The accused- Suresh has also, in particular, has stated that the sister of Phool Singh (informant) was earlier married to Mulayam Singh of his village. Mulayam Singh had received injury in his leg, thereafter, she (sister of Phool Singh) started living with his Bhanja, Surendra Pradhan having taken away jewellery with her and when a panchayat was held in respect of return of the jewellery to Mulayam Singh, pursuant to that the same was returned, since then, Surendra Singh started having enmity with him and because of that he has been falsely implicated.

16. In defense, two witnesses have also been examined namely, Mulayam Singh S/o Kallu Singh as DW-1 and R.S. Pal, Professor of Mathmetics, Narayan College Shikohabad, District Mainpuri as DW-2.

17. After considering the entire evidence on record and having heard both

the sides, the trial court has convicted and sentenced the appellants Menhdipal, Raj Pal and Suresh while other accused Bare Singh and Nasuruddin have been acquitted.

18. The main argument made by the learned counsel for the appellant is that according to F.I.R., PW-1 Phool Singh had run away from the place of incident as was mentioned by him in the F.I.R. itself which makes it evident that he was not an eyewitness of the occurrence and, therefore, his presence on the scene of occurrence is doubtful. His testimony ought to be dis-believed. It was further argued that the presence of PW-1 should be treated also doubtful on the spot because he did not suffer any injury, not even a scratch, despite him being on the spot. Further it was argued that on the same evidence the trial court has acquitted two co-accused, while the present accused-appellants have been convicted, which is not sustainable and in this regard he has relied upon Surjan and others Vs. State of U.P., 2018 Law Suit Allahabad 2016.

19. On the other hand, learned A.G.A. has vehemently argued that there is no infirmity in the impugned judgment because there were three eye-witnesses of the occurrence namely Phool Singh (PW-1) and Bhoore Singh as PW-2 and PW-4 Surajmukhi, wife of the informant, who have given eye-witness account of this occurrence, as they had seen the accused-appellants having assaulted the deceased, as a result of which three persons have died in this case namely, Kusuma Devi, Ganga Sri and Mahavir and the ocular testimony is corroborated by the medical report, therefore, the trial court's judgment requires to be upheld and the appeal deserves to be dismissed.

20. Now this Court has to examine as to whether trial court has correctly evaluated the evidence on record or does it require any interference, in the light of arguments made by the learned counsel for the appellants.

21. PW-1 Phool Singh, who is informant of the case, has stated in examination-in-chief that 7 ½ months ago at about 10:30 pm, he was sitting on Chabutra in front of his house and was smoking *Bidi* and his wife was making curd there only. Near him his daughter Kusuma Devi was sleeping on a cot. The house of Bhoore Singh is situated in front of his house and there is hardly a gap of 10 hands between his house and the house of Bhoore Singh. Bhoore Singh and his wife were also sleeping outside their house on Chabutra. The house of Bhoore Singh and Mahavir is one and the same. Mahavir, his mother Ganga Sri and sister Bhoomi Sri were also sleeping in front of their house. There was light as well which was emitting from the lantern which was burning in his chappar. In the meantime, Amrit Singh, Khurshid Khan, Nasuruddin, Bare Lal and Suresh came towards his house, they were, in all, 10 to 12 miscreants. Amrit Singh was armed with licensed gun of his father. Khurshid had gun, Nasuruddin had a gun, Bare Lal had a Pauna and Suresh had a gun. Menhdipal had also a gun and apart from them, 4-5 miscreants were having guns of country made pistols in their hand, whom he could not recognize but would recognize if they come before him. After all these miscreants had came there, Amrit Singh shouted that here was Phool Singh, let him be caught, at this PW-1 got up from the cot and fled from there and concealed himself by the side of wall of Kayam Singh and witnessed the occurrence from there and

was also shouting. Amrit Singh made fire upon his daughter by his gun and when the same hit his daughter Kusuma, she got up and, thereafter, fell down. When she was lying on the ground, Menhdipal also fired upon her, by which she died. His wife started crying that her daughter was killed, thereafter, the miscreants headed towards Mahavir, who is his nephew and they (miscreants) also made fire upon Mahavir and getting hit Mahavir, fell down. His mother (Mahavir's mother) Ganga Sri was also fired upon by the miscreants, both Mahavir and Ganga Sri died on the spot. On Mahavir and his mother, fire was made by Nasuruddin, Khurshid Khan and Raj Pal while other miscreants continued to stand on Chabutra there only. The villagers namely Kayam Singh, Chob Singh, Ajab Singh, Ganga Singh, Ram Khiladi, Chandra Bhan, Suraj Singh, Ram Prakash and Komal came there rushing, armed with Lathi and reached the spot. It is further stated by him that Amrit Singh had taken off wrist watch of Mahavir and Menhdipal had taken off Pongni from the nose of Mahavir's mother. Thereafter, miscreants having seen the pressure of much crowd of the villagers, fled towards north. Mahavir and his mother, both died after they fell down on the ground and, thereafter, the miscreants had taken all these articles from their person. Further it is stated that the miscreants were harbouring animosity towards him. Amrit Singh had made fires upon police and in that case police had written name of PW-1 as a witness. PW-1 had got a patta executed in in his favour from Pradhan and in that regard Amrit singh had filed a case against him because he did not want the land to be given to him. The brother-in-law of Amrit Singh is Barelal. Menhdipal is brohter of Amrit Singh, while Raj Pal is brother-in-law of Menhdipal and have sitting with Suresh, Khurshid and Nasuruddin, day in and day out. He knew these miscreants from before and all of them were present in court room except Amrit Singh and Khursheed Khan. After fleeing of miscreants, he got a report written by Kayam Singh at his (PW-2's) house and taking the same he went to P.S. next day in the morning at about 8:30 a.m.. He further stated that he had not gone to the P.S. due to fear in the night. He had handed over the written report to Deevan Ji at P.S. Fariha which is Ext. Ka-1.

22. In cross-examination, this witness has stated that it is wrong to say that 15 to 16 months ago, he had assaulted the son of Draupa Devi namely, Kushal Pal by sickle (hansiya) regarding which a case was filed against him in the court of Magistrate in Shikohabad which was a false case. In case of 1982, in the first week, the father of accused Nasuruddin had deposed against him in the said case. It is wrong to say that he had been convicted and sentenced in that case with imprisonment of three months and fine of Rs. 3,000/- but stated that he was only told to have been fined with an amount of Rs. 3,000/-. The said fine was imposed against him about two months ago. He had not filed any appeal against the said conviction. The said case was running since prior to the present occurrence but he had no knowledge about the said case. He had received summons of the said case after the occurrence of the present case. He showed ignorance that Nasuruddin was studying in Narayan College Shikohabad and was student of B.A. final year. On the date of occurrence, he was at home during day and was not appearing in examination. It is wrong to say that 15 to 16 months ago, the father of Gaffoor namely, Munna was murdered who died of T.B.. He does

not know whether Gaffoor had given any application to police regarding murder of Munna. He also does not know that Devkinandan Khanna was S.H.O. at the P.S. about 15-16 months ago. He further stated it to be wrong that he is a history sheeter and that he was in supervision of police. He did not know that his name was entered in register no. 8 at the P.S. and also stated it to be wrong that he did not have any agricultural land and further stated that he was owning about 5 to 6 bighas of agricultural land in village Barthara and three bighas of land was in the name of his father. He further stated that concerning Patta, a case was contested about two to three years ago, in which he had filed objections and in the same, his statement was recorded but he had lost the said case and that he had not filed any appeal against the said judgment despite the fact that court had set aside his patta. Further this witness has stated that he had written in his report that he was present at the Chabutra outside his house but he cannot tell as to why the same was not written. There was no chhappar on the Chabutra of Mahavir and Bhoore Singh, although in front of their house there was a chhappar and in front of his house, there was also a Chhappar. The miscreants came and shouted that here was Phool Singh and right then he fled from there.

23. This witness has stated that he had written name of Nasuruddin as one of the assailants who had made assault upon Mahavir and his mother and has also stated to the Investigating Officer that he was standing by the side of wall of Kayam Singh but he could not tell as to why the Investigating Officer did not record the same in his statement. He also stated it to be wrong that no such occurrence took place nor had he seen any such incident and that due to animosity he was taking name of Nasuruddin to be an accused in this case. Further stated that no one had made an attempt to bring improvement in the relations between Amrit Singh and Menhdipal. There was a dispute with respect to partition of house of land between Menhdipal and Mahavir and no other enmity was there between them. Amrit Singh was taking side of Menhdipal. He had not seen that in this regard father of Raj Pal had come for holding panchayat. When the miscreants stated that here was Phool Singh, let him be caught, then he was about 25-30 paces away from him. PW-1 was standing towards south of the house of Kayam Singh in the corner but the said place was about 50 to 60 paces away. Till the incident happened, he continued to stand there only raising alarm but no miscreants had made fire upon him because they could not get any opportuity to make fire nor any fire hit him. From the southern corner of his chhappar, at a distance of about 10 paces towards north, was a lantern. Dalan of Mahavir was about 10 to 15 paces away from his Chhappar. In the entire incident, hardly 10 to 15 minutes might have been consumed. He further stated that no one had disclosed to him the name of Raj Pal. When he had written report at his house, at that time those witnesses were present there, who had seen the occurrence. Raj Pal was about 10 paces away towards east from his Chhappar when he had made fire upon Ganga Sri, while PW-1 was about 5 paces away towards west from Ganga Sri, when Ganga Sri was fired upon. From there, all miscreants had fled towards north. It was wrong to say that Raj Pal was not present at the place of incident and that he was falsely named by him because he was having enmity with Menhdipal and Raj Pal, who was his relative.

24. Further this witness has stated that out of the miscreants only two were wearing Dhata (cloth covering the face).

Bare Lal was wearing Dhata and his face was not visible but he could be identified from his voice, hence, his name was written. Amrit Singh had shouted that here was Phool Singh, let him be caught, nothing else was stated by the miscreants except that they were abusing. He had not written in report nor had stated so to the I.O. that Bare Lal, was identified by him by his voice. At about 6:00-6:30 am, he had written the written report at his house. Barthara was about 3 to 4 furlong away towards west from his village and Keshpura was 3-4 mile from his village towards south. Nagla Fateh was about one mile away from his village in the east. Nagla Sunav was one mile and one furlong away towards north from his village and Machariya would have been three furlong away towards east. The Chaukidar lives in Barthra, Nagla Fateh and Sunav. The said Chaukidar did not come after the occurrence. The Chaukidar of his (PW-1's) village had come at about 5:00 pm, who was sent to the P.S. to apprise that the occurrence had taken place at the house of PW-1 and that PW-1 was coming. It was wrong to say that the police personal had arrived at 6:00 a.m., in fact they had come after PW-1 had reached P.S. at about at about 8:00-8:30 a.m.. Further this witness has stated that he had accompanied the dead body from his village which were taken to P.S. and remained present there for about one hour. The dead bodies reached Firozabad after sun set, which were taken there in bullock cart. Further he has stated that I.O. had recorded his statement the same day when he had lodged the report which was recorded at about 7:00 am at the P.S. and statement of Chob Singh was also taken down at the P.S. but the statement of Chaukidar was not recorded at the P.S. Further he has stated that no person belonging to the house of Bhoore had accompanied the PW-1 to P.S. Only, Chob Singh had accompanied him to the P.S. He had no knowledge that Bare Lal had stood surety for Amrit Singh. It is also wrong to say that there was no light at the place of incident and some unknown persons had given effect to this occurrence but due to animosity he had lodged name of Bare Lal and he also stated it to be wrong that the report was got lodged in consultation with the Investigating Officer subsequently. He also stated it to be wrong that his report was sent to the P.S. by the I.O. and, thereafter, its copy was sent with the dead bodies. This witnss has further stated that Amrit Singh, Menhdipal and Hakim Singh are real brothers and their father Bhimsen is still alive. The son of Hakim Singh, namely, Mahavir was murdered and Ganga Sri was wife of Hakim Singh. Further, he has stated that there is difference in Pauna and Gun in respect of their size as Pauna is a little smaller in size when compared to gun. He had stated to the Investigating Officer that Menhdipal was having Pauna in his hand. There is no difference in *Bandook and Pauna* except that of size as Pauna is also treated to be gun. It was wrong to say that because of animosity with Amrit Singh, name of Menhdipal was wrongly written and it was wrong to say that he had not seen Menhdipal at the place of occurrence. He further stated that he did not have any animosity with Suresh. His sister (PW-1's) Maya Devi was married to Pradhan of Pilakhtar, namely Surendra Singh. Suresh also belongs to Pilakhtar. He does not know that there was animosity between Suresh and Surendra Singh since long. After the occurrence till the next morning, Surendra Pradhan had not come to his house and he further stated that it was wrong to say that he has falsely implicated Suresh at the instance of Surendra Pradhan.

25. It is evident from the testimony of this witness that he had animosity with

the accused, the details of litigations have already been mentioned by this witness in the above quoted statements. Therefore, it could not be said that there was no motive of giving effect to this occurrence by the accused side because enmity is a double edged weapon which is established law and that because of enmity there could be false implication, as well as incident can actually be caused. In the case in hand, this witness has clearly stated that he was sitting outside his house on Chabutra when the accused came in his house, armed with weapons, which are mentioned above and accused Amrit Singh had exhorted others that here was Phool Singh, who should be caught and it was then that he had got up from the cot and ran from there and concealed himself behind the wall of Kayam Singh and from there he witnessed the incident, in which Amrit Singh had made fire upon his daughter Kusuma and when she fell down, Menhdipal again made fire upon him by which she died. Thereafter, miscreants headed towards Mahavir (his nephew) and made fire upon him and also fire was made by the miscreants upon Ganga Sri, who was mother of Mahavir, by which Mahavir and Ganga Sri died on the spot. He also has clearly stated that Mahavir and his mother were fired upon by Nasuruddin, Khurshid Khan and Raj Pal, while other miscreants remained standing on Chabutra. It has also come in evidence that accused Amrit Singh had taken off writst watch of Mahavir and accused Menhdipal had taken off the golden Pongni of mother of Mahavir after they had fallen down and had died. It has also come on record in evidence that the distance between the place where incident happened from the house of Kayam Singh, where he was standing towards south of the house, at a distance of 50 to 60 paces and witnessed the occurrence, it could not be said that the place of incident was not visible to him as there was moon light as well as light of lanterns.

26. The arguments of learned counsel for the appellants that he could not have seen the occurrence from such a distance i.e. 50 to 60 paces, does not appear to be a tenable one and it may also be mentioned here that the investigating officer has not shown the house of Kayam Singh in site plan (Ext. Ka-20), which ought to have been shown, nor any distance of the said house from the place of incident has been shown which may be treated to be lacunae left by the Investigating Officer in conducting the investigation but its benefit may not be allowed to go to the accused as per settled law.

27. We find that in site plan Ext. Ka-20 by 'O' is shown the place from where the informant is stated to have seen the occurrence concealing himself there. By 'D' is shown the place where the informant was smoking on a cot when the accused came and were seen, thereafter, he fled from there. By 'C' is shown the place where informant's wife was making curd and from this place only she had seen accused Amrit Singh and Menhdipal to have fired upon his daughter. By 'D' is shown the place where deceased Kusuma was sleeping on a cot and from where the blood stained bedding was taken by the Investigating Officer. By 'E' is shown the place where there was a Khatola (small cot) on which, Rama daughter of Phool Singh was sleeping. By 'F' is shown the place where dead body of Kusuma was lying and from there blood stained and ordinary soil were collected by the I.O. By 'X' 'X' is shown the place, where two blank cartridges of 12 bore were found which

were said to have been fired upon the deceased, were taken in possession by the I.O. By 'G' is shown the place, where Bhoomi Sri was sleeping on cot and from here she had seen the accused committing murder. By 'H' is shown the place, where Mahavir was sleeping and after hearing noise, ran from there and collided with a wall towards south by which he fell, where his dead body was lying. By + (plus) is shown the place, where marks of pallets on the wall were found, which was about three feet high, where brain matter was found at some places and from the said place, blood stained and ordinary soil were taken by I.O. in possession and the marks of pallets were shown by dots. By 'I' is shown the place, where deceased Ganga Sri was sleeping on a cot and from this very cot it was stated that after hearing sounds of fire, she tried to run away and collided with wall and fell down and her dead body was lying there, which was shown by 'B' and from this place blood stained soil and ordinary soil were collected and on the wall also there were marks of pallets found shown by dots and to the left side of the dead body, three blank cartridges were found lying, which were taken in possession by the I.O. By 'J' is shown the cot where Bhoore was sleeping. By 'K' is shown the place, upon which Somwati was sleeping and from this place she had seen Kushma, Mahavir and Ganga Sri being assaulted by the bullets. By 'L' is shown the place where lantern was hung. By 'M' is shown the place where lantern was hung. By 'R' is shown the place, from where witness Bhoore had seen his mother and brother being assaulted by the accused. By 'arrow' is shown the direction from where villagers came after hearing sounds of fire and had chased the accused. Though, the distances are not shown in the site plan but it appears that the entire incident happened in an area which was totally visible from place shown by 'O' from where PW-1 is stated to have seen the occurrence and other eye-witness namely Surajmukhi is stated to have seen the occurrence by letter shown by 'C', therefore, we find that presence of PW-1 appears proved on the place of incident when this occurrence happened.

28. PW-2, Bhoore Singh, who is also an eye-witness, has stated in examination-in-chief that deceased Mahavir Singh was his real brother and deceased Ganga Sri was his mother and deceased Kusuma Devi was his cousin sister, all of whom had been murdered about seven and half months ago at about 10:30 pm, when he was lying on a cot on Chabutra in front of his house and his wife and children were also sleeping near him. His mother and Mahavir were lying there only and all of them were sleeping. He heard sounds of fire and some noise. When he opened his eyes, he saw that there were some men. He saw Kusuma getting hit by fire arm in the moon light. In front of 'Chabutra', a lantern was burning in Chhappar. He had seen Amrit Singh, Menhdipal, Nasuruddin, brother of Nasuruddin- Kishnoo, Bare Lal, Raj Pal and Suresh, in all, 10 to 11 miscreants, out of them Menhdipal with Pauna, Amrit Singh with his father's licensed guns, Raj Pal with gun, Khursheed Khan with gun, Nasuruddin with gun, Kishnoo with gun, Suresh with gun and Bare Lal with Pauna, were armed and after coming there, the miscreants murdered his mother as well as Mahavir. Nasuruddin, Kishun Lal and Raj Pal had made fire upon his mother and upon his sister Kusuma, Menhdipal had made fire. Name of father of Kushma is Phool Singh. In Phool Singh's chhappar, a lantern was

burning, who is his uncle. At the time of this occurrence, Chob singh, Naththu, Ganga Singh, Kayam Singh, Suraj Singh, Chandra Bhan, Komal Singh and Ram Prakash came on the spot and after having seen these villagers, under pressure, the miscreants fled towards north. After death of Mahavir and his mother, the miscreants had taken off Mahavir's wrist watch and Pongni of his mother and fled. Bhoomi Sri is his sister, who was sleeping near her mother. Near Phool Singh, his daughter Kusuma was there and his wife was making curd. Out of the miscreants, five were present in court, while Amrit singh and Kishun Lal were absconding.

29. In cross-examination, this witness has stated that towards south of the house of Mahavir, was house of Kayam Singh and not towards south-east. The house of Kayam Sigh would be five to ten paces away from the house of Mahavir and to the East of house of Kayam Singh, is house of Komal Singh. Towards west adjoining to house of Phool Singh is the house of Kayam Singh and from the southern wall of the house of Kayam Singh, the house of Phool Singh is fully visible. At the time of incident, PW-2 was sleeping beneath the Chhappar in his Dalan, where there was a little high wall. He did not raise any alarm, as he was concealing himself there. No miscreant had made any fire upon him. The place where he was sleeping, from there, at a distance of about five hands, a lantern was hanging, which used to be lighted everyday and when the Investigating Officer visited the place of occurrence, the same was burning there only. Kayam Singh and Komal Singh after coming there, stood by the side of wall and had witnessed the incident. The place where he (PW-2) was standing, from there, Phool Singh was not visible, although he had heard voice of Phool Singh, who was shouting loudly. The place where he (PW-2) was standing, the witnesses were wholely visible. He further stated that report was not written at home in front of him, rather the same was written at the P.S.. Phool singh had read out this report in front of him. The written report was scribed by Kayam Singh in front of him and whatever was told by him, the same was written. Prior to the said report being written there was no consultation made among the family members. It was wrong to say that Raj Pal was not on the place of incident and had not seen the occurrence. It is wrong to say that prior to writing the report, no one had taken his name and because Phool Singh had got his name written, therefore, he was taking his name now. It is wrong to say that the house of Kayam Singh was situated south-east of his house at a distance of about 100 paces, from where the place of incident was not visible. Further he has stated that it was wrong to say that he had not seen any miscreant chasing the informant- Phool Singh. Further he stated that about two to three miscreants had chased Phool singh for about 10 to 15 furlong. One mile consists of eight furlong. He had stated to I.O. that Nasuruddin had also made fire. He had mentioned the name of Nasuruddin among those who had made fire upon his brother when he made statement to the I.O. but he could not tell the reason as to why the same was not written by him. After hearing sounds of fire, his brother and mother had not fled from there. His mother and brother collided with wall and soon thereafter, miscreants had fired upon them, which resulted in their death. He has not stated to the I.O. that his mother Ganga Sri and brother Mahavir had fled after hearing sounds of fire and that he could

not tell as to why the same was written by the I.O. He has further stated that he had seen Kusuma being fired upon, which was made by Amrit Singh and Menhdipal and none else had fired upon her. Thereafter, the miscreants had killed his mother Ganga Sri and Mahavir chasing them. He had seen Suresh making fire. Written report was scribed in the night at about 11:00 pm. The Inspector had come at about 8:30 a.m. and at that time Phool Singh and Kayam Singh were in the village, as both of them had returned from P.S.. Kayam Singh had not gone to the P.S.. Phool Singh and Chob Singh had returned from the P.S. before 7:00 a.m.. It was wrong to say that Nasuruddin was studying in Shikohabad, as he had not seen him studying there. It was also wrong to say that during the occurrence, he was appearing in examination of B.A. and it was wrong to say that there was no light at the place of incident nor was there any lantern burning. It was wrong to say that no lantern used to be burning everyday in the Chhappar. It is wrong to say that unknown dacoits had come there who had killed the deceased and he could not recognize them and it was also wrong to say that he had not seen Nasuruddin at the place of incident. He was interrogated by the Inspector the next date in the morning.

30. Further, he has stated that during the occurrence, it was rainy season but it was not raining. The cloud used to come and go and it was wrong to say that three hours prior to the occurrence, it had rained and it was also wrong to say that in the night of occurrence, there was heavy wind. Further he stated that none of the miscreants was wearing any Dhata. The place where he had concealed himself, from there, the cot of Mahavir was maximum at a distance of five furlong. The miscreants had not made fire by placing gun upon anybody's chest. The miscreants might have fired maximum from a distance of four furlong. After fleeing away of all miscreants, he had lifted the hand of his mother and brother to know, whether they were alive or not and after having felt them, no blood stains were found on his hand and clothes. There were few drops of blood on the wall. The walls upon which, there were drops of blood, the same was to the north of his Dalan. Further he has stated that I.O. had obtained his signature on a half paper, on which he had also recorded his statement. On the next date of incident, I.O. had come to the spot in the morning, and, thereafter, he came after about three days thereafter. At that time, he had interrogated Chob Singh, Ganga Singh etc. and he had already recorded statements of Phool Singh. On the next day of occurrence, I.O. had taken in possession the blood, lanterns etc. and had obtained the signatures. The dead bodies were taken away from the village at about 10:00 a.m. with which he had also accompanied. Apart from him, Ram Khiladi, Suraj Singh, Chandrabhan, Natthu, Ganga Singh and other persons of the village had also accompanied and had reached Firozabad at about 5:00 pm. The dead bodies were taken in buffalo-cart up to P.S. In Gonch, tractor of Bramhanand was found by which dead bodies were taken up to Firozabad. Along with dead bodies inspector had also gone from the village, leaving behind few policemen. Further this witness has stated that after fleeing away of the miscreants, he had a talk with Phool Singh at about 11:00 pm. Consultation had taken place as to the names, who were to be written in report, who had been recognized, while others could not be recognized. The others, if they appear

before him, could be recognized. He had stated details of other miscreants to the I.O. but he cannot tell as to why the I.O. had not written the description of other miscreants, as stated by him. He denied that written report was scribed next day in the morning. He had not given any such statement to the I.O. that in the morning, Kayam Singh had written a report and Phool Singh and Chob Singh had gone for lodging the report to the P.S. He also stated it to be wrong that he could not recognize the miscreants and that after making consultation, names of the accused were got written in the report and that Bare Lal's name was impleaded due to animosity, falsely, although he was not involved in occurrence. He has further stated that there was no animosity of his or his family members with Suresh. Till the time report was written, Suresh, Pradhan of Pilakhtar had not come. The sister of Phool Singh namely, Maya was not available in the village, rather she was in village Pilakhtar, which was about 2 Kosh away from his village. It was wrong to say that he did not know Suresh from prior. It was wrong to say that there was some dispute between Surendra Pradhan and Suresh pertaining to some land. It is wrong to say that in a case relating to the post of Pradhan, Suresh had contested Surendra. Prior to occurrence, PW-2 did not have any relation with Suresh. He (Suresh) used to go to the place of Amrit Singh and others. He had made report regarding this at the P.S. orally and not in writing. It was wrong to say that Suresh was not involved in this occurrence and it was also wrong to say that because of enmity between his Phoopha and Surendra, Suresh was falsely implicated in this case. As soon as, fire was made, he opened his eyes. Kusuma was hardly five to 10 paces away from him. Kushma was fired from a distance of about one yard. He has stated to the I.O. that Menhdipal had made fire upon Kusuma, if the same was not written he could not tell its reason. It was wrong to say that after this occurrence, he has started living in the house of Menhdipal. At present time, no one is living in the house of Menhdipal. Now police is living in PW-2's house. It is wrong to say that he has falsely mentioned name of Menhdipal in the present case and his house was usurped by him and it is also wrong to say that he was living in that house at present.

31. Dr. Vinay Kumar Yadav, Medical Officer, S.N.M. hospital, Firozabad has been examined as PW-3, who conducted post mortem of the deceased **Ganga Sri** wife of Hakim Singh at 1:00 pm, whose dead body was brought in sealed condition by Constable Khacher Singh and Constable Ranvir Singh in sealed condition and was identified by them. The rigor mortis had passed off from the upper portion of the body but was present in the lower portion. The following ante-mortem injuries were found on her person.

(i) Gun shot wound of entry 2 cm X 2 cm cavity deep on right temporal region. Blackening present around the wound.

(ii) Gun shot wound of exit 6 cm X 8 cm on left temporal region & left cheek. There was fracture of right and left temporal bone and left mandible.

32. In internal examination, he found that membranes of brain were ruptured. Brain was also ruptured. In stomach half digested food was present in small intestine, while in large intestines fecal matter was present. The cause of death was found to be the ante-mortem injuries

and her death was one and half days old. He has proved her post-mortem report as Ext. Ka-2 in his hand writing.

33. On the same day he conducted the post-mortem of the other deceased **Kushma Devi**, daughter of Phool Singh, at about 1:30 pm, whose dead body was also brought by the same Constables in sealed condition and was identified by police constables. She was just 14 years old and was found to have died one and half days ago. The following ante-mortem injuries were found on her person:-

(i) Gun shot wound 8 cm x 6 cm x cavity deep on left side of skull and face. Contents of skull cavity were coming out.

(ii) Gun shot wound 4 cm x 4 cm x cavity deep on left lower part of the chest.

34. In internal examination, he had found fracture of all left lateral and frontal bone of skull and left mandible. Brain membranes were punctured. The brain was ruptured. In skull cavity 12 metallic pallets and one card-board was found. The left side of the chest wall was punctured and there was fracture on left 8th, 9th, 10th rib. The left Pleura was punctured and left lung was also punctured. In chest cavity, in the left side, four metallic pallets were found. In abdominal cavity, five metallic pallets and two card-board were found and in her abdomen, half digested food was found. In small intestines digested food was found, while in large intestines fecal matter was found. Spleen was punctured. The cause of death was found to be excessive bleeding and hemorrhage. He has proved post-mortem report of this deceased as Ext. Ka-3 in his hand writing.

35. On the same day, he also conducted post-mortem of the third deceased, **Mahavir**, at 1:45 am, whose dead body was brought by the same constables in sealed condition and was identified by them. He was aged about 20 years and the rigor mortis was present, both in upper and lower portion and had found following ante-mortem injuries on his person:-

(i) Gun shot wound 6 cm x 8 cm x cavity deep on top of skull and left side of scalp. Brain and its contents were coming out of the wound. Occipital, frontal and left temporal bones were fractured.

(ii) Gun shot wound 2 cm x 3 cm, on left lumber region, cavity deep.

(iii) Gun shot wound 3 cm x 3 cm x cavity deep on left lumber region 6 cm below injury no. 2.

36. In internal examination, he found that brain was ruptured. Brain membranes were punctured. In skull cavity, 12 metallic pallets and one card-board was found. Abdominal wall was punctured. Peritonium was punctured. 9 Metalic pallets equal to the size of pea and eight metalic pallets and two card boards were found in abdominal cavity. In stomach, half digested food was found. The small intestines were found punctured and the digested food was found and large intestine was found also punctured and fecal matter was present. The death had occurred due to excessive bleeding and haemorrhage and time of death was about one and half days old. He proved report of post-mortem of this deceased as Ext. Ka-4 in his hand writing.

37. He stated that all the three deceased could have died on 7.8.1982 at 10:30 pm by fire arm injuries and that if deceased Kusuma was lying on cot and

had been fired upon, the kind of injuries that she has sustained, could have been received by her.

38. In cross-examination, this witness has stated that all the three deceased would have consumed food 3 to 4 hours prior to their death. The fire upon Ganga Sri would have been made from a distance of around 3 to 4 feet and fire upon Kusuma and Mahavir would have been made maximum from a distance of about 6 feets but he could not tell. All the three deceased have died on account of having received fire arm injuries which have been noted above and as fire appears to have been made from a close range, it gets corroboration from the ocular testimony of PW-1, PW-2 and PW-4.

39. Surajmukhi, wife of Phool Singh, has been examined as PW-4 and has stated in examination-in-chief that about eight months ago in the night at about 10:30 pm, she was making curd on her 'Chabootra', which was in front of his house and near her, her husband was smoking '*Bidi* on a cot and also her daughter Kusuma Devi was lying there on a cot. First of all, Amrit Singh came there with whom, there were Menhdipal, Menhdipal's son-in-law Raj Pal, Bare Lal, Nasuruddin, his brother Kiruddin, Suresh, and two-three other men. Menhdipal was armed with country made pistol. Amrit Singh was with licensed gun, Bare Lal with Pauna, Raj Pal with gun, Naresh, Nasuruddin and Khursheed had Katta and Pauna. Soon after coming there, Amrit Singh exhorted, here is Phool Singh, let him be caught and should be killed, at which her husband fled towards the house of Kayam Singh. Amrit Singh made a fire upon her daughter, who after getting hit fell down on the ground and, thereafter, Menhdipal also made fire upon her and as soon as she received second fire arm injury, she died and, thereafter, the miscreants proceeded towards Mahavir. She has further stated that Kiruddin and Nasuruddin had also assaulted. First fire was made by Nasuruddin which was aimed at Mahavir. Kiruddin and Suresh also fired upon Mahavir, by which Mahavir died. Bare Lal, Raj Pal and Menhdipal also made fire upon mother of Mahavir i.e. Ganga Sri and she died as soon as she got hit. It was the moon lit light and a lantern was also burning in chhappar, in the light of which, she has identified the assailants/miscreants. Near Mahaivr and his mother, brother of Mahavir namely, Bhoore Singh (PW-2) was also present. She has stated that Suraj Singh, Chandrabhan, Ram Prakash and Kayam Singh of the village also came on the spot and, thereafter, miscreants fled towards the house of Amrit Singh. She identified Raj Pal, Bare Lal, Menhdipal and Suresh in court by placing her hand upon them and after placing her hand upon Nasuruddin she stated that all these were involved in this occurrence, whom she knew very well. She further stated that when they fled from there, these miscreants had taken away *'Pongni'* from the nose of Mahavir's mother and wrist watch of Mahavir also.

40. In cross-examination, this witness has stated that the place where Mahavir and Ganga Sri were there, was to the east of her house and the accused had come from the side of house of Amrit Singh and all of them, first of all, came to her house and the miscreants assaulted her and her eight year old daughter by barrel of gun and also made fire upon her husband. Her husband had not received injury of fire arm and they (miscreants) had chased her husband for a certain

distance. The Mahavir and his mother had not fled from there, rather kept concealing there only. Mahavir and his mother were killed on the ground. When the fire was being made in her house, right then, Mahavir and his mother had hardly put their feet on the ground and soon all the miscreants made fire upon them and at that time both these decesed would have been about one or two paces away from chhappar of PW-4. Further this witness has stated that from her chhappar, the cot of Mahavir would have been at the most 10 paces away and near that, was also the cot of Ganga Sri, Mahavir's mother. When she was making curd, about 45 minutes prior to that they had taken meals along with her husband and children. The Incident would have happened within 45 minutes of Mahavir and Ganga Sri having consumed food. When she was put a question as to whether when inspector came, then her husband had lodged a report, to which, she gave reply in affirmative. Further she was questioned whether any query was made from her husband before lodging the report, she started weeping. She has further stated that Raj Pal used to go to the place of Mehndipal but she does not know as to whether there had happened any quarrel between Raj Pal and her husband few days prior to this occurrence. She also stated it to be wrong that Raj Pal was not present on the spot and that she was taking his name at the instance of her husband. Further this witness has stated that she knew Nasuruddin very well from prior to the occurrence. Nasiruddin, Kiruddin and Munna are three real brothers. Munna died of T.B. and it is not that Nasuruddin were four brothers and he had taken names of only 3 out of them. Prior to the occurrence, Nasuruddin used to come to her house also. Another question was put to her that when the miscreants were firing upon Mahavir and Ganga Sri, whether their back was towards her, to which she answered in the affirmative. Another question was put whether Nasuruddin was studying in Shikohabad, to which replied that she had not heard about it and he used to live with the miscreants and she stated that it is wrong to say that Nasuruddin was not on the place of incident and was appearing in the examination in Shikohabad. This witness has further stated that she continued to stay in the village after death of Kusuma. Her statement was recorded by I.O. 15 days after the death of Kusuma. In the night when incident happened, no rain had taken place, although it was cloudy then but moon had come out of the coluds. She had stated to the I.O. that Bare Lal had made fire upon the mother of Mahavir but she could not tell as to why the same was not written by him. Further she has stated that when miscreants were making fires, at that time, Suraj Singh, Chandrabhan, Ram Khiladi, Kayam Singh and his brother Ajab Singh had come there. First fire hit Kusuma near her ear and after getting hit, she fell down on the ground by the side. After the miscreants had fled, she had felt the body of Kusuma and then she had wept. The blood stains had also come on her clothes but were not shown to the I.O. She has stated it to be wrong that on the said date she was not in the village, and that she was taking name of Bare Lal due to animosity. She also stated that when her statement was being recorded, I.O. had seen lantern which was burning in the Chhappar, when the incident had happened.

41. Further this witness has stated that Maya Devi is sister of her husband, who was married to Mualayam Singh of

Pilakhtar. Mualayam Singh is still alive. He had thrown out Maya Devi, whereafter she had started living with Surendra Singh Pradhan of Pilakhtar. It is wrong to say that when Mulayam Singh had thrown out, Maya Devi, she had gone, taking along with her, her jewellery also. It is wrong to say that in recovering the said jewellery, the accused Suresh had given help to Mulayam Singh and since then Suresh had started harboring animosity towards her and her husband. Mulayam Singh had left Maya Devi about 14 years ago. She has stated it to be wrong that the animosity was going on between Surendra Singh Pradhan and accused Suresh and that Suresh was not involved in this occurrence and his name was taken only on account of animosity.

42. Further this witness has stated that country made pistol is normally small in size, about one balist and while 'Pauna' is little bigger than that which i.e. 3 to 4 balist. She had told the I.O. that Menhdipal was having 'Pauna' and her statement to that effect was correct. She had told I.O. that Mehndipal had made fire upon mother of Mahavir but why the same was not written by him, she could not tell its reason. There was animosity between her husband and Menhdipal pertaining to land. She has stated it to be wrong that the dacoity had taken place in her village and further stated it to be wrong that Kusuma, Mahavir etc. had got killed in said dacoity and due to animosity the name of Menhdipal was falsely implicated. Further stated that on the date of incident, she had seen Mahavir and Ganga Sri having food in the night.

43. PW-5 K.P. Singh, who had conducted the investigation in this case, has stated in cross-examination that at 8:00 am in the morning, he had reached the place of incident and when Kadam Singh was filling the inquest report, he was shown lantern by Phool Singh, Boomi Sri and Bhoore Singh but he could not see whether they were in running condition. These lanterns were hanging by the bamboo used in chhappar, which was shown in the site plan by him by 'L' at one place which was in chhappar of Bhoomi Sri. When he had reached there the lantern was not burning. He had recorded statements of Phool Singh at the P.S. and also that of Surajmukhi on 29.8.1982. On the date, when he recorded statement of Surajmukhi, he did not interrogate Phool Singh. Between 8.8.1982 and 29.8.1982, he visited the village where the occurrence took place many times. On 8.8.1982, Surajmukhi was crying and was not in a position to make statement. On 9.8.1982, she could not be found by him. After 12.8.1982, she was not found by him. The site plan was made by him at the instance of informant and the witnesses. He has not shown the place from where fire was made upon Ganga Sri by the miscreants. The place, where Ganga Sri had fallen, to the south of that, there were pallets mark in the wall but he has not made any reference of the height of those marks from the ground, nor the total area of the said marks but on the basis of his memory he could say that those marks were at the height of about one and half feet from the ground, while the said wall was about 3 feet high and the said marks were spread in the area of one to one and half feet. He has further stated that report was lodged in his presence at the P.S., which was got lodged by Phool Singh. Prior to lodging the report by Phool Singh, none had given information about this occurrence, neither by Chaukidar nor by any other person. He did not find Chaukidar at the place of

incident. Further he has stated that if the dead bodies be transmitted to Firozabad, they would be taken by the route on which the police station is situated. He further state that it was not so that in the night the dead bodies remained at his P.S. When he reached at about 9:15 pm at the P.S., he did not find the dead bodies. Further he has stated that it was not that after reaching at the place of incident, one to two hours thereafter, he had come to the P.S. back with the dead bodies and prepared the report there and, thereafter, he dispatched the dead bodies. He further has stated it to be wrong that no witness had taken name of Raj Pal and that his name was mentioned by him in the statements only because it was mentioned in the report. He does not know that Nasuruddin was a student of B.A. part -II and was appearing in examination. He did not find anyone in village Barathra belonging to the house of Nasuruddin and had found his house in locked condition. The parents of Nasuruddin were living in rented accommodation. He had gone to their house in Fariha and had met parents of Nasuruddin but he could not meet Khursheed Khan and Nasuruddin. He had recorded statements of Nasuruddin on 20.8.1982. He did not make entry in G.D. of the witnesses, whose statements were recorded by him. Further he has stated that Bhoore Singh had not given any such statement to him that when day broke, after getting a report scribed by Kayam Singh, Phool Singh and Chob Singh went to the P.S. to lodge the report. He has further stated that Surajmukhi had not given him any such statement that Bare Lal had made fire upon mother of Mahavir. He has further stated that he had not gone to P.S. from Nagla Dan Sahay in a jeep but he could not tell as to when first Parcha reached the office of C.O., nor could he tell as to when the second and third parcha reached the office of C.O. The dead bodies were dispatched from the place of incident at about 11:45 am. He had not summoned Chaukidar of Nagla Dan Sahay. Surajmukhi has not stated to him that Menhdipal had made fire upon mother of Mahavir and he stated it to be wrong that the entire investigation was conducted on previous dates and that false recovery memo/fard was prepared by him, of the lanterns.

44. Kallu Singh, has been examined as DW-1, from the side of accused who has stated in examination-in-chief that he knows accused- Suresh, who is resident of his village and Surendra Pradhan is also of his village. His (DW-1's) marriage was performed with sister of Phool Singh namely, Maya Devi, who was resident of village Dan Sahay. Now Maya Devi stays with Surendra Singh Pradhan. Maya Devi had gone from his home of her own accord and along with her, she had taken the jewellery. She had gone to her parents' house with jewellery, whereafter DW-1 had gone with Suresh to take her back but Phool Singh did not send her nor the jewelleryy was returned to him. For return of the jewellery, Suresh had cooperated with him because of which a quarrel had happened between Phool Singh and Suresh and DW-1 had returned home. The said quarrel had happened eight to nine years ago.

45. In cross-examination, this witness has stated that the jewellery which Maya Devi had taken away, no report was lodged in that regard nor any panchayat was held. Suresh is in jail for about eight to ten months. He is his brother by the relationship of village and whenever any untoward incident happens with him, he

takes suresh along with him. He has never helped Suresh because DW-1 is invalid and is not capable to give any kind of help. He had never gone to meet Suresh in jail. He had gone to the house of Phool Sigh with Suresh without telling about it to any villager. Today, he had been taken to court by brother of Suresh and had asked him to depose in court. Further he has stated that about the murder having taken place in the house of Phool singh, he had no information. It is wrong to say that Maya Devi had not taken away any jewellery and that he had not gone with Suresh.

46. DW-2, Dr. Sri R.S. Pal, Professor of Mathematics, Narayan Degree college, Shikohabad, Mainpuri, has been examined as PW-1 from the defence side, who has stated that he was principal in the said college in 1982. The accused Nasuruddin, who is present in court was student in his college of B.A. Part-II. In 1981-82, he was studying in BA-II and examinations were held in July-August, 1982. After having seen the admit card of accused Nasuruddin, he stated that the same was issued by the college and upon it there was signature of Suresh Chandra Dubey of Arts Department with which, he was conversant as he had seen him writing, the same was marked as Ext. Kha-1. After having seen the admit card of Nasruddin, he stated that the said admit card was issued from Agra University, which is Ext. Kha-2. After having perused the scheme of examination dated 7.6.1982, he stated that the same was issued by Agra University, which is Ext. Kha-3. Further he stated after having seen application of Gaphoor Kha dated 20.7.1982 that the said application was given by father of the deceased and he had issued a certificate thereon under his signature and the same was in hand writing of his clerk and the same is marked as Ext. Kha-4. Further he stated that he does not know that accused Nasuruddin was NCC cadet. Nasuruddin had appeared in examination of B.A. part - II, which were held on 6.8.1982. He was arrested from his college.

47. In cross-examination this witness has stated that in Session 1981-82, about 1750 students were in his college but he does not know each student personally. The examination of BA-II had begun on 3.7.1982. The Session of teaching of 1981-82 had continued by the University up to 15th May, 1982. He cannot tell as to till when the studies were continued in that session in his college. Prior to the examination, the students are given preparation leave but he could not tell whether dring preparations leave, where the accused Nasuruddin lived. He had seen the accused Nasuruddin last time in session 1981-82 on 6.8.1982 and, thereafter, he never met him. He has stated it to be wrong that he did not know Nasuruddin prior to him being Challaned by police. The court also put a question to which, he responded by saying that in B.A. part-II he did not have mathematics as a subject.

48. The prosecution case is that the occurrence took place on 7.8.1982 at about 10:30 pm in the night in village Nagla Dan Sahay under the jurisdiction of P.S., Fariha, District Mainpuri. When seven persons named in the F.I.R. namely Amrit Singh, Menhdipal, Raj Pal and Bare Lal, Suresh Yadav, Nasuruddin, Khursheed Khan and 4-5 other miscreants came there towards the house of informant- Phool Singh (PW-1), when he was sitting out of his house on Chabutara and was smoking and the miscreants, who were fully armed with fire arm weapons which included

gun, country made pistols, 'Pauna', (small gun) and at that time deceased-Kushma was sleeping, which is shown in the site plan by 'D' and very near that spot, is shown the location of the informant and his wife by 'B' and 'C', where informant was smoking and his wife (PW-4) was making curd. Soon after reaching there, the accused Amrit Singh had exhorted that here was Phool Singh (PW-1), let him be killed and then PW-1 fled from there towards the house of Kayam Singh and from there he witnessed that his daughter Kushma was fired upon by Amrit Singh and his brother (Amrit Singh's) Mehndipal and Bare Lal, Suresh made fires upon Mahavir and his mother Ganga Sri, who tried to flee from there but they died by fire arm injuries, near the wall, which has been shown in the site plan by 'a' and 'b'. This occurrence has been witnessed by PW-1, PW-2 and PW-4, in moon light, as well as in the light of lanterns, which were burning there and which have been taken into possession by the Investigating Officer also. Therefore, we find that there was sufficient light in which the accused could have been identified by the witnesses, PW-1, PW-2 and PW-4 who were of the same area and these miscreants were well known to the informants side, hence, it cannot be said that there could be any difficulty in their identification.

49. Dr. Vinay Kumar Yadav (PW-3) has found two gun shot injuries upon the dead body of Kusuma, one on her skull and the other on her chest, the said statements of the doctor is found corroborated by the ocular testimony of PW-1, PW-2 and PW-4, because it has come in evidence that after getting first injury, she fell down and, thereafter, the another shot was made upon her which ultimately resulted in her death. Similarly, the other two deceased namely, Ganga Sri and Mahavir are found to have received 2-3 injuries respectively, of fire arm by the said doctor and the injuries upon Ganga Sri is found of fire arm i.e. entry wound in temporal region having blackening and the other also in the same area, which is exit wound, therefore, her death appears to have resulted on account of single gun shot wound made in temporal region from a very close range because of blackening having been found. The third deceased-Mahavir is found to have suffered injury no. 1 at the top of skull. Injury no. 2 in lumber region and injury no. 3 also in lumber region, which would show that he had received three injuries of fire arm and number of pallets were found embedded in the body of these two deceased persons. The statements which have been cited above of PW-1, PW-2 and PW-4, clearly show that these injuries were stated to have been caused by accused Nasuruddin, Khursheed Khan and Raj Pal by which both these deceased had died. Therefore, we find that the ocular testimony is fully corroborated by medical reports and it is apparent that all the miscreants named above had come there forming an unlawful assembly armed with deadly weapons and succeeded in killing all the three deceased named above, in prosecution of common object of the said unlawful assembly.

50. The arguments made by the learned counsel for the appellants that according to F.I.R. itself PW-1 had fled from the place of incident soon after arrival of the miscreants there and had concealed himself behind the wall of Kayam Singh and from there he has stated to have seen the occurrence which is unbelievable because it was not possible for him to have witnessed the occurrence from the said place nor the Investigating

Officer has shown the house of Kayam Singh in the site plan.

51. We are not inclined to accept this argument because in the site plan it has clearly been shown that from place 'O', PW-1 is shown to have witnessed the occurrence and whatever places have been demarcated in the site plan, where these deceased had been fired upon, were clearly visible. Merely because the house of Kusuma had not been indicated by mentioning his name, would not mean that PW-1 could not have seen the occurrence from the said place where he has stated himself to be present and had concealed himself in order to save his life.

52. The other argument that other injured i.e. wife of PW-1 Surajmujhi (PW-4) could not be treated to be an eye-witness because had she been there, she certainly would have suffered some injuries when so many miscreants were assaulting the deceased.

53. We are not inclined to accept this argument because it cannot be visualise as to in what manner the said witness would have saved her life by concealing herself. The occurrence is said to have taken place in the night hours at about 10:30 pm, which was a time when normally people would sleep and therefore, the presence of PW-1, PW-2 and PW-4 on the place of incident cannot be disbelieved as they were lying there after having taken food, when this occurrence has happened.

54. It is further argued by the learned counsel for the appellant that no recovery of any fire arm has been made from the accused-appellants but that could not be taken to be any ground for acquittal because even if weapons of assault has not been found by Investigating Officer, that, at the most would be treated to be ineffeciency on the part of the police or a lacuna left by the prosecution, the benefit of which would not be allowed to go to the accused side in face of the fact that three murders have been committed in very brutal manner, which have been witnessed by three eye-witnesses.

55. Next argument which was made by the learned counsel for the appellant that the two co-accused namely, Bare Lal and Nasuruddin have been acquitted by the trial court on the same evidence, while the remaining three, who are appellants before us, have been convicted which is a discriminatory approach and in fact when other two were not found guilty, the present appellants also ought not to have been found guilty by the trial court and should have been acquitted.

56. In this regard, we have gone through the judgment of the trial court and we find that it is recorded by it that Bare Lal happened to be brother-in-law of Amrit Singh and it was argued before the trial court that he had been falsely nominated in this case on account of his relationship with Amrit Singh. The complainant had stated in cross-examination that Bare Lal was wearing Dhata on his face and, therefore, could not be seen. According to him, he had recognized Bare Lal from his voice and, accordingly, was nominated in the F.I.R., however, his evidence did not suggest that Bare Lal had uttered any word during entire occurrence. The complainant had stated that Amrit Singh had asked his companions to catch the complainant and nothing else was uttered by the miscreants, therefore, in these circumstances involvement of Bare Lal in the crime was

found not fully established by the trial court and benefit of doubt was granted to him and accordingly was acquitted.

57. We find that this accused was also closely known to the complainant side, therefore, there was no possibility of his identification not being made by the complainant and other witnesses but the view taken by the trial court that he could not be identified because of 'Dhata' and only on the basis of his voice, he was stated to have been recognized as he had uttered that catch hold of complainant and by these words alone the identity of the said accused could not have been established, we are of the view that the said opinion of the trial court does not appear to be reasonable but this Court cannot do anything in this regard as no criminal appeal has been preferred from the side of prosecution against his acquittal.

58. The other accused Nasuruddin has also been acquitted by the trial court with regard to whom, it is recorded in the judgment that it was argued that he was a student of B.A., who had been falsely implicated because his father had appeared as a witness against the complainant and that the occurrence related to 7.8.1982. The complainant had admitted that in the first week of August, 1982 the father of Nasuruddin had deposed against him in a criminal case, which has ended in his conviction. Thus, the complainant could have a motive in falsely implicating him. Moreover, it had also come in evidence of the accused that at the relevant time, he was a student of B.A. and his examination was in progress. Sri R.S. Pal (DW-2) was Officiating Principal of Narayan Degree College, Shikohabad, who has stated that examination of B.A.-II were held in the month of August 1982 and that Nasuruddin was appearing in that examination. He had also stated that Nasuruddin had appeared in the examination held on 6.8.1982 and his statement shows that examinations were not over and Nasuruddin was to appear even then thereafter. Exhibit Kha-4 was the certificate, which was issued by him indicating that the practical examination in respect of geography was to be held on 21.9.1982. Ext. Kha-3 was scheme of examination, which showed that examination continued even after 6.8.1982. In these circumstances, the trial court held these circumstances sufficient to create doubt that Nasuruddin would have participated in the crime during the days of his examination and on that basis, he was also given benefit of doubt.

59. We are not inclined to accept this logic given by the trail court that because Nasuruddin had appeared in the examination on 6.8.1982 and his remaining examination were yet to be over, therefore, he could not have participated in the present crime in question because this occurrence is stated to have happened on 7.8.1982 at 10:30 pm in the night, while examination was over by 6.8.1982 and no such details have been mentioned by the trial court as to what was distance of the place of occurrence from the place where he was to appear in examination and whether it was possible for him to come to the place of incident and go back again to appear in examination or not. Unless these facts were also taken into consideration, an opinion would have been expressed that it was not possible by this accused to come back after committing crime and appear in the examination, no such benefit ought to have been given on the plea of alibi, but

we are helpless in this regard because no such appeal has been preferred against the acquittal of this accused. It may be clarified here that if there are more than one accused involved in a crime and if other co-accused is acquitted on false grounds, it would not be a circumstance in which the other accused would also be allowed to claim parity and acquittal, if the circumstances and the evidence on record reveals that actually both the accused had given effect to this occurrence.

60. We further find too many discrepancies in the statements of eye-witnesses and the Investigating Officer for example the complainant had stated before I.O. that Menhdipal was having *'Pauna'* but in his examination on oath before court, he stated that he was having a gun, which no doubt was a discrepancy but *'Pauna'* is a short gun and, therefore, in such circumstances when so many accused had come and made assault upon the deceased, this discrepancy would not be held to be a material one.

61. It was argued that Raj Pal was brother-in-law of Menhdipal and that he had been falsely implicated in this case because of that relationship.

62. We are not inclined to accept the same that he would have been nominated simply because he was brother-in-law of Menhdipal. All the eye-witnesses of the occurrence have named him as an accused. It has also come in the statement of Bhoore Singh (PW-2) that consultation was made before the scribing of the report and in this regard it was argued that the F.I.R. looses its significance and the same was got written after consultation but we do not find any force in this argument also because Bhoore Lal had clarified that the conversation had taken place only with respect to the fact that, who were the accused who had been identified by them so that they could be named in the F.I.R. and we find that in the F.I.R. names have been written of all those accused, who were actually identified by the complainant side while those accused, who could not be identified, were referred as four to five unknown persons, therefore, such kind of consultation or conversation would not demolish the prosecution case.

63. Further we would like to deal in detail with respect to the statement of PW-1 in the light of objections raised by the accused side that it was not possible for PW-1 to witness the occurrence. In this regard PW-1/informant has stated that he had witnessed the occurrence from near the wall of Kayam Singh, which was situated at a distance of about 50 to 60 paces from his house and, therefore, according to accused side it was not possible for this witness to have identified Raj Pal from such a distance. We have found it on record that informant had rushed to the wall of Kayam Singh after the miscreants arrived near his house, when Amrit Singh had exhorted his companions to catch hold of the informant, so that he may be shot dead and, thereafter, the miscreants started firing upon his daughter Kusuma Devi, therefore, we are of the view that from 50 to 60 paces distance, it could not be very difficult for the PW-1 to have witnessed the occurrence. It was very natural for this witness to run away from the spot to save his life and to actually witness the occurrence and to make hue and cry so that other villagers could also assemble to scare away the deceased. Had he stayed there and resisted the accused, he would also have been eliminated. We must also

keep in mind the rustic background of the witness so as to ignore the discrepancies with respect to distance stated by him from where they state to have seen the occurrence, as they may have little idea about 'furlong' and 'paces' etc.

64. With respect to accused Suresh, it has come on record that he was resident of village Pilakhtar and that informant's sister Maya Devi was married to one Mulayam Singh of the said village, who subsequently stayed with Surendra Pradhan without getting married ('baith gayi'). It was because of this reason, that strained relations were stated to be there between Surendra Pradhan and accused Suresh and this led to nominating Suresh also as one of the accused in the present case but we find that no evidence has come on record that the relations between Surendra Pradhan and the Suresh were strenuous. It was also suggested from the accused side that the complainant's sister Maya Devi had deserted her previous husband along with ornaments and thereupon Mulayam Singh, previous husband of teh Maya Devi was assisted by accused Suresh in return of those ornaments and since then, thereafter, animosity developed between the two sides, because of which Suresh was falsely implicated in the present case.

65. We do not find this to be ground serious enough for animosity so that a false implication would be made of this accused and in view of the strong evidence having come on record that this accused was also involved in causing this occurrence, as is evident from the eye-witnesses' account mentioned above, his involvement is found to be there.

66. Thus we come to the conclusion that the trial court does not appear to have committed any error as far as holding these three appellants guilty is concerned, although we have already noted above that other two co-accused, who have been acquitted by the trial court, there being no such State appeal having been preferred against the acquittal, nothing could be done at our end but the present appeals deserve to be dismissed and is, accordingly, dismissed.

67. The accused are on bail, hence their bail bonds and personal bonds are discharged. Accused shall be taken into custody to serve out the remaining sentence.

68. Let a copy of this judgment be transmitted to the trial court expeditiously along with lower court record with a direction that the trial court shall ensure that the accused-appellants served out the remaining sentence.

69. Both the appeals stand dismissed.

(2020)1ILR 759

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.11.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 3574 of 2015
With
Criminal Appeal Cases No. 4045 of 2015, 4046 of 2015 & 3657 of 2015

Bishnu Srivastava @ Pawan Srivastava & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri V.P. Srivastava, Sri Lav Srivastava

Counsel for the Opposite Party:

Sri J.K. Upadhaya, A.G.A.

Criminal Law - Indian Penal Code - Section 147 and 302/149 - Appeal against conviction.

It is well settled position that a natural witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is alleged and proved. (para 21)

The minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. (para 25)

All these facts not only create doubt about common object of alleged unlawful assembly but also about the existence of any such unlawful assembly. There is doubt whether all the accused persons were present at the spot. In view of all these facts, conviction of accused-appellants of Section 149 of IPC is not in accordance with law and thus they deserve acquittal. (para 28)

Appeals of accused-appellants allowed except Santosh Kumar Yadav. (para 31)

Hence, appeals partly allowed. (E-2)

List of cases cited: -

1. St. of Punj. Vs Hardam Singh, 2005, S.C.C. (Cr.) 834

2. Dilip Singh Vs St. of Punj., A.I.R. 1953, S.C. 364

3. Harbans Kaur Vs St. of Har., 2005, S.C.C. (Crl.) 1213

4. St. of U.P. Vs. Kishan Chandra & ors, 2004 (7), S.C.C. 629

5. Dalbir Kaur Vs. St. of Punj., AIR 1977 SC 472
6. St. of Gujrat Vs. Naginbhai Dhulabhai Patel, AIR 1983 SC 839

7. Piara Singh & ors. Vs. St. of Punj. [AIR 1977 SC 2274 = (1977) 4 SCC 452]

8. Hari Obula Reddy & ors. Vs. St. of A.P., (1981) 3 SCC 675

9. Anil Rai Vs. St. of Bihar, (2001) 7 SCC 318

10. St. of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456

11. Bhagalool Lodh & anr. Vs. St. of U.P., (2011) 13 SCC 206

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

13. Raju @ Balachandran & ors. Vs. St. of T.N., (2012) 12 SCC 701

14. Gangabhavani Vs. Rayapati Venkat Reddy & ors., 12 (2013) 15 SCC 298

15. Jodhan Vs. St. of M.P., (2015) 11 SCC 52)

16. Ganeshlal Vs. St. of Mah. (1992) 3 SCC 106

17. Mohd. Khalid Vs. St. of W.B. (2002) 7 SCC 334

18. Prithvi (Minor) Vs. Mam Raj (2004) 13 SCC 279

19. Sidhartha Vashisht @ 14 Manu Sharma v. St. (NCT of Delhi) (2010) 6 SCC 1]

20. Rammi @ Rameshwar Vs. St. of M.P., (1999) 8 SCC 649

21. Leela Ram (dead) through Duli Chand Vs. St. of Har. & anr., (1999) 9 SCC 525

22. Bihari Nath Goswami Vs. Shiv Kumar Singh & ors., (2004) 9 SCC 186

23. Vijay @ Chinee Vs. St. of M.P., (2010) 8 SCC 191

24. Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124

25. Shyamal Ghosh Vs. St. of W.B., (2012) 7 SCC 646

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

27. Rajendra Shantaram Todankar Vs. St. of Mah. & ors. [JT 2003 (2) SC 95]

28. State of Punj. Vs. Sanjiv Kumar @ Sanju & ors. [JT 2007 (9) SC 274]

29. Allauddin Mian & ors., Sharif Mian & anr. Vs. St. of Bihar [JT 1989 (2) SC 171]

30. Daya Kishan v. State of Haryana [JT 2010 (4) SC 325]

31. Kuldip Yadav & ors. Vs. St. of Bihar [JT 2011 (4) SC 436]

32. Lalji & ors. Vs. St. of U.P. [JT 1989 (1) SC 109]

33. Ranbir Yadav Vs. St. of Bihar [JT 1995 (3) SC 228]

34. Rachamreddy Chenna Reddy & ors. Vs. St. of A.P. [JT 1999 (1) SC 412])

35. Nallabothu Venkaiah Vs. St. of A.P (2002) 7 SCC 117

(Delivered by Hon'ble Raj Beer Singh, J.)

1. All these appeals arise out of a common judgment and order dated 18.08.2015 passed by the learned Additional Sessions Judge/Fast Track, Bhadoi-Gyanpur in Session Trial No.106 of 2008 (State Vs. Binnu Srivastava @ Pawan Srivastava and 7 others), under Sections 147, 302, 149 of I.P.C., and S.T. No. 07/09, under Section 25 Arms Act, both P.S. Gyanpur, District Bhadohi, whereby accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Santosh Kumar Yadav @ Kariya, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav have been convicted under Section 147 and 302/149 of I.P.C. and were sentenced to imprisonment for life along with fine of Rs. 25,000/- each under Section 302/149 of I.P.C. and two years rigorous imprisonment along with fine of Rs. 2000/- under Section 147 of I.P.C. Accused-appellant Santosh Kumar Yadav @ Kariya was further convicted under Section 25 of Arms Act and was sentenced to 5 years rigorous imprisonment along with fine of Rs. 5000/-. In default of payment of fine, accused-appellants were sentenced to different period of imprisonment.

2. Prosecution version is that on 20.06.2008 at around 12.00 noon, deceased Raj Kumar, who was brother of complainant Manoj Kumar Yadav, has left his home for going to Gyanpur by motorcycle and when he reached near veterinary hospital, accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Santosh Kumar Yadav @ Kariya and Sandeep Rawat @ Rinku, riding on two motorcycles, stopped deceased Raj Kumar. Accused-appellants Rahul Rawat and Prashant Yadav were already present there. All these accused persons made exhortation to kill Raj Kumar and consequently accused-appellant Santosh Kumar Yadav @ Kariya shot a bullet at the head of deceased Raj Kumar from country made pistol. Resultantly, Raj Kumar died on spot. This incident was witnessed by complainant (PW-1) Manoj Kumar Yadav, (PW-2) Bhola and by several other persons.

3. (PW-1) Manoj Kumar Yadav reported the matter to police by submitting a written complaint Ex.Ka-1 and on that basis, case was registered against all the 8

accused-appellants on 20.06.2008 at 12.30 P.M. under Sections 147, 149, 302 of I.PC. vide Ex.Ka-4.

4. The inquest proceedings were conducted by S.I. Biri Singh under the supervision of Inspector Umesh Pratap Singh. The dead body of deceased was sent for postmortem, which was conducted on 20.06.2008 by (PW-4) Dr. Rajeev Kumar. Following injuries were found on the body of the deceased:

(i) Wound of entry 1.5 cm. x 0.5 cm. in longitudinal place. 15 cm. above vertically from lat. end and left eyebrow and 7 cm. up and med form. Tragus over lat. half and (L) frontal area. bleeding and shout particle implemented over skin around wound in 5 cm. X 6 cm. diameter upper (L) eye and blackening C earbon particle (L) eye brow. Lat. 2/3 hair show seizing 3 cm. x 3 cm. area around wound show scarching blood present. margins and wound inverted.

(ii) Exit wound 2 cm. x 1 cm over Rt. Temporal area just above the superior attachment of Rt Pinna to scalp and 6 cm Horizontally back from lat eye of Rt. eye brow, margin ever feet, bleeding occur.

Cause of death of deceased is shock and hemorrhage, as a result of ante-mortem injury caused by firearm.

5. Investigation was taken up by (PW-6) Inspector Umesh Pratap Singh. Samples of blood stained and simple Gitti and Kankar were collected from the spot vide memo Ex.Ka-7. It was alleged that after the incident, stampede has taken at the spot and six pairs of sleeper were seized from the spot. During investigation, on 21.10.2008, while being on police custody remand, accused-appellant Santosh Kumar Yadav @ Kariya got recovered country made pistol of 315 Bore, which was used in the incident, and it was taken into possession vide recovery memo Ex.Ka-15. After completion of the investigation, charge sheet was filed against all the accused-appellants.

6. Learned trial court framed charge under Section 147, 302/149 of I.P.C. against all the accused-appellants and accused-appellant Santosh Kumar Yadav @ Kariya was further charged under Section 25 of the Arms Act. They pleaded not guilty and claimed trial.

7. In order to bring home guilt of accused-appellants, prosecution has examined 10 witnesses. Accused persons were examined under Section 313 of Cr.P.C., wherein they have denied the prosecution evidence and claimed false implication. In defence, one Rakesh Maurya was examined as (DW-1).

8. After hearing and analyzing the evidence on record, all the accused persons were convicted under Sections 147, 302/149 of I.P.C. and accused-appellant Santosh Kumar Yadav @ Kariya was further convicted under Section 25 of Arms Act vide impugned judgment and order dated 18.08.2015 and they were sentenced, as stated in paragraph no.1 of this judgment.

9. Being aggrieved by the impugned judgment and order of the trial court, appellants Binnu Srivastava @ Pawan Srivastava and Pawan Srivastava @ Prakash have preferred Criminal Appeal No. 3574 of 2015, accused-appellant Santosh Kumar Yadav @ Kariya has preferred Criminal Appeal Nos. 4045 of 2015 and 4046 of 2015, and appellants Raj

Nath Yadav, Atul Kumar Yadav, Prashant Yadav, Rahul Rawat and Sandeep Rawat @ Rinku have preferred Criminal Appeal No. 3657 of 2015. As all these appeals have been preferred against common judgment and order thus, these appeals are being decided by this common order.

10. Heard Sri V.P. Srivastava, Learned senior Advocate, assisted by Sri Lav Srivastava, Advocate, learned counsel for the appellants and Sri J.K. Upadhaya, learned A.G.A. for the State and perused the record.

11. Learned Senior counsel for the appellants submits:

(i) that presence of (PW-1) Manoj Kumar Yadav, (PW-2) Bhola and (PW-3) Amit Kumar Rawat at the alleged spot is doubtful. In the FIR there is no such version that how (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have reached at the spot and it was not clarified that where were they going. Further the name of (PW-3) Amit Kumar Rawat does not find place in the FIR.

(ii) that all the alleged eye witnesses (PW-1) Manoj Kumar Yadav, (PW-2) Bhola and (PW-3) Amit Kumar Rawat are interested and inimical witnesses. (PW-1) Manoj Kumar Yadav is brother of deceased Raj Kumar while (PW-2) Bhola is uncle of deceased and that all these three witnesses were accused in an earlier incident of murder of the father of accused-appellant Santosh Kumar Yadav. It is also stated that statement of (PW-2) Bhola and (PW-3) Amit Kumar Rawat under Section 161 CrPC, were recorded with undue delay, which has not been explained.

(iii) that spot of the alleged incident could not be established. As per FIR, the incident took place near veterinary Hospital, while in site plan, the alleged hospital has not been shown and the spot of the incident has been shown in front of the shop of Anoop Electrical. It was stated that (PW-1) Manoj Kumar Yadav has categorically stated that alleged incident took place near veterinary hospital, while as per the Investigating Officer, the veterinary Hospital is situated at quite long distance from the spot of the incident as shown in the site plan. It is further pointed out that in his cross examination (PW-2) Bhola had stated that deceased was stopped and fired near Home Guard Commandant Office.

(v) that there are contradictions and inconsistencies in the statements of witnesses. As per prosecution version, deceased was going on motorcycle, but his motorcycle was not found on the spot. As per prosecution version, deceased has died on the spot but when the police reached at the spot, his body was lying in Hospital.

(vi) that there is no evidence that all the accused-appellants were having common intention to commit murder of deceased.

It was submitted that there is absolutely nothing to indicate that accused-appellants were aware that deceased would pass from the way, where allegedly incident took place. Further, even as per prosecution version, accused-appellants Rahul Rawat and Prashant Yadav were already present at the spot, but there is nothing even to remotely indicate that these accused persons were aware that deceased would pass from there. It is submitted that there is absolutely no evidence that all the accused persons have any pre-arranged plan to commit murder of the deceased. Version of the prosecution that all the accused persons have made exhortation is quite vague.

Even, it has not been clarified that what specific exhortation was made by each of the accused persons. It was submitted that in view of all these facts, it is clear that it is not a case, where all the accused-appellants have common intention to commit murder of deceased.

12. Per contra, it has been submitted by the learned A.G.A. that all the eye witnesses have made clear and cogent statements regarding the incident. The testimony of these witnesses can not be doubted on the ground that they are related to deceased or that they were earlier accused in the murder of the father of accused-appellant Santosh Kumar Yadav @ Kariya. Enmity is double edged weapon and thus, alleged enmity may be motive to commit murder of deceased. (PW-1) Manoj Kumar Yadav has lodged prompt first information report naming all the accused-appellants and his version finds ample corroboration from (PW-2) Bhola and (PW-3) Amit Kumar Rawat. It was submitted that substantially there is no change in the spot of incident. If a person refers that incident took near some well known place, it does not mean that he intended to say that incident has taken place just at that point but his reference would cover entire vicinity of that place. Regarding common object, it was argued that there is evidence that all accused-appellants have made exhortation to kill deceased and as a consequence of the same, accused-appellant Santosh Kumar Yadav @ Kariya has fired a bullet at deceased and thus murder of deceased was committed in furtherance of common intention of all accused-appellants.

13. We have considered the rival contentions of of both the parties and perused record.

14. In evidence, (PW-1) Manoj Kumar Yadav stated that the incident took place on 20.06.2008 at 12.00 noon. There was property dispute between his family and of accused-appellant Santosh Yadav. Earlier in 2005 the family members of Santosh Yadav have given beatings to his family in which his brother Raj Kumar was injured and in that regard a case was pending in court. On 20.06.2008 his brother Raj Kumar (deceased) was going to Gyanpur by motorcycle while (PW-1) Manoj Kumar Yadav and his brother Rakesh were going to Gyanpur on foot. Accused-appellants Binnu Srivastava, Pawan Srivastava and Raj Nath Yadav on one motorcycle and accused-appellant Atul Kumar Yadav, Santosh Kumar Yadav and Sandeep Rawat @ Rinku on another motorcycle, were also going towards Gyanpur. Near veterinary hospital, accused-appellants encircled motorcycle of deceased Raj Kumar and made exhortation to kill Raj Kumar and consequently accused-appellant Santosh Kumar Yadav fired a bullet from country made pistol, which hit at the head of deceased Raj Kumar. Thereafter an atmosphere of stampede has prevailed. The incident was witnessed by him (PW-1), his brother Rakesh, one Bholanath Yadav and by many others. Raj Kumar has died at spot. (PW-1) Manoj Kumar Yadav further stated that accused-appellants Rahul Rawat and Prashant Yadav were already present at spot and they have stopped the deceased and also exhorted to kill the deceased.

15. (PW-2) Bhola stated that on account of land dispute between family of deceased and of accused-appellant Santosh Yadav, in 2005 an scuffle has taken place and in that regard a case was pending in court. On 20.06.2008 at 12.00 noon when

he (PW-2) was going to market, near home guard office, he saw that deceased Rajkumar was going towards market on motorcycle. Deceased was stopped by Rahul and Prasant and at the same time accused Binnu, Raj Nath Yadav and Pawan came on one motorcycle, while accused Rinku, Atul and Santosh came on another motorcycle and they all made exhortation to kill Raj Kumar and consequently accused Santosh Kumar Yadav @ Kariya fired from country made pistol by touching it at the head of deceased Raj Kumar. Raj Kumar fell down and an stampede took place. Manoj, Rakesh and others ran to save the deceased but accused threatened to kill them. After that all accused persons ran away.

16. (PW-3) Amit Kumar Rawat has stated that his alias name is Anil Kumar and he runs an auto parts shop at Gyanpur - Gopiganj road and it is situated at a distance of 300-400 yards from veterinary hospital. On 20.06.2008 at around 12.00 noon while he was sitting outside his shop, he saw Raj Kumar (deceased) was going towards Gyanpur by motorcycle. On two motorcycles, six accused persons came from behind. Accused-appellants Pawan, Binnu and Rajnath Yadav were on one motorcycle and accused-appellants Sandeep, Atul and Santosh Kumar were on another motorcycle and they all followed Rajkumar. As Raj Kumar started moving towards Gyanpur, accused Prashant and Rahul, who were already standing there, stopped Raj Kumar from front side while remaining six accused-appellants came from behind and they exhorted to kill Raj Kumar. Accused-appellant Santosh Kumar Yadav @ Kariya took out a country made pistol and fired a bullet at head of Raj Kumar. Some persons ran to save deceased but accused-appellants threatened to kill them too. Raj Kuar has died of fire arm injury.

17. (PW-4) Dr Rajiv Kumar has conducted postmortem on dead body of deceased and has duly proved the postmortem report Ex.ka-3.

18. (PW-5) Constable Radhey Shyam Bharti has recorded first information report.

19. (PW-6) Inspector Umesh Pratap Singh has conducted initial investigation while further investigation was conducted by (PW-7) SHO Ram Manorath Thapa.

20. (PW-8) H.M. Kedar Nath Tiwari has recorded FIR of Arms Act and deposed regarding recovery of country made pistol from accused-appellant Santosh Kumar. (PW-9) S.I. Ramchandra Tiwari has conducted investigation of case under Arms Act against accused-appellant Santosh Kumar. (PW-10) S.I. Ram Krishna Rastogi has conducted part investigation of case under Arms Act.

21. So far as the contention, that (PW-1) Manoj Kumar Yadav and (PW-2) Bhola are interested witnesses or that these witnesses have not explained that how they reached at spot, is concerned, it is well settled position that a natural witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case, the circumstances reveal that a witness was present on the scene of occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim. Generally close relations of the victim are unlikely to falsely implicate anyone. Relationship is

not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is alleged and proved. A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. In case of *State of Punjab Vs Hardam Singh, 2005, S.C.C. (Cr.) 834*, it has been held by the Apex Court that ordinarily the mere relations of the deceased would not depose falsely against innocent persons so as to allow the real culprit to escape unpunished, rather the witness would always try to secure conviction of real culprit. In the case of *Dilip Singh Vs State of Punjab, A.I.R. 1953, S.C. 364*, it was held by the Supreme Court that normally a witness is considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless witness has cause, such as enmity against accused to which to implicate falsely. Similar view has been taken by the Supreme Court in *Harbans Kaur V State of Haryana, 2005, S.C.C. (Crl.) 1213; and in State of U.P. vs. Kishan Chandra and others, 2004 (7), S.C.C. 629.* The contention about branding the witnesses as 'interested witness' and credibility of close relationship of witnesses has been examined by Apex Court in number of cases. A close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness', as held by the Supreme Court in *Dalbir Kaur v. State of Punjab, AIR 1977 SC 472*. The mere fact that the witnesses were relations or interested would not by itself be sufficient to discard their evidence straight way unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court. Similar view was taken in case of **State of Gujrat v. Naginbhai Dhulabhai Patel, AIR 1983 SC 839.** Similarly in Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498, the following observations were made by the Apex Court:

"The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

Similarly, in ***Piara Singh and Ors. Vs. State of Punjab [AIR 1977 SC 2274 = (1977) 4 SCC 452],*** the Court held:

"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

In **Hari Obula Reddy and Ors. Vs. The State of Andhra Pradesh, (1981) 3 SCC 675,** a three-judge Bench of Apex Court observed:

".. it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is

necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

A survey of the judicial pronouncements of Apex Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52)."

In view of the aforesaid exposition of law, this Court would only be required to carefully scrutinize and appreciate the evidence of closely related witnesses before arriving at any conclusion. However, their evidence cannot be disbelieved only on the ground that these witnesses are related to each other or to the deceased and when the evidence has a ring of truth as being cogent, credible and trustworthy, as has already been discussed herein above.

In the present case, it is correct that (PW-1) Manoj Kumar Yadav is brother of deceased and (PW-2) Bhola is uncle of deceased, but these witnesses have consistently deposed about their presence at spot. As per (PW-1) Manoj Kumar Yadav, at the time of incident, he was going to Gyanpur on foot. As per (PW-2) Bhola, he was going to market and in the way he witnessed the incident. It was day time. They have been subjected to cross-examination, and so far as their presence at spot is concerned, no such adverse effect could emerge, so as to make the presence of these witnesses at the scene of offence, doubtful. Version of (PW-1) Manoj Kumar Yadav has been amply corroborated by (PW-2) Bhola. One of the important aspect is that (PW-1) Manoj Kumar Yadav has lodged first information report without any undue delay. In view of all these facts, it can not be said that (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have not explained as to how they reached at spot. Thus, the contention of learned counsel for the accused-appellants has no force.

It is correct that there was enmity between the parties on account of murder of father of accused Santosh Kumar Yadav, however, it is well repeated remark in criminal matters that enmity is a double edged weapon and it cuts both ways. On the one hand, it may be a reason for false implication while on the other hand, it may also provide a motive for commission of offence. Thus, the requirement in such matters is that evidence must be scrutinized carefully in order to ascertain whether there is any possibility of false implication on account of enmity. It would be pertinent to mention here that in ordinary course a close relative

of deceased would not implicate an innocent person, sparing the actual assailants.

22. In the instant case, scrutiny of evidence shows that so far as accused-appellant Santosh Kumar Yadav is concerned, specific role of firing at deceased has been assigned to him. (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have consistently deposed that it was the accused-appellant Santosh Kumar Yadav, who has fired at the deceased. Regarding his role, no major contradiction or inconsistency could be pointed out in statement of (PW-1) Manoj Kumar Yadav. His statement is consistent with the medical evidence and corroborated by (PW-2) Bhola. First information report was lodged by (PW-1) Manoj Kumar Yadav without any delay, wherein specific role of firing was assigned to accused-appellant Santosh Kumar Yadav. No doubt there was delay in recording statement of (PW-2) Bhola and (PW-3) Amit Kumar Rawat under Section 161 CrPC, but so far as (PW-2) Bhola is concerned, his name figures in first information report as witness, which was lodged without any delay. Further the investigating officer was not asked about reasons of delay in recording his statement. Once in the first information report, (PW-2) Bhola was shown as witness, it was duty of investigating officer to record his statement promptly. There is no such material on record that after the incident this witness was not available for his statement. In view of these facts, testimony of (PW-2) Bhola can not be doubted on ground of delay in recording his statement. Mere delay in recording statement of witness does not necessarily discredit testimony. The Court may rely on such testimony if they are cogent and credible and the delay is explained to the satisfaction of the Court. [See Ganeshlal v. State of Maharashtra (1992) 3 SCC 106; Mohd. Khalid v. State of W.B. (2002) 7 SCC 334; Prithvi (Minor) v. Mam Raj (2004) 13 SCC 279 and Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1]. However, so far (PW-3) Amit Kumar Rawat is concerned, his statement was recorded with much delay on 13.07.2008 and he was not shown as witness in the first information report and thus, it does not appear safe to rely his testimony. Except the fact that it would not be safe to rely testimony of (PW-3) Amit Kumar Rawat, we do not find any force in contentions raised by learned senior counsel.

23. It was next argued that spot of the alleged incident could not be established. As per FIR, the incident took place near veterinary Hospital, while in site plan, the alleged hospital has not been shown and the spot of the incident has been shown in front of the shop of Anoop Electrical. It was stated that (PW-3) Amit Kumar Rawat has categorically stated that alleged incident took place near veterinary hospital, while as per Investigating Officer, the veterinary Hospital is situated at quite long distance from spot of the incident as shown in the site plan. It was further pointed out that in his cross examination (PW-2), Bhola has stated that deceased was stopped and fired near Home Guard Commandant Office.

24. Regarding these contentions it may be seen that as per version in first information report, the incident took place near veterinary hospital. It does not mean that incident took place just in front of that hospital. Purport of using word 'near' may vary person to person in terms of distance.

As per site plan, spot of incident has been shown opposite to shop of Anoop Electrical but investigating officer (PW-6) Umesh Pratap Singh has stated that veterinary hospital is situated in north side from point 'Á' shown in site plan Exhibit Ka-19. It is correct that veterinary hospital was not shown in site plan but there is evidence to show that it is situated nearby. It is correct that (PW-6) Umesh Pratap Singh has stated that incident took place opposite to Home guard office but this statement does not match with the site plan prepared by him, as in the site plan, place of incident has been shown opposite to shop of Anoop Electrical and home guard office is situated at some steps from there, however these are minor contradictions. It is correct that (PW-2) Bhola stated that deceased was stopped near home guard office and this fact is also supported by investigating officer while as per (PW-3) Amit Kumar Rawat, incident took place near veterinary hospital but it is also a minor inconsistency. Fact remains that all alleged points like veterinary hospital, home guard office and Annop Electrical are situated in same vicinity. In normal parlance, a witness may state that incident to be happened near veterinary hospital while another witness may say that it took place near Anoop Electrical or near any other shop/office situated nearby. Such inconsistencies are quite common. Situation may have been different, had some witnesses would have spoken altogether some distant place as spot of incident, but it is not so in this case. Considering all facts and evidence, it can not be said that alleged inconsistencies are of such nature so as to create any doubt about position of spot or about presence of (PW-1) Manoj Kumar Yadav and (PW-2) Bhola or to affect their testimony adversely. We find no substance in the argument of learned senior counsel.

25. Learned Senior counsel has pointed out certain contradictions and inconsistencies in the statements of witnesses. It was stated that as per prosecution version, deceased was going on motorcycle, but his motorcycle was not found on the spot and that as per prosecution version, deceased has died on the spot but when the police reached at the spot, his body was lying in Hospital. In this regard, it may be observed that such contradictions and inconsistencies do not affect pith and substance of testimony of (PW-1) Manoj Kumar and (PW-2) Bhola. It is correct that there is nothing to indicate that after incident, who has taken away motorcycle of deceased but it is not such a factor so as to affect prosecution version. So far as dead body of deceased is concerned, there is evidence of (PW-1) Manoj Kumar Yadav and (PW-2) Bhola that after incident, deceased was taken to hospital. Though deceased has died at spot, but it is not uncommon to take him to hospital in hope that he may be surviving. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the

truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796).

26. Having considered entire evidence carefully, so far the involvement of accused-appellant Santosh Kumar Yadav is concerned, there is clear and cogent evidence against him. In this regard, no major contradiction or infirmity could be pointed out in testimony of (PW-1) Manoj Kumar Yadav. Version of (PW-1) Manoj Kumar Yadav is quite consistent that it was the accused-appellant Santosh Kumar Yadav, who fired shot at the deceased. His version is consistent with first information report and is supported by medical evidence. Statement of (PW-1) Manoj Kumar is corroborated by (PW-2) Bhola in material particulars. Both these witnesses have subjected to cross-examination, but they remained stick to their version and no such fact could be elicited, which may cause any dent against their credibility. Regarding involvement of accused-appellant Santosh Kumar Yadav we find testimony of (PW-1) Manoj Kumar Yadav and (PW-2) Bhola coupled with other evidence on record quite impeccable and reliable.

27. However, examining the entire evidence carefully, it appears that evidence regarding common object of unlawful assembly comprising all the accused-appellants to commit murder of deceased, is quite vague. In fact, there is no categorical and cogent evidence that all the accused-appellants were present at the spot and thus, the very existence of unlawful assembly appears doubtful. Provisions of Section 149 of IPC provide that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The first part of Section 149 IPC states about the commission of an offence in prosecution of the common object of the assembly whereas the second part takes within its fold knowledge of likelihood of the commission of that offence in prosecution of the common object. Scope of two parts of Section 149 IPC has been explained in **Rajendra Shantaram Todankar v. State of Maharashtra and Ors. [JT 2003 (2) SC 95],** the Apex Court has explained Section 149 and held as under:

*"**14.** Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful*

assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 -- either clause -- is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act..... "

The same principles have been reiterated in **State of Punjab v. Sanjiv Kumar alias Sanju and Ors. [JT 2007 (9) SC 274].** Creation of vicarious liability under Section 149 IPC is well elucidated in **Allauddin Mian and Others, Sharif Mian and Anr. v. State of Bihar [JT 1989 (2) SC 171],** the Apex Court held:

"8. .....Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their

associate or associates in carrying out the common object of the assembly....."

The same principles were reiterated in paras (26) and (27) in Daya Kishan v. State of Haryana [JT 2010 (4) SC 325] and also in Kuldip Yadav and Ors. v. State of Bihar [JT 2011 (4) SC 436]. Whether the members of the unlawful assembly really had the common object to cause the murder of the deceased has to be decided in the facts and circumstances of each case, nature of weapons used by such members, the manner and sequence of attack made by those members on the deceased and the circumstances under which the occurrence took place. It is an inference to be deduced from the facts and circumstances of each case. (vide Lalji and Ors. v. State of U.P. [JT 1989 (1) SC 109]; Ranbir Yadav v. State of Bihar [JT 1995 (3) SC 228]; Rachamreddy Chenna Reddy and Ors. v. State of A.P. [JT 1999 (1) SC 412]).

In prosecution of "common object' means "in order to attain the common object'. Effect of section 149 may be different on different members of the same assembly. Common object is determined keeping in view nature of the assembly, arms carried by members and behaviour of members at or near the scene of incident. It is not necessary in all cases that the same must be translated into action or be successful. It is well settled that the expression "in prosecution of common object" has to be strictly construed as equivalent to "in order to attain the common object.' The word "knew' used in the second part of section 149 IPC implies something more than possibility and it cannot bear the sense of might have known'. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. Members of an unlawful assembly may have community of object upto a certain point. The "common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances.

28. Coming to the facts of present case perusal of evidence shows that the accused-appellant Santosh Kumar Yadav has caused single fire arm injury to deceased. It is not the case of prosecution that any of the other accused has also caused any injury to deceased. The post-mortem report of deceased also does not indicate that he was assaulted by all the accused persons, who were eight in number. (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have also not attributed any specific role to the other accused persons except that of Santosh Kumar Yadav, in causing injuries to deceased. The role assigned to the accused-appellants, except that of Santosh Kumar Yadav, is that they made exhortation to kill the deceased. It has not been specified that what words were used by these accused persons while making alleged exhortation rather only general allegation has been made that all the accused-appellants made exhortation to kill the deceased and consequently accused-appellant Santosh Kumar Yadav fired a single shot at the deceased. As per prosecution version, six accused persons have reached at spot on two motorcycles while two accused namely, Rahul and Prashant Kumar were already present there. There is nothing to indicate that how all these accused were aware that deceased would pass from that point and at that particular time. It is not the case of prosecution that deceased used to pass that

way every day. All these facts not only create doubt about common object of alleged unlawful assembly but also about the existence of any such unlawful assembly. There is doubt whether all the accused persons were present at the spot. The role assigned to the accused-appellants, except that of Santosh Kumar Yadav, is that they made exhortation to kill the deceased. It is not specified that what words were used by these accused persons while making alleged exhortation rather only general allegation has been made that all the accused-appellants made exhortation to kill the deceased and consequently accused-appellant Santosh Kumar Yadav fired a single shot at the deceased. All these facts not only create doubt about common object of alleged unlawful assembly but also about the very existence of any such unlawful assembly. It appears that it was the individual act of accused appellant Santosh Kumar Yadav, which is responsible for causing sole fatal injury to the deceased. Evidence on record is not cogent and categorical regarding common object of alleged unlawful assembly. As stated earlier, it could not be established beyond doubt that there was any such unlawful assembly. In view of all these facts, conviction of accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav with aid of Section 149 of IPC is not in accordance with law and thus they deserve acquittal.

29. Now question arises whether an accused charged under section 302/149 IPC could be convicted under section 302 simplicitor in the absence any substantial charge under section 302 IPC. In Nallabothu Venkaiah vs. State of A.P reported as (2002) 7 SCC 117, the Supreme Court was faced with two questions of law. Firstly, whether the appellant could be convicted under Section 302 IPC without the aid of Section 149 IPC, in the absence of any substantive charge under Section 302 IPC. Secondly, whether the appellant could be convicted under Sections 302/149 IPC on selfsame evidence on the basis of which other accused were acquitted. After analyzing a catena of earlier decisions on the above aspect, the law was distilled in the following words:-

"24. On an analytical reading of a catena of decisions of this Court, the following broad proposition of law clearly emerges: (a) the conviction under Section 302 simpliciter without aid of Section 149 is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence; (b) wrongful acquittal recorded by the High Court, even if it stood, that circumstances would not impede the conviction of the appellant under Section 302 read with Section 149 IPC; (c) charge under Section 302 with the aid of Section 149 could be converted into one under Section 302 read with Section 34 if the criminal act done by several persons less than five in number in furtherance of common intention is proved."

Thus, it is explicit that the conviction under Section 302 simpliciter without aid of Section 149 is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence.

In the instant case, as discussed above, evidence shows that the accused-appellant Santosh Kumar Yadav @ Kariya has fired a single bullet at deceased, which resulted to the death of deceased. Any of the other accused has not caused any injury what so ever to deceased. Both eye witnesses (PW-3) Amit Kumar Rawat and (PW-2) Bhola have also not attributed any specific role to the accused persons except that of Santosh Kumar Yadav @ Kariya, in causing injuries to deceased. Alleged exhortation attributed to these accused persons is quite vague. There is no cogent and categorical evidence to prove alleged exhortation. Only general allegation has been made that all the accused-appellants made exhortation to kill the deceased and consequently accused-appellant Santosh Kumar Yadav @ Kariya fired a single shot at the deceased. It is quite apparent from evidence that the act of firing at deceased, attributed to the accused-appellant Santosh Kumar Yadav @ Kariya, resulting in the fatal injury, is independently sufficient in the ordinary course of nature to cause death of the deceased. Medical evidence shows that the bullet fired by accused-appellant Santosh Kumar Yadav @ Kariya was sufficient to cause death of deceased. Considering entire evidence, accused-appellant Santosh Kumar Yadav @ Kariya could be convicted under Section 302 IPC. Thus, so far as accused appellant Santosh Kumar Yadav @ Kariya is concerned, he is liable to be convicted under section 302 IPC. Similarly conviction of accused-appellant Santosh Kumar Yadav @ Kariya under Section 25 Arms Act is based on evidence and calls for no interference.

30. In view of aforesaid, conviction of accused-appellant Santosh Kumar Yadav @ Kariya under Section 302/149 IPC is altered to under Section 302 IPC and sentence of life imprisonment along with fine is maintained. Conviction and sentence of accused-appellant Santosh Kumar Yadav @ Kariya under Section 25 Arms Act is also affirmed but sentence of five years rigorous imprisonment is reduced to three years. However his conviction and sentence under Section 147 IPC is set aside. Conviction and sentence of accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav under Section 302/149 and 147 of IPC is set aside. These accused-appellants are stated on bail and thus, no further order is required in their respect. Accused-appellant Santosh Kumar Yadav @ Kariya is stated in judicial custody, he shall serve out remaining sentence.

31. Appeals of accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav are allowed. Appeal of accused-appellant Santosh Kumar Yadav @ Kariya is partly allowed in above terms.

32. A copy of this order be sent to trial court for compliance.

(2020)1ILR 774

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2019

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

Criminal Appeal No. 4134 of 2005
Connected With
Government Appeal No. 5496 of 2005

Fasahat ...Appellant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri T.A. Khan, Sri Dileep Kumar, Sri Ghanshyam Joshi, Sri Noor Mohammad, Sri S.M.A. Abdy, Sri Rajrshi Gupta, Sri Mukhtar Alam, Sri Rizwan Ahmad

Counsel for the Opposite Party:
A.G.A., Sri Ramesh Sinha, Sri Upendra Upadhyay

Criminal Law - Indian Penal Code - **Sections 302, 504, 506** - Appeal against conviction.

There was a delay in lodging the F.I.R. which has led to a coloured version and an exaggerated story in the FIR. However, in view of the facts of the case, explaining the delay in lodging the FIR which we have discussed. (para 47)

The defence has not been able to show what was the enmity between the prosecution and the accused. (para 39)

The prosecution has proved its case against the appellant. (para 40)

Appeal is allowed. (E-2)

List of cases cited: -

1. Shahid Khan Vs St. of Raj. (2016) 4 SCC 96

2. St. of U.P. Vs. Satish (2005) 3 SCC 114

3. Ganga Singh Vs St. of M.P. (2013) 7 SCC 278

4. Shardul Singh Vs. St. of Hary. (2002) 8 SCC 372

5. Ravindra Kumar Vs. St. of Punj., (2001) 7 SCC 690

6. St. of U.P. Vs. Baburam (2000) 4 SCC 515

7. Thaman Kumar Vs. St. of U.T. of Chandigarh, (2003) 6 SCC 380

8. Yunis alias Kariya Vs. St. of M.P. (2003) 1 SCC 425

9. Shivaji Genu Mohite Vs. The St. of Mah. (1973) 3 SCC 219

10. Rajagopal Vs. Muthupandi alias Thavakkalai and Others (2017) 11 SCC 120

11. Balveer Singh Vs St. of M.P. 2019 (108) ACC 317

12. Jagdish Murav Vs St. of U.P. and Ors, (2006) 12 SCC 626

13. Meharaj Singh Vs St. of U.P., (1994) SCC (Crl) 1390

14. Mahendra Pratap Singh Vs St. of U.P. (2009) 11 SCC 334

15. Shripathi & ors. Vs St. of Karnat., (2009) 11 SCC 660

16. Suresh Vs. St. of UP, AIR 2001 SC 1344

17. Privy Council in Mahboob Shah Vs. Emperor [AIR 1945 PC 118]

18. Goudappa & ors. Vs. St. of Karnataka, (2013) 3 SCC 675

19. Jai Bhagwan & ors. Vs. St. of Har., (1999) 3 SCC 102

20. Ramesh Singh Alias Photti Vs St. of A.P., (2004) 11 SCC 305

21. Murari Thakur & anr. Vs St. of Bihar, (2009) 16 SCC 256

22. Asif Khan Vs St. of Maha. & anr., (2019) 5 SCC 210

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

1. The Criminal appeal no. 4134 of 2005 has been filed against the judgment and order of the trial court dated 30.08.2005 passed by the Special Session Judge, J.P. Nagar in Sessions Trial No.

231 of 2004, Case Crime No. 244 of 2004 (State Vs. Fasahat & others) under Sections 302, 504, 506 IPC, Police Station-Said Nagli, District-J.P. Nagar whereby the appellant Fasahat has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life with a fine of Rs.10,000/- and in case of default further imprisonment of three years.

2. The Government Appeal no. 5496 of 2005 has been filed by the State against the judgment and order of the trial court dated 30.08.2005 passed by the Sepcial Sessions Judge, J.P. Nagar in Sessions Trial No. 231 of 2004, Case Crime No. 244 of 2004 (State Vs. Fasahat & others) under Sections 302, 504, 506 IPC, Police Station-Said Nagli, District-J.P. Nagar whereby the accused-respondents Jamshed, Tanveer, Dilshad have been acquitted of the charges.

3. Briefly stated the facts of the case, as per the report of the informant Khaliq Ahmad are that on 01.05.2004 at about 4 o' clock in the evening Fahim Ahmad, brother of the informant was sitting in his shop when the accused Fasahat, Dilshad, Jamshed and Tanveer came to the shop and out of these persons Jamshed, Tanveer and Dilshad caught hold of the deceased Fahim Ahmad while Fasahat with the intention to kill, stabbed Fahim Ahmad with such force that his intestines came out. It is further mentioned in the FIR that the informant then took his brother, in an injured condition, to Hasanpur for treatment under Dr. Shiv Swaroop Tandon. It is also stated that on the cry raised by Fahim Ahmad, he alongwith one Irshad and Munazir came rushing to the shop and managed to extricate his brother from the clutches of the accused. The accused however, made good their escape hurling abuses and threats to kill. The report also mentions that Fahim Ahmad, the injured, was left in the care of other relatives and the informant has come to lodge the FIR (Ex. Ka-1). The report was transcribed by Sri Surendra Singh, Head Moharrir.

4. The injury report is marked as Ex. Ka-4 and reads as under:-

"(1) Incised wound 13cmx2cm cavity deep on LT side margins are clean cut. Intestine Protrude rite and Bleeding from the wound present. Kept under observation.

(2) Incised wound 2cx0.5cmx0.2cm on RT hand Palm in between Rt Index and RT Middle finger 12 cm below to RT wrist joint. Bleeding from the wound Present.

Opinion: Inj. No. (1) and (2) caused by sharp edged object. Inj. No. (1) kept under observation referred to Dist. Hospital Moradabad for further management. Patient is in low condition. Inj. No. (2) simple in nature.

Duration--above injuries fresh."

5. On 4.5.2004 the informant submitted an application (Ex. Ka-2) before the Thana In-Charge mentioning therein that his brother was under treatment at Hasanpur but on 4.5.2004 he was referred by the Doctor to be taken to Meerut and while he was being taken to Meerut and had travelled just a short distance from Hasanpur that the injured Fahim Ahmad died as a result of injuries caused to him on 01.05.2004 and therefore, the informant came back to the village with the dead body and is reporting the matter to the police.

6. Inquest was held on 4.5.2004 from 22:15 to 23:30 hrs of the same day and marked as Ex. Ka-6. Cause of death is mentioned as due to injuries received on 01.05.2004.

7. The IO sent the body for postmortem and the postmortem was conducted on 5.5.2004 at 11:00 am. In the postmortem report Ex. Ka-3 it is stated that the death had occurred about 3/4th day earlier. The postmortem report mentions cause of death as septicemia due to ante mortem injuries.

8. The crime was investigated by SSI Indu Pal Sharma who visited the spot along with Head Constable Vijay Pal Singh and Constable Narayan Das and reached the Dhakka crossing at about 18:40 hours. On the way they picked up Ali Waris and one Salim Ahmad as witnesses and thereafter, they picked the accused-appellant Fasahat and on the pointing out of Fasahat the knife used in the murder was recovered from the Haryana by-pass crossing after going some distance in the shrubbery and this recovery was made in the presence of witnesses Ali Waris and Salim Ahmad. The accused-appellant Fasahat informed that this was the same knife which was used in the assault on deceased Fahim Ahmad. The recovery memo of the knife Ex. Ka-11 has been proved by the Investigating Officer, SSI Indu Pal Singh (third IO), P.W.-7.

9. Ex. Ka-5 is the Site Plan of the place where the incident occurred. Ex. Ka-12 is the Site Plan of the recovery of the offending knife. Thereupon, chargesheet was filed against the accused-appellant under Section 302, 504 and 506 IPC on 20.7.2004.

10. Learned counsel for the appellant submitted that P.W.-1 was not an eye witness of the incident and, therefore, the entire story narrated in the FIR as well as the testimony of the P.W.-1 is false.

11. The P.W.-1 in his examination-in-chief has stated that on 01.05.2004 at 4 o'clock in the evening when there was sufficient day light, his brother Fahim Ahmad was sitting in his cement shop in Kasba Dhakka. The accused-appellant Fasahat along with Jamshed, Tanveer and Dilshad, with common intention, came to the shop where the accused Jamshed, Tanveer and Dilshad caught hold of Fahim Ahmad from behind whereas the accused-appellant Fasahat stabbed Fahim Ahmad with a knife with the intention to kill and as a result of stabbing the intestines of Fahim Ahmad came out. The witness along with Irshad and Munazir rushed to the shop and exhorted the accused and extricated Fahim Ahmad from the hands of the accused. Thereafter, they took Fahim Ahmad to the Hasanpur District Hospital and from there they took him to Dr. Shiv Swaroop Tandon for private treatment. On 4.5.2004, Dr. Shiv Swaroop Tandon referred the injured Fahim Ahmad for further treatment to Meerut whereupon the witness took Fahim Ahmad to proceed to Meerut and while on way just after they had left Hasanpur, Fahim Ahmad died as a result of injuries received by him.

12. In cross examination, the P.W.-1 further stated that only Fasahat had a weapon whereas the other accused did not carry any weapon. He also stated that Jamshed had grabbed the deceased Fahim Ahmad from behind whereas Dilshad had caught hold of his hands and Tanveer had caught hold of his legs. Since he has described the incidence in detail and his testimony from cross-examination is found intact, therefore, we do not find substance

in the contention of learned counsel for the appellant that he is not eye witness and entire story narrated in F.I.R. and his testimony is false.

13. The learned counsel for the appellant submitted that as per the statement of P.W.-1 when he reached the site, the deceased had already fallen from the chair which would suggest that this witness had not seen as to which of the accused had stabbed Fahim Ahmad and, therefore, he was not an eye witness to the incident and had arrived subsequently at the spot.

14. The submission of the learned counsel is without any substance since the P.W.-1 has described the incidence in detail that when he entered the shop the accused Tanveer had caught the deceased by his legs whereas Dilshad had caught his hands and Jamshed was holding him from behind. In his cross examination he has further stated that he was at the spot when the incident occurred and that he, Irshad and Munazir were immediately present there and a crowd gathered later on and when he reached the spot the accused were assaulting his brother Fahim Ahmad. The witness has further repeated that when he reached the shop he found that Dilshad and Jamshed had caught hold of his brother and at the time when stabbing took place his brother was standing. He has described the weapon whose handle was of aluminum and that when he exhorted the accused, they ran away from the spot.

15. Referring to the site plan (Ex. Ka-5), learned counsel for the appellant submitted that Khaliq Ahmad, the informant, whose shop was not in front of the shop of the deceased Fahim Ahmad, could not have seen the incidence and he was not an eye witness. However, from the site plan we find that there is not much distance between the shop of the deceased and that of the P.W.-1 and in any case, the incident was a broad day light incident in the summer of 01.05.2004 at 4:00 PM and therefore, it cannot be said that P.W.-1 had not witnessed the incident. We find the testimony of P.W.-1 to be consistent with the narration of facts as stated in the FIR. We also find from the postmortem report that Dr. Iqbal Hussain who first examined the deceased has clearly mentioned that injury no.1 was 13cm long with 10 stitches 4cm above the navel. Injury no. 2 was 11 cm with several minor injuries 2 cm under the skin. Injury no. 3 was 2cm x 1 cm and 10 cm above the hip joint. Injury no.4 was an injury caused to the hand and was 1 cm x ½ cm deep. In his testimony P.W.-3 has confirmed that the injury no.1 could have been caused by stabbing with a knife and that injury no.2 which is a tailing wound could have been caused while removing the knife from the body by the tip of knife. Injury no.4 could have been caused by a knife when somebody is trying to prevent the injury with his hands. The learned counsel for the appellant referring to the statement of the Doctor P.W.-3 submitted that if the injury no.2 could have been caused by a harrow it would mean that it was not caused by a knife as alleged in the FIR and in the testimony of P.W.-1. We are not inclined to accept the submission of the learned counsel for the appellant for the reason that this was only a suggestion of the P.W.-3 Dr. Iqbal Hussain, who has also stated that he has not seen the harrow. On the other hand, the P.W.-3 is quite clear and emphatic that the injury no. 1 which was 13 cm long could have been caused by a knife and the injury no. 2 could also have been caused while removing the knife from the body and the

injury no.4 to the hand could have been caused by a knife when somebody is trying to hold the knife. Thus, in our opinion, the testimony of P.W.-1 stands corroborated by the postmortem report and the statement of Dr. Iqbal Hussain P.W-3 who has proved the postmortem/injury report.

16. The learned counsel for the appellant next submitted that the statement of P.W.-2 Irshad who is stated to be an eye witness was recorded after four days and, therefore, Irshad was a tutored witness and not an eye witness, therefore, his testimony was wholly unreliable and conviction of the accused could not have been based on such a testimony. Reliance has been placed upon a judgement of the Supreme Court in ***(2016) 4 SCC 96 Shahid Khan Vs State of Rajasthan.*** In the said judgement the Supreme Court has held that where the statement of P.W.-24 and 25 (in that case) were recorded after three days of the occurrence and no explanation was forthcoming as to why they were not examined for three days coupled with the fact that the police had not been able to show as to how they came to know that these witnesses saw the occurrence, therefore, the delay in recording the statement casts a serious doubt about their being eye witness to the account. The Supreme Court further held that P.W.-24 and 25 in view of their unexplained silence and delayed statement to the police do not appear to be wholly reliable witnesses. The Supreme Court has further held that there is no corroboration of their evidence from any other independent source either and on these facts the Apex Court found it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants.

17. At this stage, we may advert to the testimony of P.W.-2 Irsahd. P.w.-2 Irshad is one of the persons named in the FIR alongwith the informant and one other person Munazir who had witnessed the incident. This witness in his testimony has clearly outlined that he and Munazir were sitting in the Sweetmeat shop of one Salim when the accused Fasahat, Jamshed, Tanveer and Dilshad came there from the west with common intention and these persons and the accused entered the shop of the deceased Fahim Ahmad. Accused Fasahat had a knife in his hand. The accused Jamshed, Tanveer and Dilshad caught hold of Fahim Ahmad whereas Fasahat with the intention to kill Fahim stabbed him in his stomach with the knife with the result that Fahim's intestines came out. He has further described that Fahim tried to hold the knife as a result of which he received injuries in his palm. He has also stated that he has witnessed this incidence in the presence of Khaliq Ahmad (informant) and Munazir. He also stated that they exhorted the accused and extricated Fahim from the clutches of the accused. Thereafter, the witness along with others put Fahim Ahmad in an Ambassador car and took him away. He has also stated that Fahim Ahmad died as a result of injuries received by him. In his cross examination, this witness has further stated that the incident was a broad day light incident which occurred at 4:00 PM on 01.05.2004 and as soon as they heard the shouting, he, Munazir and Khaliq Ahmad (informant) reached the shop, the deceased was in the shop. When he reached the spot Fahim Ahmad was standing when he was stabbed in the stomach. Other than the accused Fasahat none of the other accused carried any weapon. After receiving the injuries, the deceased collapsed and fell down in the

shop. He had received injuries in his stomach and his right hand. This witness has further stated that his statement was recorded by the police on the fourth day.

18. We find that P.W.-2 Irshad has been named in the F.I.R as a person who alongwith the informant and one Munazir rushed to the shop as soon as they heard some noise in the shop. We also find from his statement that the witness had also made a statement to that effect and has described the incidence in the same manner as described by the P.W.-1 that accused Dilshad, Tanveer and Jamshed had caught hold of Fahim Ahmad and it was accused Fasahat who had stabbed Fahim in the stomach. Thus, P.W.-2 is the person who has been named in the FIR at the very first instance and therefore, even if his testimony was recorded four days later it cannot be said that he was a tutored witness nor under the circumstances can it be said that he was not an eye witness of the incident rendering his testimony as unreliable. The testimony of P.W.-2 is consistent and corroborates with the testimony of P.W.-1, the injury report Ex. Ka-4 and the postmortem report Ex. Ka-3. It is not a case of as to how the police came to know that this witness saw the occurrence. The incident of stabbing occured on 01.05.2004 whereas the injured died of his injuries on 4.5.2004. P.W.-2 has been named as a witness in the F.I.R. lodged on the date of stabbing itself. The Supreme Court in **State of U.P. Vs. Satish (2005) 3 SCC 114** in paragraph 18 has held as under:-

*"**18.** As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating officer is categorcially asked as to why there was delay in examination for the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that it there is any delay in examination of a particular witness the prosecution version become suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. (See Ranbir v. State of Punjab,1973) 2 SCC 444, Bodhraj v. State of J&K (2002) 8 SCC 45 and Banti v. State of M.P. (2004) 1 SCC 414)."*

19. The Supreme Court in ***(2013) 7 SCC 278, Ganga Singh Vs State of Madhya Pradesh,*** in paragraph 12 and 12 has held as under:-

"12. According to Mr. Mehrotra, however, PW-5 is not a reliable witness as she has made a significant omission in her evidence by not stating anything about the seizure of the blouse, dhoti and broken bangles which were made in her presence. But we find that no question has been put to PW-5 in cross-examination with regard to seizure of the blouse, dhoti and broken bangles in her presence. If the appellant's case was that PW-5 cannot be believed because she made this significant omission in her evidence, a question in this regard should have been put to her during her cross- examination. To quote Lord Herschell, LC in Browne vs. Dunn [(1894) 6 R 67]:

".....it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that the imputation

is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit."

13. Section 146 of the Indian Evidence Act also provides that when a witness is cross-examined, he may be asked any question which tend to test his veracity. Yet no question was put to PW-5 in cross-examination on the articles seized in her presence. In the absence of any question with regard to the seizure of the blouse, dhoti and broken bangles in presence of PW-5, omission of this fact from her evidence is no ground to doubt the veracity of her evidence."

20. In the instant case with regard to the delayed examination of the witness Irshad no question has been put by the defence to the Investigating Officer, therefore, in view of the finding of the Hon'ble Apex Court in the above case defence cannot gain any advantage on the basis of delayed examination of the witness Irshad.

21. In the circumstances, we find that the judgement of the Supreme Court in the case of Shahid Khan has no application to the facts of the present case.

22. The case was investigated by SI Mahendra Singh P.W.-6 who first investigated the matter on 01.05.2004. The Investigating Officer Mahendra Singh (First IO) has prepared the Case Diary and he recorded the statement of Head Moharrir Surendra Singh as well as the statement of informant Khaliq Ahmad and also prepared the Site Plan (Ex. Ka-5). In his examination-in-chief he has stated that on 03.05.2004 he made entries of the medical report in the Case Diary and after the expiry of the injured victim, Fahim Ahmad, Section 302 was also added in his report and the panchayatnama was prepared Ex. Ka-5 which has been proved by him. He has proved the photo of the dead body (Ex. Ka-7) as well as the recovery. He has proved that the case crime no. was registered in his presence and he recorded the statement of the informant on 2.05.2004. In his cross examination the Investigating Officer has stated that on the date of the incident i.e. 01.05.2004 the informant came to the Thana at 4:45 PM and thereafter he first went to inspect the site on the direction of the SO and returned after two hours and during this time he also raided a few places and searched for the accused. He also stated that the informant came to the Thana again at 9:30 PM when the report was written down. He also stated that the informant had stated that he was informed by somebody that his brother had been stabbed and thereafter, he reached the crime spot. The Investigating Officer P.W.-6 also stated that the sweetmeat shop is hardly 8-10 steps from the crime spot. This witness has further stated that thereafter, he was transferred from that police station.

23. The investigation was next carried out by P.W.-5 Arun Kumar Verma, IO (second) who in his examination-in-chief has stated that on 04.05.2004 he was posted as SO Thana Saidnagli and on 01.05.2004 Khaliq Ahmad had lodged a report with regard to the incident. Thereafter, during treatment the injured Fahim Ahmad died and therefore, a second

report was lodged on 4.05.2004 (Ex. Ka-2) regarding offence under Section 302, 504, 506 IPC. He has also stated that the initial Case Crime no. 244 of 2004 under Section 307, 504, 506 IPC was lodged in his presence in the Thana and the matter at that time was investigated by SI Mahendra Singh and that he had also gone with the SI Mahendra Singh to the crime spot which is about 5 Kms from the Thana. He has also stated that the deceased had two cement shops; in one shop he used to sit and the other shop was being used as a store. In the shop there were chairs. He has also stated that the crime spot was in the village Dhakka in the main bazaar and there were shops adjacent to the crime spot. This witness had also stated that Fahim was first treated in the Primary Health Centre and then taken to Dr. Shiv Swaroop Tandon. In cross examination this witness has stated that at the site there was no blood. He also stated that he was informed by the informant that the injured Fahim Ahmad was taken from Hasanpur and that one Farman was holding the injured.

24. The Investigation, thereafter, was taken over by SSI Indu Pal Sharma, IO (third) P.W.-7 who has proved the recovery of the offending knife and stated that the knife was recovered on the pointing out of the accused Fasahat in a shrubbery whereupon a recovery memo was made by him Ex. Ka-11 which has been proved by the IO Indu Pal Sharma. He has further stated that he did not send the knife to the Forensic Science Laboratory for testing since the knife had been washed clean. The learned counsel for the appellant assailing the testimony of the Investigating Officer Mahendra Singh stated that when the said IO reached the crime spot he did not find any blood stains, therefore, the incident of stabbing did not occur at all and the appellant has falsely been accused of the crime. The submission of the learned counsel for the appellant cannot be accepted for the reason that the witness P.W.-1 and witness P.-W.-2 who are the eye witnesses of the incident have both clearly stated that soon after the stabbing and after the accused and co-accused ran away from the spot one Haseeb had removed his shirt and tied it to the wound to prevent bleeding. In our opinion, this would account for the fact that there may not have been any blood on the spot.

25. P.W.-4 Dr. J.P. Singh, the incharge Medical Officer, Primary Health Centre, Hasanpur in his examination-in-chief has proved the injury report Ex. Ka-4 which was prepared by him at the time when the deceased Fahim Ahmad had been brought to the Primary Health Centre in an injured condition for medical checkup. He has described the injuries as follows:-

1– कटा हुआ घाव 13 से0मी ग 2 से0मी0 ग पेट की कैवेटी तक गहरा जो कि पेट के ऊपरी हिस्से से मध्य लाईन के बायी ओर दाहिनी तरफ को नाबी से 3 से0मी0 ऊपर था। चोट के किनारे साफ कटे हुये थे। आँते बाहर निकल आयी थी। घाव से रक्त बह रहा था। चोट को जेरे निगरानी रखा गया था।

2– कटा हुआ घाव 2 से0मी0 ग 0.5 से0मी0 ग 0.2 से0मी0 दाहिने हाथ पर हथेली की तरफ से तर्जनी उँगली व मध्यम उँगली के बीच तक था। दाहिनी कलाई से 12 से0मी0 नीचे था। घाव से रक्त बह रहा था। किनारे साफ कटे थे।

मेरी राय में चोट नम्बर 1 व 2 किसी धारदार हथियार से आनी सम्भव है। चोट नं01 को जेरे निगरानी रखते हुये जिला अस्पताल मुरादाबाद को रैफर किया गया था। मरीज की हालत खराब थी। चोट नं0 2 साधारण किस्म की थी। उपरोक्त चोटे ताजा थी। दोनो चोटे धारदार छुरे से आना सम्भव है चोट नम्बर 02 यदि आदमी के छुरा मारा जाये और आदमी उसे हाथ से पकड़ने पर आनी सम्भव है। चोट नं0 1 मानव

जीवन के लिये खतरनाक थी। उपरोक्त चोटे दिनांक 01.05.04 को शाम 4.00 बजे आना सम्भव है।

26. The P.W.-4 has also submitted his expert opinion stating that the injury no.1 and 2 as noted above, was possible to have been caused by a sharp edged weapon. He has further stated that having regard to the seriousness of the injury no.1 he had referred the injured for further treatment in the District Hospital, Moradabad since the medical condition of the injured was bad. The injury no.2 however, was simple. Both the injuries were fresh. He has also opined that it was possible for both the injuries to have been caused by a sharp knife and that injury no.2 could have been caused if the injured tried to hold the knife with his hand. Injury no.1 was stated to be fatal. This witness has further testified that it is not possible for these injuries to have been caused by falling upon a harrow.

27. P.W.-8 Ali Waris who is an independent witness has proved the recovery of the knife from the shrubbery and has also stated that the accused-appellant Fasahat had informed the SO in his presence that he had caused injury to Fahim Ahmad with this knife and while making good his escape he had washed the knife at a tap near Afzal Tel Depot and thereafter had thrown the knife at the place where it was found in the shrubbery. This corroborates the statement of the Investigating Officer (third) Indu Pal Sharma who has stated that he did not send the knife to the Forensic Science Laboratory for testing since the knife had been washed clean. The Site Plan of the recovery is Ex. Ka-12. Spot marked as "X' is shown as the spot where the offending weapon i.e. knife was found on the pointing out of the accused. "XA' is the spot where the accused is stated to have handed over the knife to the police. Point "B' is the spot where the police jeep was stopped and from where the police and the accused went in search of the knife. The single arrows represent the spot where the police along with accused reached over the bridge. The double arrow thereafter, marks the way led by the accused to the spot where the knife was found. The site plan Ex. Ka-12 has been proved by the Investigating Officer, Indu Pal Sharma P.W.-7.

28. The learned counsel for the appellant also submitted that the witness Abid was never examined. The name of Abid finds mention in the examination-in-chief of P.W.-1 Khaliq Ahmad, the informant who has stated that on the date of the incident i.e. 01.05.2004 in the morning the accused had got into an altercation with the said Abid. Abid in order to save himself ran into the shop of his brother Fahim Ahmad, the deceased. The accused persons followed Abid to the shop of Fahim Ahmad who scolded the accused. The accused then threatened Fahim stating that he would have to face consequences for protecting Abid and it is for this reason that the accused with common intention murdered Fahim Ahmad.

29. Sri Upendra Upadhayay, learned counsel for the complainant as well as learned AGA submitted that motive stood established as being the incident which occurred on the day of the incident i.e. 01.05.2004 when the accused with the intention to assault Abid chased him and Abid ran into the shop of Fahim to save himself and Fahim saved Abid from the accused persons and the accused had thereupon threatened Fahim with dire

consequences for saving Abid. This establishes the motive for the murder of Fahim by the accused persons though we may hasten to add that even if Abid was not produced as a witness to testify to the occurrence of the incidence that occurred with him on the morning of 01.05.2004 but then in the facts and circumstances of the case, the incident being a broad day light incident having occurred at 4 o' clock in the afternoon/evening in the summer month and having witnessed by P.W.-1 and 2 and the facts having been corroborated by the injury report, postmortem report as well as recovery of the murder weapon having been witnessed by independed witness Ali Waris P.W.-8 in the presence of Investigating Officer on the pointing out of the accused and incident being a day light incident, motive becomes irrelevant.

30. In the case of ***Shardul Singh Vs. State of Haryana (2002) 8 SCC 372,*** it has been held that :-

"motive', which is not always capable of precise proof, if proved, may lead additional support to strengthen the probability of the commission of the offence by the person accused but the absence of motive does not ipso facto warrant an acquittal."

31. Similarly, in the case of ***Ravindra Kumar Vs. State of Punjab, (2001) 7 SCC 690,*** the Apex Court has held that-

"It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. It is therefore not possible to change the tide on account of the inability of the prosecution to prove the motive aspect to the hilt.

32. Similarly in the case of ***State of U.P. Vs. Baburam (2000) 4 SCC 515*** it has been held that-

"It is not possible to accept the view that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would be weaken the prosecution to any would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it is generally in a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations that cannot be put in evidence by them due to the ban imposed by law. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of offender to such a degree as to impel him to commit the murder cannot be construed as a fatal weakness of the prosecution."

33. Similarly, in the case ***Thaman Kumar Vs. State of Union Territory of Chandigarh, (2003) 6 SCC 380,*** it has been held that-

"There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. Hence in the facts and circumstances of the case, the absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused."

34. Similarly, in the case of ***Yunis alias Kariya Vs. State of M.P. (2003) 1 SCC 425,*** it has been held that-

"Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is settled law that establishment of motive is not a sine qua non for proving the prosecution case."

35. In ***(1973) 3 SCC 219 (Shivaji Genu Mohite Vs. The State of Mahrashtra)*** the Supreme Court in paragraph 12 has held as under:

"12. As stated earlier, the fact that the prosecution in a given case has been able to discover a sufficient motive or not cannot weigh against the testimony of any eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such case if a motive is properly proved such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if a motive is not established the evidence of any eye-witness is rendered untrustworthy."

36. In ***(2017) 11 SCC 120 (Rajagopal Vs. Muthupandi alias Thavakkalai and Others)*** the Supreme Court in paragraph 14 has held as under:

"14. Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."

37. It was further submitted by the learned counsel for the respondents that statement of P.W.-1 should be read as a whole and it cannot be read piecemeal by picking up statements made here and there. He submitted that even if P.W.-1 has in his cross examination stated that he was at the crossing on the road marked by X inside a circle in the Site Plan Ex. Ka-5 but in the same context he has also stated that at the time of the incidence he was standing about 4-5 meters to the east of the shop where the incident occurred, therefore, it cannot be said that P.W.-1 could not have witnessed the murder of

Fahim Ahmad. The learned counsel for the respondents have further submitted that the statement of P.W.-1 in cross examination that Tanveer had held the legs of deceased Fahim, Jamshed had held him from behind and Dilshad had held him by his hands is consistent and intact with the narration of facts in the FIR.

38. With regard to the lodging of the FIR at 22:00 hours on 01.05.2004, learned counsel for the respondents submitted that the incident happened at 4:00 PM thereafter, the informant rushed with the injured Fahim to the Primary Health Centre where Dr. J.P. Singh (P.W.-4) examined him and prepared the injury report. Dr. J. P. Singh, thereafter referred him to the District Hospital, Moradabad. The informant then took the injured Fahim for further treatment to Dr. Shiv Swaroop Tandon where he was treated privately and remained there till 04.05.2004 as per the statement of the informant. On 04.05.2004 Dr. Shiv Swaroop Tandon referred the injured for further treatment at Meerut and while the informant was taking the injured from Hasanpur to Meerut the injured Fahim Ahmad died on the way. Therefore, considering the time lapse which has occurred from the time the injury was caused to the deceased Fahim Ahmad till he was taken to Dr. Shiv Swaroop Tandon and left there in the care of other relatives and only thereafter, that the informant rushed to the police station to lodge the FIR on the same day at 10:00 P.M, in our opinion, such time lapse has reasonably been explained and therefore, the submission of the learned counsel for the appellant that there was inordinate delay in lodging the FIR is totally misconceived.

39. The accused in their defence under Section 313 Cr.P.C. have denied the incident altogether and claimed that they have been falsely implicated in the murder of the deceased Fahim Ahmad due to enmity. However, the defence has not been able to show what was the enmity between the prosecution and the accused.

40. In this view of the matter, it is amply clear that the prosecution has proved its case against the appellant Fasahat.

41. In view of the facts of the case and the case laws referred to above, we do not find any illegality or infirmity in the finding recorded by the trial court with regard to the appellant Fasahat and appeal is liable to be dismissed. Hence, the **Criminal appeal no. 4134 of 2005** is dismissed. The conviction and sentence awarded by the trial court is affirmed. The appellant Fasahat is already in jail. He shall be kept there to serve out the sentence as awarded by the trial court and affirmed by us in the above case.

42. In **Government Appeal no. 5496 of 2005,** the learned AGA for the State-appellant submitted that as per the site plan, the deceased Fahim Ahmad was attacked in his shop and the site is marked by point "A" whereas Khaliq Ahmad the informant is stated to be standing 4-5 metres from the spot "A", therefore, spot "A" would be clearly visible. He further submitted that statement of P.W.-1 that Jamshed had caught hold of Fahim from behind, Dilshad had caught hold of him by the hands and Jamshed was holding him by the legs is consistent with the narrative in the FIR that the three accused-respondents Jamshed, Tanveer and Dilshad were holding Fahim whereas Fasahat, the other accused had stabbed him with a knife. Learned AGA has

further submitted that respondents Jamshed, Tanveer and Dilshad had gone with Fasahat with a common intention to avenge the incident which had happened in the morning of 01.05.2004 regarding Fahim giving protection to Abid in his shop and even though Fasahat alone was carrying a weapon and inflicted the fatal stab wound on Fahim, the deceased, the respondents Jamshed, Tanveer and Dilshad were equally guilty.

43. Sri Mukhtar Alam further submitted that Dr. Shiv Swaroop Tandon was never examined as a witness and, therefore, the entire story that the injured was taken for treatment to Dr. Shiv Swaroop Tandon was a concocted story and could not have been relied upon. In our opinion, even if Dr. Shiv Swaroop Tandon was not produced as a witness by the prosecution but Dr. J.P. Singh P.W.-4 has proved the Ex. Ka-4 which is the injury report prepared by him on the very first instance when the injured Fahim Ahmad was brought to the Primary Health Centre for treatment immediately after being stabbed and the injury report corroborates the incident of stabbing. The injury report of Dr. J. P. Singh further finds support from the injury report prepared by Dr. Iqbal Hussain, P.W.-3, in-charge Medical Officer. The doctor in the District Hospital conducted the postmortem of the deceased and the injuries mentioned in the postmortem report corroborate the statements of P.W.-1 and 2 that the deceased Fahim Ahmad was stabbed.

44. Sri Mukhtar Alam further submitted that the Medical Officer/doctor who declared the injured Fahim Ahmad having been brought dead did not communicate the said information to the police and there was violation of Section 39 of the Cr.P.C. Section 39 of the Code provides that every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the sections of the Indian Penal Code mentioned in Section 39 to be duty bound to communicate such information to the nearest Magistrate or the police officer of such commission or intention. However, as submitted by the learned AGA, we find that Section 307 and 323 IPC are not mentioned in Section 39 Cr.P.C. We may, however, note that at the time when injured Fahim Ahmad was admitted for treatment to Dr. Shiv Swaroop Tandon he was still alive and a case under Section 307, 504, 506 IPC had been registered which Sections do not find mention in Section 39 of Cr.P.C., therefore, there was no obligation on the part of Dr. Shiv Swaroop Tandon to communicate such information to the nearest Magistrate or the police officer. However, we may hasten to add that the FIR was lodged in the Thana Hasanpur on 1.5.2004 and bears the endorsement of the S.I of the same date. Just below it is the endorsement of the in-charge CJM District J.P. Nagar, though no date has been mentioned but we have no reason to believe that the same was sent to the Magistrate at a later date and not on 1.5.2004 itself. The FIR also bears the seal of the Circle Officer, Hasanpur referring to the concerned court. We may also note that report of the death of injured Fahim Ahmad was made to the Thana concerned on 4.05.2004 itself which is the date of death of the injured by the informant Khaliq Ahmad (Ex. Ka-2). We therefore reject the contention of the learned counsel for the respondents that there was violation of provisions of section 157 Cr.P.C. The judgment of the Supreme Court in the case

of Jagdish Murav (supra) therefore, has no application to the facts of the present case.

45. The next submission of the learned counsel for the respondents, Sri Mukhtar Alam is that the F.I.R. itself was delayed. However, we may note in this context that the incident occurred at 4:00 P.M./16:00 hours on the afternoon/evening of 01.05.2004. The P.W.-1 in his testimony has stated that he had taken the injured first to the Primary Health Centre where he was examined by Dr. J.P. Singh who referred him to the District Hospital, Moradabad. Thereafter, he took the injured to Dr. Shiv Swaroop Tandon where he was left in the care of other relatives and thereafter the P.W.-1 rushed to lodge the F.I.R. The first Investigating Officer P.W.-6 Mahendra Singh has in his testimony stated that he had reached the site of the incident at 6:00 PM in the evening which means that the information had been given to the police by that time. He also states in his cross-examination that the informant Khaliq Ahmad had come to the Thana for lodging the FIR at 4:45 PM in the evening, though the time may not be correct since from the original record it is seen that the Medical Officer, Incharge (PHC) Hasanpur has examined the injured Fahim Ahmad on 1.5.2004 at 5.35 p.m. and submitted the injury report Ex. Ka-4. . The IO did not register the F.I.R. at that time but as per his statement he went to the spot for inspection and only, thereafter the F.I.R. was registered at 22:00 hours same day i.e. on 1.5.2004. The time of the FIR is mentioned in the chik F.I.R. as 22:00 hours on 01.05.2004. The chik FIR has been proved by the SSI Indu Pal Singh P.W.-7. Therefore, it is not correct to state that there was delay in lodging the F.I.R. It is also to be noted that the chik FIR was sent to the Magistrate by Dak as per the noting of the Circle Officer and also endorsed by the CJM, J.P. Nagar as "seen". We may also noted that if it is the allegation of the defence that the FIR was delayed no question in this regard was put to the IO either and therefore, the defence cannot gain any advantage through such submission.

46. The Supreme Court in ***Balveer Singh Vs State of Madhya Pradesh 2019 (108)ACC 317*** in para 20 has held as under:-

"20. *Delay in FIR - For the occurrence on 11.03.1998 at 05.30 PM, FIR No.114/98 was registered on the same day at 06.00 PM. As per the evidence of Constable Radhey Shyam (PW-10), FIR was handed over before the Court of JMFC, Bina on 12.03.1998. So far as the contention regarding delay in receipt of the FIR in the court, the trial court held that not sending the FIR immediately to the Court after its registration, cannot be put against the prosecution case since after 05.30 PM, the court timing gets over and in these circumstances, production of FIR before the Court on the next day during the court timings does not indicate that the FIR is ante dated. The case of prosecution, in our view, cannot be doubted on the ground of delay in receipt of the FIR in the court."*

47. Sri Mukhtar Alam, learned counsel has placed reliance upon the judgement of the Supreme Court in ***Jagdish Murav Vs State of U.P. and Ors, (2006) 12 SCC 626 and Meharaj Singh Vs State of U.P., (1994) SCC (Crl) 1390*** and submits that there was a delay in lodging the F.I.R. which has led to a coloured version and an exaggerated story in the FIR. However, in view of the facts

of the case, explaining the delay in lodging the FIR which we have discussed at length and rejected hereinabove, and in view of the judgment of the Supreme Court in the case of Balveer Singh and Ganga Singh (supra), in our opinion, the judgement of Jagdish Murav and Meharaj (supra) have no application to the facts of the present case.

48. Sri Mukhtar Alam, learned counsel for the respondent next submitted that respondents role was only one of holding the injured/deceased whereas the actual incident of stabbing was carried out by accused Fasahat and, therefore, they had rightly been acquitted by the trial court and the acquittal should not be reversed on the evidence as it stands. He has relied upon the judgment of the Supreme Court in ***(2009) 11 SCC 334 Mahendra Pratap Singh Vs State of Uttar Pradesh*** as well as ***(2009) 11 SCC 660, Shripathi and others Vs State of Karnataka*** and submitted that in Sripathi (supra) the accused A-1 and A-3 had on the instructions of A-4 held the deceased whereas it was A-4 who was carrying a knife in his pocket, suddenly brought it out and stabbed the deceased.

49. In our, opinion, the judgement in the case of Mahendra Pratap Singh (supra) and Sripathi (supra) have no application to the facts of the present case for the reason that in the case of Sripathi (supra) it could not be established that the accused A-1 to A-3 had a common intention and object in perpetrating the crime and had caught hold of the deceased with that intention. On the other hand in the present case, it has been successfully proved by the prosecution through the testimony of the witnesses that on the morning of the incident the accused had chased one Abid into the shop of Fahim, the deceased who had scolded the accused and sent them away and while leaving the accused had threatened Fahim Ahmad with dire consequences for having saved Abid. The prosecution has also succeeded in proving that all the accused on the same day in the afternoon at 4:00 pm i.e. 1.05.2004 with common intention came to the shop of Fahim and while Jamshed, Tanveer and Dilshad caught hold of Fahim, the accused Fasahat stabbed Fahim with such force that the intestines of the deceased came out. It is not the case of the defence that the accused were not aware of the intention of Fasahat to stab Fahim or that after the accused had held the deceased Fahim Ahmad the accused Fasahat took out a knife from his pocket and stabbed Fahim and that the accused could not have known of the intention of Fasahat to stab Fahim to death.

50. In this view of the matter, the judgement cited by Sri Mukhtar Alam namely, Sripathi (supra) and Mahendra Pratap Singh (supra) with reference to common intention under Section 34 have no application to the facts of the present case.

51. Otherwise also the manner in which the crime was committed, we find that Jamshed, Tanveer and Dilshad along with the accused Fasahat had with a common intention reached the shop of the deceased to teach him a lesson and to kill him in relation to a previous incident which occurred the same morning in which the deceased had saved one Abid from the clutches of the accused persons. It has specifically come on record that Jamshed had grabbed the deceased Fahim Ahmad from behind whereas Dilshad had caught hold of his hands and Tanveer had caught hold of his legs, meaning thereby

that they had rendered the deceased immobile and ineffective to save himself from knife blow dealt by accused Fasahat. If the three accused-respondents had not caught hold of the deceased so firmly, there would have been a chance for the deceased to have run away and save himself. Thus, it is clear that they had reached the spot alongwith the accused Fasahat with the common intention to avenge the incident of the same morning and to assault the deceased and to kill him. Therefore, in our opinion, all the three accused-respondents having reached the spot in furtherance of their common intention to commit murder of the deceased and also actively participated in the crime, therefore, they are liable to be held guilty of the offence under section 302/34 I.P.C.

52. It is to be noted for convicting a person with the aid of Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established (i) common intention and (ii) participation of the accused in the commission of the offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 IPC will still be attracted as essentially it involves vicarious liability.

53. In the present case it has been specifically proved by the prosecution that the respondents were present on the spot and were catching hold of the deceased and thereby they actively participated in the commission of the crime with common intention to kill the deceased. It is also the case of the prosecution that an incident had taken place in the morning in which the deceased had scolded the accused persons and saved one Abid who was being chased by the accused persons and, thereafter the accused persons had left threatening the deceased Fahim of dire consequences and on the same day they reached the shop of Faheem and committed his murder with common intention. The prosecution has also proved its case beyond reasonable doubt.

54. The Apex Court in ***Suresh Vs. State of UP, AIR 2001 SC 1344,*** opined in para 36 and 37 as under:

*"**36.** However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our view in the light of consistent legal approach on the subject throughout the period of judical pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.*

***37.** Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a*

common intention pre-supposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such a preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

38. *Dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissauded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in Shatrughan Patar & Ors. v. Emperor [AIR 1919 Patna 111] held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.*

40. *In Barendra Kumar Ghosh vs. King Emperor [AIR 1925 PC 1] the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:*

".....the words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other

things 'they also serve who only stand and wait'. By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar of diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

(Emphasis supplied)

Referring to the presumption arising out of Section 114 of the Evidence Act, the Privy Council further held:

"As to Section 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; Abhi Misser v. Lachmi Narain [1900 (27) Cal. 566]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation de facto(as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by Section 114 brings the case within the ambit of Section 34.

(Emphasis supplied)

41. *The classic case on the subject is the judgment of the Privy Council in Mahboob Shah vs. Emperor [AIR 1945 PC 118]. Referring to Section 34 prior to its amendment in 1870 wherein it was provided:*

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

it was noticed that by amendment, the words "in furtherance of common intention of all" were inserted after the word "persons" and before the word "each" so as to make the object of Section clear. Dealing with the scope of Section, as it exists today, it was held:

"Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance

of such intention. To provide the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre- arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from this act or conduct or other relevant circumstances of the case."

(Emphasis supplied)

55. In ***Goudappa and others Vs. State of Karnataka, (2013) 3 SCC 675,*** Hon'ble Supreme Court opined that Section 34 IPC lays down a principle of joint liability in doing a criminal act and the essence of that liability is to be found in the existence of common intention.

56. In ***Jai Bhagwan and others Vs. State of Haryana, (1999) 3 SCC 102,*** para 11 reads as under:-

*"**10.** To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case."*

57. In ***Ramesh Singh Alias Photti Vs State of A.P., (2004) 11 SCC 305,*** the Supreme Court in para 12 has held as under:-

*"**12.** To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other*

relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696 : AIR 1971 SC 855)."

58. In ***Murari Thakur and Another Vs State of Bihar, (2009) 16 SCC 256,*** the Supreme Court in para 7 has held as under:-

"7. We agree with the view taken by the High Court and the trial court that the accused had committed murder of deceased Bal Krishna Mishra after overpowering him in furtherance of their common intention on 26-8-1998 at 4 p.m. No doubt it was Sunil Kumar, who is not before us, who cut the neck of the deceased but the appellants before us (Murari Thakur and Sudhir Thakur) also participated in the murder. Murari Thakur had caught the legs of the deceased and Sudhir Thakur sat on the back of the deceased at the time of commission of this murder. Hence, Section 34 IPC is clearly applicable in this case."

59. In ***Asif Khan Vs State of Maharashtra and Another, (2019) 5 SCC 210,*** the Supreme Court in paragraphs 23, 24 and 25 has held as under:-

*"**23.** The principles as noticed above have been reiterated time and again. We may refer to the judgment of this Court in Narinder Singh and Another Vs. State of Punjab, (2000) 4 SCC 603, the facts in the above case has been noticed in Paragraph No.5 of the judgment, which are to the following effect:-*

"5. On 6-11-1989 Gurdev Singh with his son Hardip Singh (PW 2) was going on a bicycle to Village Jagatpur in order to withdraw the money from his account in the Cooperative Bank there. Hardip Singh was pedalling the cycle while Gurdev Singh was sitting on its carrier. Around 12 o'clock when they reached the metalled road near the field of one Gurmej Singh, resident of Jagatpur, they saw the appellants sitting near a tree. They got up and intercepted Gurdev Singh and Hardip Singh. Both got down from their cycle. Appellant Narinder Singh proclaimed that they would teach Gurdev Singh a lesson as he had not vacated the office of Granthi of the Gurudwara as per their demand. He grabbed Gurdev Singh by his arms while the second appellant Ravinder Singh alias Khanna took out a gatra kirpan, which he was wearing and stabbed Gurdev Singh with the gatra kirpan on the left side of his neck. Gurdev Singh after receiving the kirpan-blow fell down....."

***24.** The role assigned was that he grabbed Gurdev Singh by his arms while the second appellant stabbed 24 Gurdev Singh with kirpan. In Paragraph No.5, following has been stated:-*

"5. .....He grabbed Gurdev Singh by his arms while the second appellant Ravinder Singh alias Khanna took out a gatra kirpan, which he was wearing and stabbed Gurdev Singh with the gatra kirpan on the left side of his

neck. Gurdev Singh after receiving the kirpan-blow fell down....."

25. *This Court in Paragraph No.16 of the judgment held that both the appellants had committed the murder of Gurdev Singh. It was held that it is not material to bring the case under Section 34, as to who inflicted the fatal blow, following was laid down in Paragraph No.16:-*

"16. .....Both the appellants committed the murder of Gurdev Singh, Granthi in furtherance of their common intention. It was submitted by Mr Gupta that Narinder Singh could not have been convicted with the aid of Section 34 as this section is nowhere mentioned in the impugned judgment. Mention of the section in the judgment is not the requirement of law to convict a person. If the ingredients of the offence are present, conviction can be made. It is not material to bring the case under Section 34 IPC as to who, in fact, inflicted the fatal blow. The High Court has rightly interfered in the matter and sentenced the appellants accordingly."

60. Learned trial court considering that P.W. 1 and P.W. 2, namely, Khalik Ahmad and Irshad have stated that deceased was caught hold by the accused Tanvir, Dilshad and Jamshed and both have stated that they reached the spot after hearing the noise and after the injury was caused, has held that their witnessing of catching hold of the deceased by accused Tanvir, Dilshad and Jamshed is doubtful. In view of the facts already discussed above and the settled legal position the finding of the trial court is wholly perverse.

61. In view of the aforesaid, we are of the view that the accused respondents had wrongly been acquitted by the trial court for the ultimate criminal act done by all the respondents in furtherance of the common intention of all.

62. For the reasons stated above, the ***Government Appeal no. 5496 of 2005 is allowed*** and the judgement and order of the trial court dated 30.8.2005 in so far as it relates to the acquittal of the accused-respondents Jamshed, Tanveer and Dilshad is set aside. We hold the respondents 1, 2 and 3, namely, Jamshed, Tanveer and Dilshad guilty of the offences punishable under section 302/34 I.P.C. and sentence each of them to imprisonment for life with fine of Rs. 5000/- and in case of default of payment of fine, they shall undergo further simple imprisonment for a period of six months.

63. The CJM, Jyotiba Phule Nagar is directed to take the accused-respondents, namely, **Jamshed**, **Tanveer** and **Dilshad** in custody forthwith and send them to jail to serve out the sentences awarded by us as above.

64. Office is directed to send a copy of this order to the court concerned within a week for compliance. The CJM concerned shall send his report with regard to the accused-respondents within one month thereafter, which shall be kept on record of this case.

65. The lower court record shall be returned to the court concerned.

(2020)1ILR 795

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE ANIL KUMAR-IX, J.

Criminal Appeal No. 5375 of 2010

Surendra ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sanjiv Singh, Sri Animesh Chatterjee, Sri Apul Mishra, Sri Ashok Kumar Tripathi, Sri Chetan Chatterjee, Sri Namwar Singh, Sri Yogesh Kumar Srivastava, Sri P.N. Mishra

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

Criminal Law - Indian Penal Code - Section 376 - Appeal against conviction.

The witnesses are chance witnesses and their testimonies are not reliable. As regards, their being chance witnesses there is no doubt, but it is not rule of law that the chance witnesses cannot be believed. (para 19)

Medical examination report of the victim thus fully supported the ocular testimonies of PW 1 and PW2. (para 22)

We are considering whether the maximum punishment was warranted in this case or in the circumstances of the case appellant is entitled for some leniency. In case before us the age of the victim at the time of incident was about 2-½ to 3 years, she was not even able to speak properly as has been mentioned by the trial Court in impugned judgement. (para 26)

Appeal is dismissed. (E-2)

List of cases cited: -

1. Sachchey Lal Tiwari Vs. St. of U.P. (2004) 11 SCC 410

2. Sarvesh Narain Shukla Vs. Daroga Singh And Others (2007) 13 SCC 360

3. Khujji @ Surendra Tiwari Vs. St. of M.P. (1991)13 SCC 627

4. Anil Rai Vs. St. of Bihar (2001) 7 SCC 318

5. Maqbul @ Zubir & ors. Vs. St. of U.P., A.I.R. (2010) SC 762

6. St. of M. P. Vs. Santosh Kumar, AIR 2006 SC 2648

7. Kamal Kishore & ors. Vs. St. of H. P., AIR 2000 SC 1920

8. Mukesh and Anr. Vs. St. for NCT of Delhi & ors., 2018 (8) SCC 149

9. St. of M.P. Vs. Bala @ Balaram, AIR 2005, SC 3567

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

1. This criminal appeal has been filed against the judgement and order dated 20.09.2003 passed by Additional Session Judge (Fast Track) Court No. 14, Mathura in Session Trial No. 972 of 2002, (State Vs. Surendra) arising out of Case Crime No. 223 of 2002, under Section 376 I.P.C., Police Station Raya, District Mathura, whereby sole appellant Surendra has been convicted and sentenced to life imprisonment with fine of Rs. 5,000/- under Section 376 I.P.C., with default stipulation.

2. Prosecution case in brief is that the informant Chandra Pal has lodged first information report on 05.02.2002 at 01.15 P.M. at P.S. Raya, District Mathura alleging therein that on 05.02.2002 at about 12.00 noon he was going towards Raya from his village Gonga. At about 12.30 P.M. when he reached near the field of Charan Singh, on hearing the shrieks of a child from the field of Charan Singh, he stopped there and went to that field. When he reached there, he saw that appellant/accused was committing rape on an innocent girl child of about 2-½ to 3 years. There was blood on the spot and the child was lying in a pool of blood. At that moment, Murari s/o Masi, Pappu s/o Bagari both resident of village Gonga and Jagveer s/o of Nekse resident of Dhaku also reached there. Seeing them, the accused/appellant tried to escape from

there but they caught him on the spot after applying some force. The victim was in very serious condition. There were injuries with blood on private part of the victim. On being asked accused/appellant told his name as Surendra s/o Shanker Singh Bhat @ Sunil Bhati resident of Gokleshwar, District Dharchula (Nepal). Some persons living on the side of the road near the railway station told them the name and father's name of the victim and also told them that her parents were searching her for a long time. The informant Chandra Pal along with other persons brought the victim and the accused/appellant to the Police Station Raya and lodged the first information report by giving his written report Ext. Ka-1 which was scribed by Rakesh Bansal s/o Kishan Lal Bansal resident of Hathras road Raya, Mathura. The entry was made in general diary (G.D.) of Police Station vide Report No.20 at 13.15 hours on 05.02.2002 by Sri Vijay Singh (PW 4) and investigation was handed over to PW 5, Sub-Inspector Indra Pal Singh Tomar.

3. After registration of the first information report at Police Station the victim was sent to the government hospital with lady Constable Sushma of P.S. Raya for her treatment and medical examination. She was medically examined on 05.02.2002 by Dr. Sunita Majumdar Medical Officer Women Hospital, Agra and prepared injury report (Ext. Ka-6).

According to the injury report Ext. Ka-6 she was of average built, weak condition pulse 110 per minute, there was no mark of injury anywhere on the external body surface. In internal examination, vagina admits little finger easily. Vagina smear prepared and sent for pathological examination.

Injuries noted are as follows:

(i) Left lateral vaginal tear at 5 o' clock position 1cm in length, breath 0.3 MM,muscle deep bleeding present. This tear was stitched bleeding on this side was controlled.

(ii) Right lateral vaginal tear at 7 o' clock position

(a) Skin tear externally 1.5cm x 0.3cm

(b) muscle deep extending internally (apex could not traced) bleeding present tight vaginal packing done duration of injuries 1 and 2 about 6 hours.

Victim was advised to admit in district female hospital for examination of injuries and primary T/T Sedation, X-ray of right wrist including carpels and right elbow for age determination, vaginal smear for pathological examination to ascertain the presence of spermatozoa and spermatic fluid, victim was referred to S.N. Medical College, Agra for the repair and further T/T of injury no.2 which could not be stitched due to lack of proper pediatric anesthesia. There was no other medical examination report or x-ray report of the victim on record as was advised by the doctor.

4. On request letter dated 05.02.2002 of Station Officer P.S. Raya, accused appellant was also medically examined by Dr. B.P. Sarswat Medical Officer District Hospital Mathura on the same day at 3:00 PM. The medical examination report exhibited as Ext. Kha-6.

According to the medical examination report Ext. Ka-6 accused/appellant Surendra was brought by Constable Santosh Kumar and Sahadat Police Station Raya. He was examined on 05.02.2002 at 3:00 P.M. According to the report he was young healthy man of about

25 years well built and well nourished. The following injuries were found on his body.

(i) multiple abrasion in an area of 16 cm x 6 cm in front of left knee and upper front of left leg size varying from 2 cm x 1 cm to 1 cm x 0.5 cm.

(ii) Abrasion 2 cm x 1 cm on medial aspect of right knee joint.

(iii) Abrasion 2 cm x 1 cm on front of right leg middle part.

(iv) External clothes pant and shirt were not teared except on the cuff of the shirt was having blood stained, under garments also having blood stains on both underwear. His clothes were sealed and handed over to the Constable for examination by forensic expert for necessary examination including blood group.

(v) Finger nails scrapped also collected and preserved sealed along with clothes for examination by forensic expert.

(vi) He was not under influence of alcohal or any other thing.

(vii) There was no wetting of pubic hairs but pubic hairs sample taken and sent to forensic expert.

(viii) There were no female hair on his body.

(ix) There was slight redness on glans and prepuce but no external injury on penis.

(x) Genital part was fully developed and he was a young person and can do sexual acts.

(xi) There was no smacma (white layer) around the glans penis and there was no gonorrheal discharge on genital organs.

In the opinion of doctor injury nos. 1, 2 and 3 were fresh, simple and caused by friction.

Two underwears, one cuff of shirt and finger nails scrapping and pubic hair sealed and handed over to accompanying Police Constable for examination by forensic expert.

5. After the registration of F.I.R. at the police station, Investigating Officer Indrapal Singh Tomar started investigation on 05.02.2002. He recorded statement of Head Constable Vijay Singh, who had registered the F.I.R. on the basis of written report of the informant. He has recorded statement of informant Chandra Pal on 05.02.2002 and he copied medical examination reports of the victim and the accused in the case diary on 06.02.2002. He inspected the spot on the pointing out of the informant and prepared site plan Ext. Ka-4. He had recorded statement of Kallu, father of the victim and statement of Murari one of the eye witnesses of the incident. On 28.03.2002 Investigating Officer had recorded statement under Section 161 Cr.P.C. of eye witness Pappu. On 10.04.2002 he recorded statement of eye witness Jagveer and after completion of investigation he submitted charge sheet Ext. Ka-5 against accused Surendra under Section 376 I.P.C.

6. As the case was exclusively Triable by the Court of sessions, hence it was committed to the Court of Sessions and numbered as Session Trial No. 972 of 2002. After that, this session trial was made over to the Court of Additional Sessions Judge (Fast Track) Court No. 14 Mathura for final trial and disposal of the case. After hearing of the learned counsel for the appellant as well as Public Prosecutor, learned Trial Judge has framed the charge under Section 376 I.P.C., against accused/appellant on 15.01.2003, which was read over and explained to the accused in Hindi, who pleaded not guilty and claimed to be tried.

7. After framing of charge prosecution was directed to adduced its evidence by which it proposes to prove guilt of the accused. The prosecution has examined as many as five witnesses. The brief sketch of the witnesses examined by the prosecution is as hereinunder:-

(I) **PW 1, Chandra Pal** is the informant and eye witness of the case, he has deposed that on the date of occurrence at about 12.00 noon he was going to Raya town from his village 'Gonga' and at about 12.30 PM when he reached near the field of Charan Singh, he heard shriek of a female child and rushed towards that field. When he reached in the field of Charan Singh, he saw that a man was committing rape on innocent child aged about 2-1/2 to 3 years. There was blood on the spot and all over body of the victim. There were injuries and blood on her private part. Murari and Pappu, who belonged to the village of this witness also reached on the spot. When the culprit saw them, he tried to escape but was caught by them on the spot. He disclosed his name as Surendra s/o Sunil Bhati, resident of District Gokleshwar (Nepal). The accused was identified by this witness in the Court room. He further deposed that he along with other persons brought the victim and the accused to the police station Raya. When he reached with victim on the road before the Railway station, the persons living on the side of the road told him the name of the victim and her father's name and also told that her parents were searching her since very long time. They also told that the accused carried her in the field in his lap and committed rape on her. He got the F.I.R. Scribed by Rakesh Bansal s/o Kishan Lal Bansal resident of Raya and lodged the F.I.R. on the basis of aforesaid written report which has been proved by PW 1 as Ext. Ka-1.

PW 1, Chandra Pal was put to a lengthy cross-examination but nothing adverse could be elicited from him in his cross examination. He has told the purpose for going from "Gonga' to Raya for marketing at 12.30 P.M. He was going to Raya town on foot and Murari (PW2) was also with him.

(ii) **PW 2, Murari** is an independent eye witness. His statement has been recorded before the Trial Court on 03.07.2003. He has deposed in his examination in chief that about 1-½ years ago at about 12 to 12.30 hour he was going to Raya town from the village "Gonga' along with Chandrapal (PW 1). Behind them Pappu (not examined) was also coming towards Raya town, when they reached near the field of Charan Singh situated near Southern cabin of Railways, they heard a loud cry of a child. On hearing the shriek of the child, they went into the field of Charan Singh. When they reached there, they saw that accused of the case Surendra was committing rape on the child. The child was about 2 ½ to 3 years old. There was blood on all over her body. Chandrapal (PW1) and Pappu (not examined) had also witnessed the incident. The accused tried to run away from there but was caught by them on the spot. The accused disclosed his name as Surendra. He was identified by this witness in the court room. When they were going to the police station along with the victim and accused for lodging the F.I.R., they saw that some persons who were residing on the road side were searching the victim, they identified the victim. Victim and accused were brought to the police station by Chandra Pal (PW1), Pappu and this witness. The F.I.R. was lodged by Chandra

Pal (PW1), the condition of the victim was serious, there were injuries on her thigh.

In his detailed cross examination, he has fully supported the contents of the F.I.R. and statement of PW 1 Chandra Pal.

(iii) **PW 3, Kallu** is father of the victim. In his examination-in-chief he has deposed that the occurrence is of about 1-½ years ago. The age of the victim was 2-1/2 to 3 years. The victim disappeared while playing. He along with his neighbours were searching her. At about 12.30 PM victim was brought there (police station) by some person of village "Gonga' P.S. Raya, then he reached there and came to know that the accused Surendra who was apprehended and brought there by them had committed rape on her daughter (victim). Those persons told him that accused was caught by them while he was committing rape on the victim in the field of Charan Singh. He further deposed that victim sustained injuries in her private part due to commission of rape on her. Her condition was very serious and there was blood on all over her clothes. After registration of F.I.R. victim was sent to District Hospital Mathura for medical treatment. The victim was brought in the Court below by this witness at the time of recording his statement. At the time of recording of the statement of this witness in the Court, the victim was about 4 years old but was unable to speak properly, some questions were asked by the Court but the victim could not speak.

(iv) **PW 4, Constable Vijay Singh** was posted as Head Constable in the concerned police station at the time of alleged incident. He has registered this case on the basis of written report and has also made entry in General Diary (G.D.). In his statement, he has proved concerned G.D. report No.20 dated 05.02.2002 at 13.15 hour Ext. Ka-3 and chik F.I.R. Ext. Ka-2. In his cross examination he has admitted that at some places in chik F.I.R. there were overwritings and whitenings. He has also stated that at the time of registration of F.I.R. scribe Rakesh Bansal s/o Kishan Lal Bansal, witnesses Murari and Pappu, resident of village "Gonga', Jagveer resident of Dhaku, Mohan Singh Punia resident of Bisawali along with the victim and accused Surendra were present there. He had not seen any member of the family of the victim there. Chik F.I.R. was sent to the Court on next day. There is overwriting at the top of the chik F.I.R. Ext. Ka-2 and G.D. Ext. Ka-3.

(v) **PW 5, Indra Pal Singh Toma**r has deposed that on the date of incident i.e. 05.02.2002, he was posted as Sub-inspector in police station Raya, F.I.R. was lodged in his presence. He was handed over the investigation of this case on 05.02.2002 and on that day recorded the statement of Head Constable Vijay Singh, who had registered F.I.R. of this case, besides him statement of informant Chandra Pal (PW1) was also recorded and medical reports were copied in case diary by him. On 06.02.2002, he prepared site plan at the pointing out of the complainant vide Ext. Ka-4. He recorded the statement of father of the victim Kallu and witness Murari on the same day, i.e. 28.03.2002. He recorded the statements of Pappu and Jagveer on 10.04.2002. After investigation, he has submitted charge sheet in Case Crime No. 223 of 2002, under Section 376 I.P.C. against the accused Surendra. He has proved the charge sheet paper no. 4A/2 which is Ext. Ka-5 in the record. In his cross examination he has stated that victim was not produced before the Court by him. He had not seen the clothes of the victim, which were worn by her at the time of

incident. He had not taken sample of blood stained and plain earth from the spot. He had not recorded statement of the doctor. Statement of father of the victim Kallu was recorded by him on 06.02.2002.

(vi) **PW 6, Dr. Sunita Mazumdar** has conducted medical examination of the victim on 05.02.2002 at about 3 PM and has prepared medical examination report. She has proved injury report of the victim which is Ext. Ka-6 on the record. She has also stated that she could not count the teeth of the victim as she was uncooperative and was weeping bitterly. She had referred the victim to S.N. Medical College, Agra for her further treatment as the injuries to her were grievious in nature, but not mentioned in the report. In her cross examination PW 6, Dr. Sunita Mazumdar has stated that report of the pathology and radiologist was not brought before her, therefore, she has not prepared supplementary medical examination report.

8. After the closure of prosecution evidence the statement of the accused/appellant Surendra under Section 313 Cr.P.C. was recorded on 01.09.2003. Accused stated that he had been falsely implicated in this case on the basis of false and fabricated evidence. He further stated that he had come to Raya in search of work of watchman for himself. The complainant and his companions assaulted him and falsely implicated in this case after snatching his money and luggage from him. He demanded opportunity for adducing evidence in defence.

9. In defence Dr. B.P. Sarswat, who was posted as emergency Medical Officer in District Hospital Mathura at the time of occurrence was examined as DW 1. He had conducted medical examination of the accused-appellant Surendra on 05.02.2002 on request of Station Officer of concerned police station. In his statement, he has proved medical examination report Ext. Kha-1 of the accused Surendra.

10. After hearing learned counsel for the parties, scrutinizing and evaluating the evidence, the learned Trial Court has recorded conviction of the accused Surendra under Section 376 I.P.C. and passed sentence as already mentioned in Para 1 of this judgement.

11. Being aggrieved by the judgement and order of the learned Trial Court, this appeal has been preferred by the accused appellant.

12. We have heard Sri A.K. Tripathi, learned counsel for the appellant and Sri Ajit Ray, learned A.G.A. appearing on behalf of the State and perused the entire material on record.

13. Learned counsel for the appellant has mainly raised following points:-

(i) Both the eye witnesses PW 1, Chandra Pal and PW 2, Murari are the chance witnesses, they are resident of different village "Gonga". There are material contradictions and inconsistencies in the statements of both the aforesaid witnesses; their testimonies inspire no confidence. PW 3 Kallu, father of the victim is not an eye witness. He happened to reach there after the alleged incident. In fact the accused/appellant had come to Raya in search of work of watchman. The complainant and others snatched his money and luggage and falsely implicated him in this case.

(ii) There are overwritings, cuttings in chik F.I.R., and it was sent to

the concerned Magistrate on next day. The F.I.R., has not been lodged by the father of the victim. It was prepared after consultation with Police which creates serious doubt on prosecution version.

(iii) Testimonies of aforesaid witnesses of fact Chandra Pal and Murari are not supported by the medical evidence. The doctor has not given any opinion about commission of rape on the victim.

(iv) Bloodstained clothes of the victim and the appellant were not taken by the I.O., and were not sent to expert for its examination.

(v) Place of occurrence has not been proved, sample of bloodstained and plain earth has not been collected by the I.O., from the spot.

(vi) Learned counsel for the appellant further contended that learned Trial court has convicted and sentenced the appellant against the settled principle of law, hence not sustainable in the eyes law. Learned counsel for the defence lastly argued that sentence awarded to the appellant is too severe and harsh. He is already in custody in this offence for about 17-½ years. He is a very poor person. A lenient view be taken keeping the long detention and background of the appellant.

14. Sri Ajit Ray, learned A.G.A. appearing on behalf of the State has refuted the arguments advanced by the learned counsel for the appellant that the first information report is prompt; PW 2 Chandra Pal and PW 3 Murari are independent eye witnesses and they have fully supported the prosecution version. The appellant was caught by them on the spot. PW 3 Kallu has also supported the prosecution version. Ocular testimonies are fully corroborated by the medical evidence. He has further contended that minor contradictions in the statements of witnesses will not affect the prosecution case. There will be no adverse effect on the prosecution version by overwriting and whitening as shown in the F.I.R. Prosecution case is fully proved by cogent evidence of the independent eye witnesses supported with medical evidence, therefore, mere defect in investigation will not be a ground to discard the testimony of the eye witnesses.

15. Now, we have to scrutinize and consider the reliability of witnesses of fact examined by the prosecution. The prosecution has examined PW 1, Chandra Pal, PW 2, Murari and PW 3, Kallu as witnesses of fact.

16. PW 1, Chandra Pal stated the purpose of his going to Raya town from his village "Gonga' and how he reached the spot at the time of incident he has stated that he himself has seen the accused committing rape on the victim..

PW 1 is not related to the victim or his father Kallu. He was not even knowing the father's name of the victim which was told him by the persons living on the side of the road before railway station. He is not inimical to the accused. He along with other persons caught the accused on the spot and handed over to the Police. There is no material contradiction on any point in his statement. In his lengthy cross-examination this witness remained firm and reiterated again and again that he had seen the entire occurrence.

17. PW 2, Murari has deposed in his examination-in-chief and reiterated in his cross examination that at the time of incident, he has also reached the spot with Chandrapal (PW1) and had seen that

accused of this case Surendra was committing rape on the victim and he was apprehended on the spot by them.

PW 2, Murari is not related to the victim or his family members, he has seen the victim and accused for the first time on the spot. In prompt F.I.R. Ext. Ka-2 and in statement of PW 1, Chandra Pal his name has been mentioned as an eye witness of the occurrence. In his statement he has stated the purpose for going to Raya on that day. PW 4, Constable Vijay Singh has also stated that this witness was present with the informant at the time of registration of F.I.R.

18. PW 3, Kallu is father of the victim. He was not an eye witness but he reached to the Police Station after the occurrence. He has stated that victim is his daughter and at the time of occurrence her age was 2-1/2 to 3 years. He has also stated that there was injury on her private part, there was blood on her body and clothes. Her condition was very critical. After lodging of F.I.R., victim was sent to District Hospital, Mathura for treatment. He has also stated that accused was caught and brought to the Police Station by PW 1, Chandra Pal and PW 2, Murari.

At the time of recording of the statement of PW 3, Kallu in the Court, the victim was also in his lap. PW 3, Kallu stated that she could not speak. Some questions were also asked by the Trial Court, but she did not speak.

19. Learned counsel for the appellant submitted that both the eye witnesses PW 1, Chandra Pal and PW 2, Murari are of different village "Gonga" which is about one kilometer from the spot. It is further submitted that both the aforesaid witnesses are chance witnesses and their testimonies are not reliable. As regards, their being chance witnesses there is no doubt, but it is not rule of law that the chance witnesses cannot be believed. The reason for a chance witnesses being present on the spot and his testimony requires close scrutiny and if same is otherwise found reliable, his testimony cannot be discarded merely on the ground of his being chance witness.

Regarding reliable testimony of chance witnesses, in **Sachchey Lal Tiwari Vs. State of U.P. (2004) 11 Supreme Court Cases 410** Hon'ble Apex Court has held as under:

"Coming to the plea of the accused that PW 2 was a "chance witness" who has not explained how he happened to be at the alleged place of occurrence it has to be noted that the said witness was independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing an independent witness as "chance witness" it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses - soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in

the matter of explaining their presence. The courts below have scanned the evidence of PW 2 in great detail and found it to be reliable. We find no reason to differ".

In **Sarvesh Narain Shukla Vs. Daroga Singh And Others (2007) 13 Supreme Court Cases 360;** it was held by Hon'ble Apex Court that if the chance witness has explained his presence by stating that he had gone for 'Darshan' and was on his way back home and Court comes to the conclusion that testimony of such a chance witness is credible, the evidence cannot be thrown out merely on the ground that the witness happened to be present by chance.

In **Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh (1991) 13 SCC 627;** it was held by Hon'ble Apex Court that the witness being a resident of the locality in the vicinity where the occurrence had taken place, his presence at the market place could not be considered to be unnatural.

In the instant case PW 1, Chandra Pal and PW 2, Murari, both have explained their presence on the spot at the time of incident. In his cross-examination PW 1, Chandra Pal has deposed that he was going from his village "Gonga" to Raya town for marketing purpose as and he had to purchase sugar, oil, chillies etc. PW 2 Murari has deposed that he is a driver by profession and used to drive Jeep, he was going from his village to Jeep Stand Raya for driving work. Both the aforesaid witnesses are of nearby village "Gonga" and for their personal work they were going to Raya town on foot on the fateful day and when they reached near the field of Charan Singh, they heard cries of the victim and reached on the spot. Thus, both the above witnesses have given proper explanation of their presence on the spot at the time of incident. Accused/appellant was also caught and handed over to the police by both the aforesaid witnesses. Therefore, their presence on the spot at the time of incident is natural and believable. There is no material contradictions in the evidence of the witnesses to doubt their testimony. They were totally independent witnesses, who had no cause to give false evidence against the appellant and their evidence is acceptable regarding the time, place and manner of incident as well as the identity of the accused/appellant.

20. Learned counsel for the appellant submitted that appellant is resident of 'Nepal' and on the date of occurrence he had come Raya in search of work of watchman. He further submitted that both the said eye witnesses PW 1 and PW 2 snatched his money and luggage from him and implicated him in this false case. The above submission of learned counsel for the appellant is unbelievable because it has not been specified anywhere that what luggage and how much money was with the appellant which was snatched by the witnesses. There is no evidence of any such kind in support of above submission.

21. PW 1, Chandra Pal and PW 2, Murari are the eye witnesses of the incident, there is no inconsistency in their statements, they have fully supported prosecution version, they are not related to the victim, they had no animus against the accused, hence their testimonies are cogent, credible and trustworthy.

22. As regards corroboration of ocular testimony with medical evidence, the victim was medically examined on the same day at 3.00 PM at Government Hospital, Mathura. Medical examination

report is Ext. Ka-6, which has been proved by PW 6, Dr. Sunita Mazumdar. On private part of victim left lateral vaginal tear and right lateral vaginal tear were found. Bleeding was also present there. Medical examination report of the victim thus fully supported the ocular testimonies of PW 1 and PW2. Learned counsel for the defence raised two objections on medical examination report of the victim. First objection was raised about inconsistency regarding period of injury and second objection was raised about the absence of opinion of doctor regarding commission of rape.

As regards first objection, the occurrence of the incident was at 12.30 PM and victim was medically examined at 3 PM. According to it, duration of injury was of 2-1/2 hours, in medical examination report duration of injury is mentioned as 6 hours. Thus, there is difference of 3-1/2 hours between the two but in this regard opinion of the doctor cannot be specified and there may be variation. In examination-in-chief, PW 6 Dr. Sunita Mazumdar has herself stated that the injury of the victim may also be of about 12.00 noon on 05.02.2002. It is also established legal position that if there is difference between reliable ocular testimony and medical report, ocular testimony shall prevail.

As regards second objection raised by learned counsel for the defence, though PW 6 Dr. Sunita Mazumdar has not given any opinion about the commission of rape, but she has proved the injuries on the private part of the victim, which itself supports the ocular version regarding commission of rape on the victim.

23. Accused/appellant was also medically examined by the DW 1 Dr. B.P. Sarswat on 05.02.2002 at 4.25 PM in Government Hospital, Mathura. The medical examination report is Ext. kha-1 which has been proved by DW 1, Dr. B.P. Sarswat. According to the injury report Ext. kha-1, injury nos. 1, 2 and 3 were abrasions on leg and injury no.9 was slight redness on glans penis of the accused. According to the doctor (DW 1) above injuries of the accused were due to friction and may be caused by falling on earth and also by committing rape on hard surface. Besides above injuries of the appellant, blood stains were also found on the cuff of the shirt of the accused and also on both the under garments of the appellant which was handed over to Police Constable by doctor (DW 1) for examination by the expert but examination report is not available on record, injury report of the appellant and his blood stained clothes also corroborate the prosecution version.

24. Learned counsel for the defence submitted that there are whitenings and overwriting at several places in chik F.I.R., and F.I.R. was sent to concerned Magistrate after two days from the date of incident which creates a strong doubt about prosecution version in respect of the alleged incident. We have perused the original records of this case. According to the F.I.R., incident occurred at 12.30 PM on 05.02.2002 and F.I.R. was registered at the concerned Police Station at 01.15 PM, distance of Police Station from the place of occurrence is 1.5 furlong. From the above, it emerges that F.I.R. of this case is a prompt F.I.R. In chik F.I.R. there are whitenings at three places and overwriting figure '6' of Section '376' I.P.C. but there is no such overwriting or whitening on carbon copy of the concerned G.D., Report No.20, time 13.15 of 05.02.2002, time of occurrence, time of registration and copy

of written report of the informant transcribed on back of the chik F.I.R. The place where whitenings or overwriting are made on chik F.I.R. will have no adverse effect on prosecution version which has been proved by the cogent testimony of eye witnesses supported by medical evidence.

25. As regards the second objection raised regarding sending the F.I.R. after two days, the F.I.R. was registered on 05.02.2002, signature of the Magistrate on it was of 07.02.2002 i.e. after about two days. In this case F.I.R. was lodged promptly, accused was caught on the spot, victim and accused were medically examined in government hospital on the same day. After a few hours of the occurrence on the same day the statement of the informant was recorded by I.O., therefore, there would not be any adverse effect in sending the copy of F.I.R. to the concerned Magistrate after two days. It has been held by **Hon'ble Apex Court in Anil Rai Vs. State of Bihar (2001) 7 SCC 318** that delay in sending the copy of F.I.R. to the area Magistrate is not material where the F.I.R., is shown to have been lodged promptly and investigation was started on that basis.

26. As regards, omission of Investigating Officer to take sample of bloodstained earth from the spot and bloodstained clothes of the victim and accused and to send them for forensic examination by expert is concerned, it is mere slackness, carelessness and fault on the part of I.O. which stands completely covered by the cogent credible ocular testimony corroborated by medical evidence and the prosecution version cannot be disbelieved only on this ground as held by **Hon'ble Apex Court in Maqbul @ Zubir & others Vs. State of U.P., A.I.R. (2010) SC 762.** In the case at hand, in the F.I.R. place of occurrence was the field of Charan Singh, the Investigating Officer has inspected the place of occurrence on the next day i.e. on 06.02.2002 at the pointing of the informant and has prepared site plan Ex ka-4 in which place of occurrence has been shown at Southern east of field of Charan Singh. PW1 Chandra Pal and PW 2 Murari, both the eye witnesses have deposed that the incident occurred in the field of Charan Singh. PW 2 Murari has made it more specific by saying that incident occurred near Southern Cabin of Railway Station in the field of Charan Singh. Thus, there is no doubt about the place of occurrence which is at South East part of the field of Charan Singh.

On the basis of discussion made herein above and also considering material evidence on record, we are of the considered opinion that findings of conviction for the offence punishable under Section 376 I.P.C. recorded by the learned Trial Court are well substantiated by the evidence on record. The learned Trial Court has appreciated the evidence in right perspective. We do not find any justification to interfere with the findings of conviction recorded against the appellant under Section 376 I.P.C., therefore, the conviction recorded against the accused/appellant under Section 376 I.P.C., is hereby affirmed.

Learned counsel for the appellant submitted that punishment awarded to the appellant is too severe and harsh. It is further argued that appellant is a poor married person and has two children, nobody is there to look after them properly. Because of poverty and being resident of 'Nepal' nobody could do

proper pairvi of his case and his appeal was filed after the delay of 318 days. He is languishing in custody in this offence from the date of registration of F.I.R. of this case i.e. 05.02.2002 and till now he has passed more than 17-½ years in jail.

The offence of rape occurs in Chapter XVI of Indian Penal Code. It is an offence affecting the human body. Rape is defined in Section 375 I.P.C. and Section 376 speaks about the punishment. Section 375 and Section 376 I.P.C. have been substantially changed by Criminal Law Amendment Act No.43/1983 and amendment made thereafter by Act No.13/2013 and Act No.22/2018. In case at hand, the date of incident is 05.02.2002 i.e. after the enforcement of the Act 43/1983 (Criminal Law Amendment Act 1983). At the time of incident for commission of rape on woman below 12 years of age the minimum prescribed punishment was imprisonment for 10 years and maximum punishment was imprisonment for life and also fine. One proviso was also there that Court may, for adequate and special reason mentioned in judgement, impose sentence less than 10 years. [Section 376 sub section (2)(f)].

Learned Trial Court has awarded maximum prescribed sentence i.e. imprisonment for life and fine of Rs.5,000/- with default stipulation. Now, we are considering whether the maximum punishment was warranted in this case or in the circumstances of the case appellant is entitled for some leniency. In case before us the age of the victim at the time of incident was about 2-½ to 3 years, she was not even able to speak properly as has been mentioned by the trial Court in impugned judgement. According to DW-1 Dr. B.P. Sarswat, who conducted medical examination of the accused on 05.02.2002, appellant was healthy man of 25 years, well built and well nourished. In above circumstances victim was not in position to resist. Appellant/accused committed rape on such an innocent child of tender age.

In **State of Madhya Pradesh Vs. Santosh Kumar, AIR 2006 SC 2648,** Hon'ble the Apex this Court held that in order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record adequate and special reasons in the judgement and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special what is adequate the special would depend upon several factors and no straitjacket formal can be indicated.

In **Kamal Kishore and others Vs. State of Himachal Pradesh, AIR 2000 SC 1920,** Hon'ble the Apex Court held that the expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons.

In the case of **Mukesh and Anr. vs. State for NCT of Delhi & others reported in 2018 (8) SCC 149.**

Regarding award of sentence Hon'ble the Supreme Court has expressed view as here under:-

"Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet

those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large."

In **State of M.P. Vs. Bala alias Balaram,** AIR 2005, SC 3567, Hon'ble Supreme Court, Hon'ble Supreme Court held as under:

"The crime here is rape. It is a particular heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 IPC. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The proviso to Sections 376(1) and 376(2) IPC give the power to the court to award a sentence, lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason. It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, the courts cannot forget their duty to society and to the victim. The court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim."

In view of the aforesaid pronouncement of Hon'ble Supreme Court, we are of the view that since in this case a three years hapless girl has been ravished by the appellant, it would be a misplaced sympathy to show any leniency to the accused/appellant. Here is the case where the crime committed by the accused-appellant not only delicts the law but it has a deleterious effect on the civilized society. Gravity of the crime has to be necessarily assessed from the nature of the crime. Ordinarily, the offence of rape is grave by its nature. Even in ordinary criminal terminology a rape is a crime more heinous than murder as to destroys the very soul of hapless woman. The appellant ravished the chastity of a girl of less than 3 years old, jeopardized her future prospect of getting married, enjoying marital and conjugal life, has been totally devastated. Not only that, she carried an indelible social stigma on her head and deathless shame as long as she lives.

In view of what has been indicated herein above, the judgement and order dated 20.9.2003 passed by the Additional Sessions Judge (Fast Track) Court No. 14, Mathura in ST No. 972 of 2002 (State Vs. Surendra) arising out of

Case Crime No. 223 of 2002, under Section 376 IPC, PS Raya, district Mathura do not call for any interference by this Court. Accordingly the appeal is **dismissed**.

The appellant is in jail. He shall remain in jail to serve the sentence awarded to him by the learned Trial Court.

Let a copy of the judgement be sent along with the lower Court record to the Court below immediately for compliance and necessary entry be made in the relevant register.

Judgement be certified and be placed on record.

(2020)1ILR 809

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.01.2020

BEFORE
THE HON'BLE ANANT KUMAR, J.

Criminal Revision No. 456 OF 2018

Mohammad Shahid Siddiqui ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Nadeem Murtaza

Counsel for the Opposite Parties:
Government Advocate, Arun Sinha, Rohit Kumar, Siddharth Sinha

A. Criminal Procedure Code, 1973- Section 311 - Relevant consideration for exercise of power - While deciding application u/s 311 court ought to record - whether the presence of the witness is *essential for the due disposal of the trial or not.*

Complainant application u/s 311 Cr.P.C rejected by non-speaking order - No finding recorded by trial as to whether the presence of the witness is essential for the due disposal of the trial or not - ***Held*** - Merely giving the finding that the prosecution is trying to fill up the lacuna, does not absolve the trial court from its responsibility as bestowed under Section 311 Cr.P.C. - Order set aside & matter remanded back to the trial court for disposing application under Section 311 Cr.P.C afresh

Criminal Revision allowed. (E-5)

List of cases cited: -

1. Manju Devi Vs St. of Raj & anr (2019) 6 SCC 203

2. Ratanlal Vs Prahlad Jat & ors (2017) 9 SCC 340

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

1. When the case is taken up in the revised list, learned counsel for the revisionist, learned A.G.A. for the State and Mr. Rohit Kumar, for opposite party no.2 are present. None present for the opposite party no.3.

2. Heard learned learned counsel for the revisionist, learned A.G.A. for the State as well as learned counsel for opposite party no.2 Shri Rohit Kumar and perused the record.

3. This criminal revision under Section 397/401 Cr.P.C. has been filed for quashing of the order dated 26.04.2018, passed by the Sessions Judge, Raebareli in Sessions Trial No.429 of 2015 (State Vs. Shailendra Singh another), arising out of Case Crime No.183 of 2015, under Section 302 IPC, whereby the application under Section 311 Cr.P.C. filed by the revisionist has been rejected by the learned trial court.

4. It is submitted by learned counsel for the revisionist that the revisionist is the complainant in the case Crime No.183 of

2015, Police Station Colonelganj, District Allahabad, under Section 302 IPC and on his complaint the case was initiated which was registered as S.T. No. 429 of 2015. During the course of trial, after conclusion of the prosecution evidence, an application under Section 311 Cr.P.C. was moved by the complainant with the signature of the ADGC (Criminal) that Mohd. Asad is an important witness in the case and he should be summoned to give evidence in the interest of justice. The said application was opposed by the defence on the ground that prosecution wants to fill the lacuna. The witness Mohd. Asad was not present on the spot when the incident had taken place. In this case PW 1 Mohd. Shahid and PW 2 Mohd.Nafis Ahmad were examined and both the witnesses have not stated about the presence of this witness Mohd. Asad. After hearing the parties, learned Sessions Judge, Raebareli has taken a view that since the witness was not present on the spot as per assertion of PW 1 and PW 2 and the prosecution cannot be permitted to fill the lacuna by adducing additional evidence and this witness was not mentioned in the charge-sheet, so this witness is not an important witness for just decision in this case, so the application under Section 311 Cr.P.C. was rejected. Hence, this revision has been filed.

5. Learned counsel for the revisionist has submitted that infact the occurrence had taken place on 11.03.2015. The witness Mohd.Asad had given an application before the Chief Judicial Magistrate, Allahabad along with an affidavit on 05.06.2015 and the Chief Judicial Magistrate, Allahabad vide order dated 05.06.2015 itself had sent that affidavit for proper disposal to the Investigating Officer and the Investigating Officer on 05.06.2015 had received the same but inspite of that the Investigating Officer did not care to record the statement of witness Mohd. Asad and veracity of the said witness so far as its worth pertaining to the case and the Investigating Officer constantly sat over the matter.

6. It is further submitted by learned counsel for the revisionist that the trial court has committed manifest error in taking the view that the prosecution is trying to fill up the lacuna and since the other witnesses have not named the present witness, he is not an important witness. It is also stated that the order passed by the trial court is non speaking order, as it has not mentioned as to what lacuna the prosecution is trying to fill, which cannot be permitted to be done.

7. Opposing the revision, learned counsel for the opposite party no.2 has stated that in this case charge sheet was already filed. On the other hand, learned counsel for the revisionist has stated that the trial court has given a wrong finding that the Investigating Officer filed the charge sheet on 05.06.2015, rather the correct fact is that on 05.06.2015 charge sheet was filed only against one accused Shailendra Singh and further investigation was pending against other accused and charge sheet was filed against other accused/opposite party no.3 on 05.11.2015, so the finding of the trial court that on 05.06.2015 charge sheet was filed is not correct.

8. Opposing the revision learned A.G.A. as well as learned counsel for the opposite party No.2 have stated that presence of witness Mohd. Asad is very much doubtful on the spot as other witnesses, i.e. PW 1 and PW 2 have not stated anything about the presence of this

witness and the prosecution is simply trying to linger on the proceedings by producing the witness whose name does not figure in the charge sheet.

9. Learned counsel for the revisionist has cited a case law, ***(2017) 9 SCC 340 : Ratanlal vs. Prahlad Jat and others,*** wherein in paragraph 17 of the case law it has been held by the Hon'ble Apex Court as under :-

*"**17.** In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of any orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."*

10. In the case of ***Manju Devi vs. State of Rajasthan and another : (2019) 6 SCC 203***, the Hon'ble Apex Court in paragraphs 8, 9 and 10 has held as under :-

"8. Having given thoughtful consideration to the rival submissions and having examined record with reference to the law applicable, we find it difficult to approve the orders impugned; and it appears just and proper that the application moved in this matter under Section 311 CrPC be allowed with direction to the trial court to ensure that the testimony of the doctor conducting first post-mortem comes on record.

9. Section 311 CrPC reads as under :

"311. Power to summon material witness, or examine person present.- *Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."*

10. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the court thereunder have been explained by this Court in several decisions. In Natasha Singh v. CBI, though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under : (SCC pp.746 & 748-49, paras 8 & 15)

"8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present "at any

stage", of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even sue motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

(emphasis is original)

11. It is evident from the very language of Section 311Cr.P.C. that powers of the trial court in summoning the witness under Section 311 Cr.P.C. are very wide and for the ends of justice the trial court "at any stage of inquiry, trial or other proceedings under this Code" may summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence is appears to it to be essential to the just decision of the case.

12. In the present case just after the incident the witness Mohd. Asad had

given an application along with an affidavit before the Chief Judicial Magistrate, Allahabad and the Chief Judicial Magistrate, Allahabad had sent the same to the Investigating Officer for undertaking further proceedings.

13. Today, learned A.G.A. has filed counter affidavit and in paragraph 6 of the same, it is stated that the then Investigating Officer had tried to contact the said witness but the witness Mohd. Asad did not turn up for getting his statement recorded but in this counter affidavit it is nowhere mentioned as to what efforts were made by the Investigating Officer to procure the attendance of this witness.

14. It appears to me that the Investigating Officer was required to take notice of the affidavit of the witness Mohd. Asad when it was referred by the Chief Judicial Magistrate, Allahabad during the course of the investigation but the Investigating Officer has not taken care of the examination of the same. The trial court while disposing of the application (74 Ka) under Section 311 Cr.P.C. has not recorded its categorical finding as to whether the presence of the witness is essential for the due disposal of the trial or not. Merely giving the finding that the prosecution is trying to fill up the lacuna, does not absolve the trial court from its responsibility as bestowed under Section 311 Cr.P.C.

15. In view of the above mentioned reasons and circumstances, to my view the trial court has not properly applied its mind while deciding the application (74 Ka) under Section 311 Cr.P.C. in the light of the pronouncements of the Hon'ble Apex Court as mentioned herein above and the peculiar facts of the present case.

16. Accordingly, the criminal revision is liable to be allowed, which is hereby allowed.

17. Order dated 26.04.2018, passed by the learned Sessions Judge, Rae Bareli in S.T. No. 429 of 2015 (State Vs. Shailendra Singh and another), on the application (74 Ka) under Section 311 Cr.P.C. is set aside and the matter is remanded back to the trial court for disposing of the application under Section 411 Cr.P.C. afresh, in the light of the finding of this Court, expeditiously, preferably within a period of one month from the date of production of certified copy of this order.

(2020)1ILR 813

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Criminal Revision No. 673 OF 1999

Chhote Khan ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Jagdev Singh

Counsel for the Opposite Parties:
A.G.A

A. Criminal Procedure Code, 1973- Sections 397 & 401- Revisional jurisdiction - Interference with order of acquittal - Extent of jurisdiction - It is a supervisory jurisdiction which is exercised by the Court to correct the manifest error/illegality resulting in gross miscarriage of justice -revisional jurisdiction of the High Court cannot be

invoked merely because the lower Court has taken a wrong view of law or mis-appreciated the evidence on record - High Court is not required to act as a court of appeal (Para 4 & 5)

Criminal Revision dismissed. (E-5)

List of cases cited: -

1. K. Chinnaswammy Reddy Vs St. of AP AIR 1962 SC 1788

2. Mahendra Pratap Singh Vs Sarju Singh AIR 1968 SC 707

3. Khetrabasi Samal Vs St. of Ori AIR 1970 SC 272

4. Satyendra Nath Dutta & anr Vs Ram Narain AIR 1975 SC 580

5. Jagannath Choudhary & ors Vs Ramayan Singh & ors 2002(5) SCC 659

6. Johar & ors Vs Mandal Prasad & anr, 2008 Cr.L.J. 1627 (SC)

7. Duli Chand Vs Delhi Administration 1975(4) SCC 649

8. Pathuma & anr Vs Muhammad 1986(2) SCC 585, AIR 1986 SC 1436

9. Munna Devi Vs St. of Raj & anr 2001(9) SCC 631

10. Ram Briksh Singh & ors Vs Ambika Yadav & anr 2004(7) SCC 665, AIR 2004 SC 4583

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

1. Learned counsel for the revisionist Shri Jagdev Singh is present but no one has appeared on behalf of the opposite parties despite the fact that notice has been personally served upon the opposite party nos. 2 and 3.

2. After hearing counsel for the revisionist, learned A.G.A. and having gone thorough the lower Court's record and the judgement dated 04.12.1998 passed by Additional Session Judge, Moradabad in Sessions Trial No. 732/96 (State Vs. Ram Pal Singh and another) acquitting the accused persons from the charge under Section 302/201 of I.P.C.

3. **Learned counsel for the revisionist contented that Court below has not properly appreciated the evidence. He tried to take this Court to the judgement of Court below and made his endeavour to show that the view taken by Court below in appreciating evidence is not correct.**

4. The judicial review in exercise of revisional jurisdiction is not like an appeal. It is a supervisory jurisdiction which is exercised by the Court to correct the manifest error in the orders of subordinate courts but should not be exercised in a manner so as to turn the Revisional court in a Court of Appeal. The legislature has differently made provisions for appeal and revision and the distinction of two jurisdiction has to be maintained.

5. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. In other words, the revisional jurisdiction of the High Court cannot be invoked merely because the lower Court has taken a wrong view of law or mis-appreciated the evidence on record.

6. The law has been settled in catena of decisions wherein the dispute held that there is a distinction between the appellate jurisdiction and the revisional jurisdiction. In the revisional jurisdiction the evidence cannot be re-appreciated for looking the

validity or legality of the order passed by the Court below.

7. In **K. Chinnaswammy Reddy Vs. State of Andhra Pradesh, AIR 1962 SC 1978** it was held that revisional jurisdiction should be exercised by the High Court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting in flagrant miscarriage of justice. However, this was also a case in which revisional jurisdiction was invoked against an order of acquittal. If the Court lacks jurisdiction or has excluded evidence which was admissible or relied on inadmissible evidence or material evidence has been overlooked etc., then only this Court would be justified in exercising revisional power and not otherwise.

8. The above view has been reiterated in **Mahendra Pratap Singh Vs. Sarju Singh, AIR 1968 SC 707; Khetrabasi Samal Vs. State of Orissa, AIR 1970 SC 272; Satyendra Nath Dutta and another Vs. Ram Narain, AIR 1975 SC 580; Jagannath Choudhary and others Vs. Ramayan Singh and another, 2002(5) SCC 659; and , Johar and others Vs. Mandal Prasad and another, 2008 Cr.L.J. 1627 (S.C.)**

9. In **Duli Chand Vs. Delhi Administration, 1975(4) SCC 649** the Court reminded that jurisdiction of High Court in criminal revision is severely restricted and it cannot embark upon a re-appreciation of evidence. While exercising supervisory jurisdiction in revision the Court would be justified in refusing to re-appreciate evidence for determining whether the concurrent findings of fact reached by learned Magistrate and Sessions Judge was correct.

10. In **Pathuma and another Vs. Muhammad, 1986(2) SCC 585** reiterating the above view the Court said that in revisional jurisdiction the High Court would not be justified in substituting its own view for that of a Magistrate on a question of fact.

11. In **Munna Devi Vs. State of Rajasthan and another, 2001(9) SCC 631** the Court said:

"The revision power under the Code of Criminal procedure cannot be exercised in a routine and causal manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First Information Report even if they are taken at the face value and accepted in their entirely do no constitute the offence for which the accused has been charged."

12. In **Ram Briksh Singh and other Vs. Ambika Yadav and another, 2004(7) SCC 665,** in a matter again arising from the judgement of acquittal, the revisional power of High Court was examined and the Court said:

"Sections 397 to 401 of the Code are ground of sections conferring higher and superior courts a sort of supervisory jurisdiction. These powers are required to be exercised sparingly. Though the jurisdiction under Section 401 cannot be invoked to only correct wrong appreciation of evidence and the High Court is not required to act as a court of

appeal but at the same time, it is the duty of the court to correct manifest illegality resulting in gross miscarriage of justice."

13. In absence of anything to show as to what evidence has not been examined or the finding of fact recorded by Court below is perverse or contrary to material on record, no interference is called for.

14. In view of above, revision lacks merit. Dismissed.

15. Certify this judgement to the lower Court immediately.

(2020)1ILR 816

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.01.2020

BEFORE
THE HON'BLE RAJEEV SINGH, J.

Criminal Revision No. 1393 OF 2019

Shadan Ansari ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Bipin Kumar Tiwari

Counsel for the Opposite Parties:
Government Advocate

A. Criminal Procedure Code, 1973 - Section 303 & 304 – r/w General Rules (Criminal), 1977 - Rule 37 - legal aid provided by Amicus Curiae must be Real & Effective & meaningful aid to an accused - as accused also has the right to fair trial

B. Constitution of India - Art. 21, 22(1), 39A - accused has fundamental right under Article 22(1) to be defended by the competent practitioner - Adequate legal aid - if adequate legal aid has not been provided to the accused during trial - same is violative of Article 21.

Amicus Curiae provided by trial court, for defending revisionist - Examination-in-chief of P.W. 1 to P.W. 9 conducted before trial court - Amicus Curiae did not cross examine prosecution witnesses - application u/s 311 Cr.P.C moved by revisionist for recall of the witnesses to cross-examine prosecution witness - rejected by the court below - ***Held*** - legal aid provided by Amicus Curiae was not real and effective - as he denied to cross-examine the prosecution witnesses - Trial court directed to recall all the prosecution witnesses & provide opportunity to the revisionist to cross-examine them.

Criminal Revision allowed. (E-5)

List of cases cited: -

1. Mohd. Hussain & Julfikar Ali Vs The State (Govt. of NCT) Delhi 2012 (9) SCC 408

2. Manglu Vs St. of UP 2018 SCC OnLine All 5751

3. Anokhilal Vs St. of MP 2019 SCC OnLine SC 1637

(Delivered by Hon'ble Rajeev Singh, J.)

1. Heard learned counsel for the revisionist and Shri Aniruddh Kumar Singh, learned A.G.A.

2. This revision has been filed for quashing of the order dated 21.09.2019 passed by Additional Sessions Judge/Special Judge (POCSO Act), Faizabad in Special Session Trial No. 78 of 2018, arising out of F.I.R. No. 76 of 2018, under Sections 376, 506, 377 I.P.C. and Section 3/4 POCSO Act, P.S. Cantt., District Faizabad.

3. Learned counsel for the revisionist submitted that after investigation, charge sheet was filed by the Investigating Officer

in F.I.R. No. 76 of 2018 (supra), on which cognizance was taken by the court below and thereafter the case was registered as S.S.T. No. 78 of 2018. After framing of charges, prosecution was allowed to produce the witnesses before the trial court. Learned counsel for the revisionist further submitted that since the revisionist was not in a position to engage lawyer, as a result, Amicus Curiae, for defending the revisionist, was provided by the trial court at the State expenses. Examination-in-chief of the witnesses of P.W. 1 to P.W. 9 was conducted before the trial court, but since the opportunity to cross examine them was not availed by the Amicus Curiae, as a result, it was closed by the trial court. He has further submitted that though in another case, Amicus Curiae cross-examined the witnesses, but the same was not real and effective. In such circumstances, application under Section 311 Cr.P.C. was moved by the revisionist for recall of the witnesses to cross-examine them, but the same was rejected by the court below vide impugned order dated 21st September, 2019 with the observation that the Amicus Curiae denied the cross-examination of the prosecution witnesses on the advise of the revisionist.

4. Next submission of the learned counsel for the revisionist is that Section 304 Cr.P.C. provides that where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State. Learned counsel for the revisionist submitted that the intention of Section 304 Cr.P.C. is for providing real and effective aid to an accused and it is the duty of the trial court to ensure proper compliance of the requirement as the accused also has the right to fair trial. In support of his submissions, learned counsel for the revisionist placed reliance on the decision of the Hon'ble Apex Court in the case of **Mohd. Hussain & Julfikar Ali Vs. The State (Govt. of NCT) Delhi, 2012 (9) SCC 408.**

5. Placing reliance on the decision of a Division Bench of this Court passed in Criminal Appeal No. 1460 of 2003 (Manglu Vs. State of U.P.), he further submitted that if the adequate legal aid has not been provided to the accused during trial, same is violative of Article 21 of the Constitution of India. It has, thus, been submitted that the impugned order is bad in the eyes of law and is liable to be set aside. The revisionist may be permitted to cross-examine the witnesses after recalling them.

6. Learned A.G.A., Shri Aniruddh Kumar Singh while opposing the prayer of the revisionist submitted that there is no illegality in the order passed by the court below in rejecting the prayer to recall the witnesses, as the opportunity to cross-examine them had already been given to the Amicus Curiae appointed by the trial court.

7. I have considered the arguments advanced by the learned counsel for the parties and gone through the record.

8. It is evident from the impugned order dated 21.09.2009 itself that the court below while rejecting the application of the revisionist, observed that the prosecution witnesses were examined during the course of trial and opportunity was given to the Amicus Curiae appointed on his behalf to cross-examine them, but on the advise of the revisionist, he denied

for the same. However, by means of the application moved under Section 311 Cr.P.C., revisionist sought recall of the prosecution witnesses on the ground that he was not aware about the cross-examination of the prosecution witnesses.

9. It is also evident that the revisionist was informed that in all the three cases, Amicus Curiae was appointed by the trial court, at the expenses of the State to do effective pairvi for him, but in the present case, Amicus Curiae did not cross-examine the prosecution witnesses and it cannot be presumed that he did so on the advice of the revisionist.

10. Section 303 and 304 of the Code of Criminal Procedure read with Rule 37 of General Rules (Criminal), 1977 framed by Allahabad High Court clearly provides for providing legal aid to defend the accused, which must be real and effective aid to an accused and it is the duty of the trial court to ensure proper compliance of the requirement to fair trial. Now, it is a fundamental right under Article 22(1) of the Constitution of India that the accused has a right to be defended by the competent practitioner. Hon'ble Apex Court in the case of **Mohd. Hussain & Julfikar Ali (supra)** has clearly held that it is the duty of the trial court to ensure proper compliance of the requirement to fair trial as the accused as a right of being provided the real and effective legal aid.

11. In the case of **Manglu Vs. State of U.P., 2018 SCC OnLine All 5751**, a Division Bench of this Court already considered the provisions of Sections 303 and 304 Cr.P.C., Rule 37 of the General Rules (Criminal), 1977 framed by Allahabad High Court as also Article 22(1) along with Articles 22 and 39A of the Constitution of India. Paragraphs 11 to 20 (relevant) are reproduced below:

"11. Before dealing with the facts relating to the first point raised by learned amicus curiae, we think it appropriate to set out the legal provisions as well as the various judgments of Hon'ble the Supreme Court on this point. Article 21 of the Constitution of India runs as follows:-

"No person shall be deprived of his life or personal liberty except according to a procedure established by law."

12. Article 22 (1) of the Constitution of India is also relevant in this respect and hence the same is quoted hereinafter for ready reference:-

"Article 22 in The Constitution Of India 1949

22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

13. Article 39-A of the Constitution of India is also relevant and thus, the same is also quoted hereinbelow for ready reference:-

"39A. Equal justice and free legal aid The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

14. Section 304 of the Code of Criminal Procedure deals with legal aid to an accused, who is not represented by any lawyer and have no means to engage any lawyer. The aforesaid Section 304 of the Code of Criminal Procedure runs as follows:-

"Section 304 in The Code Of Criminal Procedure, 1973

304. Legal aid to accused at State expense in certain cases.

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defence under sub- section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub- section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub- sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session."

15. In this regard, Rule 37 of General Rules (Criminal), 1977 framed by Allahabad High Court is also relevant, thus, the said rule is also quoted hereinbelow:-

"37. When counsel should be engaged for accused.

In any case which comes before a Court of Session, the court may engage counsel to defend the accused person if -

(a) the charge against him is such that a capital sentence is possible, and

(b) it appears that he has not engaged counsel and is not possessed of for sufficient means to do so.

To enable the Sessions Court to arrive at a decision as regards the second condition in the preceding paragraph, the committing magistrate, shall in such case make enquiries from the accused at the time of commitment and after making such other enquiries as may be necessary, report within a month of the commitment order to the court to which the commitment is made whether the accused is possessed of sufficient means to engage counsel. Each case must be decided on its merits and no hard and fast rule as to insufficiency of means should be applied. The Sessions Court in making its decision shall not be bound by the report of the committing magistrate.

Counsel appointed under this rule shall be furnished with the necessary papers free of cost and allowed sufficient time to prepare for the defence."

16. It is not out of place to mention that Rule 37 of the General Rule (Criminal) 1957 framed by Hon'ble Allahabad High Court is pari materia the same of the present Rule 37 of General Rule (Criminal) 1977.

17. In Bashira vs. State of U.P. reported in AIR 1968 SC 1313, Hon'ble the Supreme Court has held that Rule 37 of the General Rule (Criminal) of the Allahabad High Court 1957 is mandatory and any violation of the same is violative of Article 21 of the Constitution of India, because the trial has not been conducted in accordance with the procedure established by law. Accordingly, Hon'ble the Supreme

Court ordered that in such situation, the trial will be vitiated. Again the aforesaid point was considered by a three Judge Bench of Hon'ble the Supreme Court in the case of Madhav Hayawadanrao Hoskot vs. State of Maharashtra reported in 1978 SCC (Cri) 468, and held at paragraph no. 14 that:-

"The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power or steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said(1):

"What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is ? or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee ?"

18. In the case of Hussainara Khatoon and Ors. vs. Home Secretary, State of Bihar reported in AIR 1979 SC 1369, Hon'ble Supreme Court has held that free legal services to indigent and poor accused is implicit in Article 21 of the Constitution of India. The following observation of Hon'ble Supreme Court at para- 6 of the aforesaid judgment is quoted hereinbelow:-

"6. .....It is now well settled, as a result of the decision of this Court in Maneka Gandhi v. Union of India (1) that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable fair and just. It is an essential ingredient of reasonable, fair and just procedure to a prisonel who is to seek his liberation through the court's process that he should have legal services available to him. This Court pointed out in M.H. Hoskot v. State of Maharashtra (2).:"Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authorative pronouncements by judges and jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure."

19. In the case of Khatri and Ors. v. State of Bihar reported in AIR 1981 SC 928, Hon'ble the Supreme Court has held that an accused is entitled to free legal services when he was first produced before the Magistrate and it is the duty of the Magistrate and Sessions Judge to inform every accused, who appears before them about their aforesaid legal right. Paras 4 & 5 of the aforesaid judgment is quoted hereinbelow:-

"4. That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the judicial magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the judicial magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the judicial magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatonn's case. This Court has pointed out in Hussainara Khatoon's case (supra) which was decided as far back as 9th March, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a Fundamental Right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding through-out the territory of India. Mr. K. G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State might find it difficulty to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenous and whatever is necessary

for his purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in Rhem v. Malcolm. "The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Justice Blackmum in Jackson vs. Bishop, 404 F. Supp. 2d, 571: "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations." Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time.

5. But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The magistrate or the sessions judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the judicial magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may

be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State."

20. In the cases of Suk Das and Another v. Union Territory of Arunachal Pradesh [AIR 1986 SC 991], Tyron Nazareth v. State of Goa [1994 Supp. (3) SCC 321] and Mohd. Hussain alias Zulfikar Ali v. State (Government of NCT of Delhi) [(2012) 2 SCC 584], Hon'ble the Supreme Court had reiterated the aforesaid principle and held that if the adequate legal aid has not been provided to the accused during the trial, the same is violative of Article 21 of the Constitution of India. Thus, the conviction and sentence of such accused cannot be sustained."

12. Hon'ble Supreme Court in the case of **Anokhilal Vs. State of Madhya Pradesh, 2019 SCC OnLine SC 1637**, has held that legal aid provided by the State must be extended real and meaningful assistance. Hon'ble Apex Court has also laid down that in all cases where there is a possibility of life sentence or death sentence, Advocates, who have put in minimum 10 years of practice at the Bar, alone be considered to be appointed as Amicus Curiae. Relevant paragraphs 33 of the aforesaid judgment is being reproduced as under:-

"33. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:--

i) In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.

ii) In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as *Amicus Curiae.*

iii) Whenever any learned counsel is appointed as *Amicus Curiae*, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

iv) Any learned counsel, who is appointed as *Amicus Curiae* on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in *Imtiyaz Ramzan Khan."*

13. Admittedly, in the present case, the legal aid provided by the Amicus Curiae was not real and effective, as he denied to cross-examine the prosecution witnesses, therefore, the impugned order has been passed on the wrong premise and is liable to be set aside.

14. Trial court is directed to recall all the prosecution witnesses, whose examination-in-chief was conducted and provide opportunity to the revisionist to cross-examine them.

15. The revision is, accordingly, allowed. Impugned order dated 21.09.2019 passed by Additional Sessions Judge/Special Judge (POCSO Act), Faizabad in Special Session Trial No. 78 of 2018 is hereby quashed.

(2020)1ILR 824

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Revision No. 4465 OF 2019

Smt. Kalpana @ Pinki & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Radhey Shyam Yadav, Sri Rajiv Lochan Shukla

Counsel for the Opposite Parties:
A.G.A., Sri Pankaj Satsangi, Sri Sikandar B. Kochar

A. Criminal Procedure Code, 1973 - Section 227 - Discharge Application - while considering petition for discharge - courts cannot act as appellate court and start appreciating evidence by finding out inconsistencies in statements of witness - Court cannot appreciate evidence at stage of framing of charge - Charges can be framed on the basis of *strong suspicion.*

Held - Discharge application, to discharge the revisionists, from the charge framed under section 306 IPC, is cryptic - material available on record - makes out a prima facie case - against the accused - no justifiable ground to set aside the impugned order refusing the discharge of the accused (Para 22 & 23)

Criminal Revision dismissed. (E-5)

List of cases cited: -

1. Rajiv Thapar & Ors Vs Madan Lal Kapoor 2013 (3) SCC 330

2. Harshendra Kumar D Vs Rebatilata Koley 2011 AIR (SC) 1090

3. St. represented by Deputy Superintendent of Police, Vigilance & Anti-Corruption, TN Vs J. Doraiswamy Ors (2019) 4 SCC 149

4. St. of Bih Vs Ramesh Singh 1977 (4) SCC 39

5. Superintendent and Remembrancer of Legal Affairs, WB Vs Anil Kumar Bhunja AIR 1980 (SC) 52

6. Palwinder Singh Vs Balvinder Singh AIR 2009 SC 887

7. Sanghi Brothers (Indore) Pvt. Ltd Vs Sanjay Choudhary AIR 2009 SC 9

8. R.P. Kapur Vs St. of Pun AIR 1960 SC 866

9.St. of Hary Vs Bhajan Lal 1992 SCC(Cr.) 426

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Mr. Sikandar B. Kochar, learned counsel filed his vakalatnama on behalf of the opposite party no.2 today in the Court, is taken on record.

2. Heard Mr. Rajiv Lochan Shukla, Advocate holding brief of Mr. Radhey Shyam Yadav, learned counsel for the revisionists, Mr. Sikandar B. Kochar and Mr. Pankaj Satsangi, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned A.G.A. for the State.

3. This criminal revision under section 397/401 Cr.P.C. has been preferred by the revisionists against the impugned order dated 01.10.2019 passed by Sessions Judge, court No. 9, Budaun in Sessions Trial No.148 of 2019 (State vs. Smt. Kalpana alias Rinki and others) arising out of Case Crime No. 95 of 2013, under Section 306 IPC, Police Station- Kotwali, District- Badaun, whereby the discharge application of the revisionists for

discharging from above charge section, has been rejected.

4. The facts in brief which are essential to be stated for adjudication of this revision are that the present first information report has been lodged by the opposite party no.2 Manoj Kumar against the revisionists on 27.02.2013 through an application under Section 156(3) Cr.P.C. with regard to the alleged incident dated 28.01.2013, which was registered as Case Crime No. 95 of 2013, under Section 306 IPC, Police Station-Kotwali, District-Badaun. As per the allegations made in the first information report, the first informant Manoj Kumar (opposite party no.2) along with his younger brother, namely, Praveen Kumar (now deceased) stays together at their ancestral home at Mohalla Jagipura, Budaun and both of them looked after the agricultural work as well as brick kiln. The first informant's younger brother, namely, Praveen Kumar got married on 30.04.2012 with the revisionist no.1 Kalpana @ Rinki and after marriage, the revisionist no.1 Kalpana @ Rinki along with her father, namely, Narendra Singh Rathore, her uncle, namely, Umesh Rathore, her mother, namely, Smt. Jaiwanti had started building pressure upon Praveen Kumar (now deceased) to live separately from his family members, on account of which, relations between Praveen Kumar (husband) and the revisionist no.1 Kalpana @ Rinki (wife) became strained and led to frequent fight between the two. The first informant Manoj Kumar along with his wife, namely, Anita tried to mediate between them. On repeated pressure of family members of the revisionist no.1 Kalpana @ Rinki, Praveen Kumar (now deceased) did not agree to live separately or have partition of his house, a fight took place between the two on 27.01.2013 and then the revisionist no.1 Kalpana @ Rinki called her parents. Thereafter, her father, namely, Narendra Singh Rathore, her mother, namely, Smt. Jaiwanti, her uncle, namely, Umesh Rathore came and threatened Praveen Kumar (now deceased) and the revisionist no.1 Kalpana @ Rinki declined to stay at her matrimonial house and left the place by threatening Praveen Kumar (now deceased) to institute a false first information report with regard to dowry. At the relevant point of time, maternal brother of the opposite party no.2, namely, Sanjeev and brother-in-law of the opposite party no.2, namely, Santosh also arrived and tried to persuade the revisionist no.1 Kalpana @ Rinki and her family members but the revisionist no.1 Kalpana @ Rinki, without paying attention to the request made by Sanjeev and Santosh, left the matrimonial house with her bag and baggage, jewellery and other articles to stay with her parents. Subsequently, on 28.01.2013, the opposite party no.2 Manoj Kumar (first informant) received an information that the revisionist no.1 Kalpana @ Rinki has instituted a false case of demand of dowry against her husband Praveen Kumar (now deceased) and his family members. On hearing the same, Praveen Kumar (now deceased) went into depression and was worried about his family members who would go to jail and was also worried about reputation of his family in the society, in this adverse circumstance, he was not in a position to survive, although all the family members consoled him but he went to his room. On the next morning, when Praveen Kumar (now deceased) did not wake up, the family members went up stairs and found that Praveen Kumar (now deceased) had committed suicide by hanging himself from the fan. Thereafter, information about the said incident was given to the

concerned police station immediately, and then, last rites were performed on 29.01.2013. Thereafter, on 30.01.2013, without delay, the opposite party no.2 went to the concerned police station for lodging the first informant report but no attention was given. Subsequently, the application under Section 156(3) Cr.P.C. moved by the opposite party no.2 against the revisionists before the concerned court below. Thereafter, the present first information report was lodged on 27.02.2013.

5. It has been contended by the learned counsel for the revisionists that Praveen Kumar (now deceased) was married on 30.04.2012 with the revisionist no.1 Kalpana @ Rinki after giving a sufficient dowry as per the status, however, elder brother-in-law, namely, Manoj Kumar (first informant), his wife, namely, Anita and mother-in-law were not satisfied with dowry received in the marriage. On various occasions, the revisionist no.1 Kalpana @ Rinki was assaulted by her husband (Praveen Kumar) due to which, she suffered serious injuries. However, she did not lodge any complain or F.I.R. to save the reputation of the family. After some time, on 27.01.2013 at about 8 O'clock, in the evening, she was again badly beaten by her husband (Praveen Kumar) and his family members as a result of which she suffered various injuries and was also forced to leave the house. Being thrown out of the house, she called her father, mother and uncle, who reached her matrimonial house and she went along with them to her parents' place. In such compelling circumstances, there was no option to the revisionist no.1 Kalpana @ Rinki to leave her matrimonial house and stay at her parents' place. For the aforesaid incident, when she was beaten on 27.01.2013, the revisionist no.1 instituted a first information report bearing Case Crime No. 32 of 2013, under Sections 498A, 323, 504, 506 IPC and ¾ D.P. Act against Praveen Kumar (husband now deceased), Manoj Kumar (borther-in-law), Anita (Jeth) and Resha Devi (mother-in-law).

6. It has further been contended by the learned counsel for the revisionists that after lodging of the aforesaid first information report, the revisionist no.1 Kalpana @ Rinki was sent to District Hospital, Budaun for examination on 28.01.2013 at about 01:00 p.m. A copy of injury report dated 28.01.2013 has been appended as Annexure no.4 to this application. Perusal of which goes to show that she has suffered a number of injuries on account of assault made by the family members of her husband.

7. It has further been contended by learned counsel for the revisionists that after lodging of the present first information report by the opposite party no.2, the investigation has been made by the Investigation Officer. During investigation, the statement of Manoj Kumar, Anita, Ashok Kumar, Arvind Lal, Sanjeev Kumar and Santosh were recorded and the charge-sheet was submitted against the revisionists. However, the Investigating Officer has not considered the first information report instituted by the revisionist no.1 Kalpana @ Rinki on 28.01.2013 and the injuries suffered by the revisionist no.1, which goes to show that she was victim of the illegality as committed by Praveen Kumar (now deceased) and his family members. Aggrieved by the charge sheet, the revisionists approached before this Court by means of Cri. Misc. Application No.

35330 of 2013 for quashing the entire proceedings initiated on the basis of F.I.R. dated 27.02.2013 bearing Case Crime No. 95 of 2013 under Section 306 IPC wherein vide order dated 14.12.2018, the Court was pleased to disposed of the aforesaid application with the direction that the revisionists may appear and surrender before the court below within 30 days from that day and apply for bail. Thereafter, the revisionists were granted bail by the court below. It has further been contended by the learned counsel for the revisionists that the copy of post mortem report of the deceased Praveen Kumar also shows that there were no injuries on the body of Praveen Kumar (deceased). It was also testified that he had suffered no injury prior to his death.

8. It has further been contended by the learned counsel for the revisionists that the real facts is that since father of Manoj Kumar (first informant) and Praveen Kumar (deceased) had expired. Manoj Kumar (first informant) and his wife Anita wanted to grab the property of Praveen Kumar, therefore, Manoj Kumar (first informant) along with his wife Anita exerted tremendous pressure upon Praveen Kumar (deceased) and tried to create differences between the revisionist no.1 Kalpana @ Rinki and her husband Praveen Kumar (deceased) for the last few days, due to which Praveen Kumar committed suicide.

9. It has further been contended by the learned counsel for the revisionists that the discharge application moved by the revisionists before the concerned court below on 25.05.2019, which has been rejected by order dated 01.10.2019 in an unjustified, illegal and arbitrary. While deciding the discharge application, the court concerned has not appreciated the points raised by the revisionists in the discharge application and failed to consider the documents available in the case dairy.

10. It has further been contended by learned counsel for the revisionists that there is absolutely no evidence on record about any instigation/ abetment on the part of the revisionists to instigate the commission of suicide by the deceased Praveen Kumar (husband of the revisionist no.1). Hence, the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. In support of his contention, learned counsel for the revisionists has placed reliance upon the judgment of the Hon'ble Apex Court in the case of ***Rajiv Thapar & Others vs. Madan Lal Kapoor reported in 2013 (3) SCC 330*** wherein it has been held by the Hon'ble Apex Court that only the material placed on record by the prosecution, could be gone into at the time of framing charges. And if, on the basis of the said material, the commission of the alleged offence was prima facie made out, the charge was to be framed. At the stage of framing of charges, it was submitted, that the requirement was not to determine the sufficiency (or otherwise) of evidence to record a conviction. The High Court can exercise powers under Section 482 Cr.P.C. or under Article 227 of the Constitution of India or suo motu to prevent abuse of process of law and can rely on material produced by the accused if suspicion is shown as the allegations in complaint and the accused may not be discharged. Paragraph no. 17 of the judgment of the Hon'ble Apex Court in the case of ***Rajiv Thapar (Supra)*** read as follows:-

"17. A perusal of the order of the High Court would reveal that the Additional Sessions Judge, Delhi, had primarily relied on certain observations made in the judgment rendered by this Court in ***Satish Mehra Vs. Delhi Administration, (1996) 9 SCC 766:-***

"15. But when the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. We are mindful that most of the Sessions Courts in India are under heavy pressure of work-load.

If the Sessions Judge is almost certain that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snip the proceedings at the stage of Section 227 of the Code itself" Madan Lal Kapoor (the respondent-complainant), before the High Court, had relied upon the judgment in ***State of Orissa Vs. Debendra Nath Padhi (2005) 1 SCC 568,*** *to contend that the judgment relied upon by the Additional Sessions Judge, Delhi, having been overruled, had resulted in an erroneous conclusion. For the same proposition, reliance was placed on the judgment of this Court in* ***Suresh Kumar Tekriwal Vs. State of Jharkhand, (2005) 12 SCC 278.*** *On behalf of the complainant, reliance was also placed on the decision in* ***State of Maharashtra Vs. Som Nath Thapa, (1996) 4 SCC 659,*** *to contend, that only the material placed on record by the prosecution, could be gone into at the time of framing charges. And if, on the basis of the said material, the commission of the alleged offence was prima facie made out, the charge(s) was/were to be framed. At the stage of framing of charges, it was submitted, that the requirement was not to determine the sufficiency (or otherwise) of evidence to record a conviction. For this, reliance was placed on* ***State of M.P. Vs. Mohanlal Soni (2000) 6 SCC 338,*** *wherein this Court had concluded, that the requirement was a satisfaction, that a prima facie case was made out. On behalf of Madan Lal Kapoor, reliance was also placed on* ***State of A.P. Vs. Golconda Linga Swamy (2004) 6 SCC 522,*** *to contend that at this stage, meticulous examination of the evidence was not called for."*

11. It has further been contended by learned counsel for the revisionists that in the present case, the evidence produced by the revisionists has not been contested or refuted by the opposite party no.2 and also there is nothing on record to show that the commission of suicide was a result of part of revisionists. Therefore, the charge framed under Section 306 IPC against the revisionists is prima facie made out.

12. Learned counsel for the revisionists has also placed reliance upon the judgment of the Hon'ble Apex Court in the case of ***Harshendra Kumar D vs. Rebatilata Koley Etc reported in 2011 AIR (SC) 1090.*** The paragraph nos. 21 and 22 of the aforesaid judgment read as follows:-

"21. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the

High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company....."

13. It has further been contended by learned counsel for the revisionists that in view of the settled law as laid down in the aforesaid judgments by the Hon'ble Apex Court, the impugned order dated 01.10.2019 passed by the court below is not sustainable in the eye of law and therefore, the same is liable to be set aside.

14. Mr. Sikandar B. Kochar, learned counsel for the opposite party no.2 as well as Mr. Amit Singh Chauhan, learned A.G.A. for the State, per contra, have vehementally opposed the submissions as urged by the learned counsel for the revisionists by submitting that no case for discharge is made out as the discharge application has been rightly rejected by the court below. While passing the impugned order dated 01.10.2019, the court below concerned has considered all the points raised by the revisionists as well as documents available on record. It has further been submitted that at the initial stage, it is the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf and on the basis of which, the court is of opinion that there is ground for presuming that the accused has committed an offence. To bolster the contention, the learned counsel for the opposite party no.2 has placed reliance upon the judgment of the Hon'ble Apex Court in the case of ***State represented by Deputy Superintendent of Police, Vigilance and Anti-Corruption, Tamil Nadu vs. J. Doraiswamy and Others reported in (2019) 4 SCC 149*** wherein it has been held by the Hon'ble Apex Court that while considering petition for discharge, courts cannot act as appellate court and start appreciating evidence by finding out inconsistencies in statements of witness and also consideration of record for discharge purpose is different from consideration of record while deciding the appeal. The paragraph no. 15 of the judgment of the Hon'ble Apex Court in the aforesaid case read as follows:-

"15. While considering the case of discharge sought immdeiately after the charge-sheet is filed, the court cannot become an appellate court and start appreciating the evidence by finding out inconsistency in the statements of witnesses as was done by the High Court in the impugned order running in 19 pages. It is not legally permissible."

15. Mr. Sikandar B. Kochar, learned counsel for the opposite party no.2 as well as Mr. Amit Singh Chauhan, learned A.G.A. for the State, therefore, submits that in view of the settled law as laid down in the aforesaid judgment by the Hon'ble Apex Court, the impugned order passed by the court below dated 01.10.2019 cannot be interfered with by this Court and the present revision is liable to be rejected, as the court below has rightly rejected the discharge application filed by the revisionists.

16. I have considered the submissions advanced by the learned counsel for the revisionists, learned counsel for the opposite party no.2 and learned A.G.A. for the State as well as have gone through the records of the present application along with the impugned order.

17. It shall be advantageous to refer to the observations made by the Hon'ble Apex Court in the case of ***State of Bihar vs. Ramesh Singh 1977 (4) SCC 39*** which are as follows :-

"4. Under S. 226 of the Code while opening the case for the prosecution the prosecutor has got to describe the charge against the accused and State by what evidence he proposes to prove the guilt of the accused. Thereafter, comes at the initial stage, the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either u/s. 227 or u/s. 228 of the Code. If "the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", so enjoined by s. 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which .....

(b) in exclusively triable by the court, he shall frame in writing a charge against the accused," as provided in S. 228.

Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at this stage of deciding the matter under s. 227 and 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the

region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence, if any, cannot show that the accused committed the offence, there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under S. 227 or S. 228, then in such a situation ordinarily and generally the order which will have to be made will be one under S. 228 and not under S. 227.

18. Aforesaid case was again referred to in another judgemnt of the Hon'ble Apex Court's in the case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal Versus Anil Kumar Bhunja reported in AIR 1980 (SC) 52*** and the Hon'ble Apex Court proceeded to observe as follows:

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in State of Bihar v. Ramesh Singh, AIR 1977 SC 2018, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."

19. In yet another case of ***Palwinder Singh Vs. Balvinder Singh reported in AIR 2009 SC 887*** the Hon'ble Apex Court had the occasion to reflect upon the scope of adjudication and its ambit at the time of framing of the charge and also about the scope to consider the material produced by the accused at that stage. Following extract may be profitably quoted to clarify the situation : -

"12. Having heard learned counsel for the parties, we are of the opinion that the High Court committed a serious error in passing the impugned

judgment insofar as it entered into the realm of appreciation of evidence at the stage of the framing of the charges itself. The jurisdiction of the learned Sessions Judge while exercising power under Section 227 of the Code of Criminal Procedure is limited. Charges can be framed also on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the Court at that point of time. This aspect of the matter has been considered by this Court in state of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568 wherein it was held as under :

"23. As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's Case holding that the trial Court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided."

20. The following observations made by the Hon'ble Apex Court in the case of ***Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary reported in AIR 2009 SC 9*** also reiterated the same position of law :-

"10. After analyzing the terminology used in the three pairs of sections it was held that despite the differences there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of a prima facie case to be applied.

11. The present case is not one where the High Court ought to have interfered with the order of framing the charge. As rightly submitted by learned counsel for the appellant, even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the Court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction. That being so, the impugned order of the High Court cannot be sustained and is set aside. The appeal is allowed."

21. In fact while exercising the inherent jurisdiction under Section 482 Cr.P.C. or while wielding the powers under Section 226 of the Constitution of India the quashing of the complaint can be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court decisions in ***R.P. Kapur Vs. State of Punjab AIR 1960 SC 866*** and ***State of Haryana Vs. Bhajan Lal reported in 1992 SCC(Cr.) 426*** make the position of law in this regard clear recognizing certain categories by way of illustration which may justify the quashing of a complaint or charge sheet.

22. In the light of the judgments of the Hon'ble Apex Court, referred to above, it is explicitly clear that the discharge application to discharge the revisionists from the charge framed under section 306 IPC is cryptic and does not stand the test laid down by the Hon'ble Apex Court.

23. The submissions made by the learned counsel for the revisionists call for adjudication on pure questions of fact which may be adequately adjudicated only upon by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and

therefore, cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the complaint, the summoning order and also all other the material available on record makes out a *prima facie* case against the accused at this stage and this Court does not find any justifiable ground to set aside the impugned order refusing the discharge of the accused. This court has not been able to persuade itself to hold that no case against the accused has been made out or to hold that the charge is groundless.

24. The prayer for quashing or setting aside the impugned order is refused as I do not see any illegality, impropriety and incorrectness in the impugned order or the proceedings under challenge. There is absolutely no abuse of court's process perceptible in the same. The present matter also does not fall in any of the categories recognized by the Hon'ble Supreme Court which might justify interference by this Court in order to upset or quash them.

25. The present revision lacks merit and is, accordingly, **rejected.**

(2020)1ILR 834

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Election Petition No. 8 OF 2017

Nawab Kazim Ali Khan ...Election Petitioner
Versus
Mohd. Abdullah Azam Khan ...Respondent

Counsel for the Petitioner:
Sri Sayed Fahim Ahmad, Sri Anurag Asthana, Sri N.K. Ali Khan (In Person), Sri Rahul Agarwal, Ms. Kalpana Sinha, Sri Navin Sinha

Counsel for the Respondent:
Sri N.K. Pandey, Nazia Rafiq Khan, Sri Safdar Ali Kazmi

A. Representation of People Act, 1951 – Section 81 (3), 86(1) - Election Petition – Procedure - Service of copy of Election Petition – Effect of minor variation bearing no substance - Mere absence of copy of a page bearing seal and stamp of the Stamp Vendor in the true copy of the election petition cannot be construed to be an omission or variation of vital nature - Even if, it could be construed as a defect, it was not a defect of vital nature attracting the consequences of Section 86(1) - There was no failure on the part of the election-petitioner to comply with the last part of Section 81(3) of the Act - Copy of the election petition served by the election petitioner upon the respondent is the true copy of the election petition filed by the petitioner – Held, election petition cannot be dismissed on allegation of failure to comply the provisions of Section 81 of the Act. (Para 9 & 13)

B. Constitution of India - Article 173 – Representation of People Act, 1951 – Election Petition – Cause of Action – Objection on the ground of lack of cause of action – Sole ground of election petition is that the respondent was less than 25 years of age and was not qualified to contest the election for Member of the Legislative Assembly in view of Article 173(b) - The concise statement of material facts have been stated in election petition - Respondent has not disputed the correctness of the

roll no., his name, parents name and date of birth - Prima facie, the respondent was ineligible to contest the election in view of Article 173(b) – Held, objection of the respondent regarding cause of action deserves to be rejected. (Para 14 & 15)

C. Representation of People Act, 1951 – Section 81, 82, 83, 86, 100 and 101 - Election Petition – Pleading – Concise statement of material fact – Effect - Section 81(1) provide that an election petition calling in question any election may be presented on one or more of the grounds specified in Sub-Section (1) of Section 100 and Section 101 - Section 83 (1) (a) provides for contents of the election petition requiring that an election petition shall contain a concise statement of the material facts on which the petitioner relies - Under Section 86(1), an election petition can be dismissed by the High Court, if it does not comply with the provisions of Section 81 or 82 or 117 – Election petition filed on sole ground that respondent was not qualified as his age was below the minimum prescribed age and in support thereof copy of Secondary School Exam Result, 2007 filed – Held, Election petition contains material facts and particulars and therefore, the third objection of the respondent deserves rejection. (Para 19, 25 & 27)

D. Election Petition - Pleading - Material facts and Particulars - Distinction - Facts which are essential to disclose a complete cause of action are 'material facts' and are essentially required to be pleaded - Particulars are details of the case set up by the party and are such pleas which are necessary to amplify, revise or explain material facts - Function of 'particulars' is to present a full picture of the cause of action to make the opposite party understand the case that has been set up against him which he has required to meet. (Para 23)

Objection to the Election Petition rejected. (E-1)

List of cases cited :-

1. Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore, AIR 1964 SC 1545

2. Ch. Subbarao v. Member, Election Tribunal, Hyderabad, AIR 1964 SC 1027

3. T. M. Jacob v. C. Poulose and others (1999) 4 SCC 274 and it held as under:-

4. Sahodrabai Rai v. Ram Singh Aharwar and others (1968) 3 SCR 13 : AIR 1968 SC 1079

5. A. Madan Mohan v. Kalavakunta Chandrasekhara, (1984) 2 SCC 288

6. U. S. Sasidharan v. K. Karunakaran and another, AIR 1990 SC 924

7. Mahendra Pal v. Ram Dass Malanger and others, (2000) 1 SCC 261

8. Anil Vasudev Salgaonkar (2009) 9 SCC 310

9. Mulayam Singh Yadav v. Dharampal Yadav and others, 2001(5) SC 242

10. Jyoti Basu and others vs. Debi Ghosal and others, AIR 1982 SC 983(1)

11. M. Karunanidhi v. H. V. Handa and others, AIR 1983 SC 558

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri N. K. Pandey along with S. A. Kazmi, learned counsel for the respondent-objector and Sri Navin Sinha, learned Senior Advocate assisted by Ms. Kalpana Sinha, learned counsel for the Election-petitioner on the following applications:-

(i) **Paper No. A-11** being application no. 3 of 2018 under Section 151 C.P.C. praying to dismiss the election petition as not maintainable under Section 86(1) of the Representation of People Act, 1951.

(ii) **Paper No. A-10** being application no. 3 of 2018 under order VI Rule 16 read with Order 7 Rule 11(a) of the Code of Civil Procedure praying to struck off paragraph nos. 7 to 28 of the election petition and to dismiss the election petition for want of cause of action under the provision of order 7 Rule 11(a) C.P.C.

With the consent of learned counsels for the parties both the applications are being heard together for disposal.

Submission of the applicant/respondent-objector:-

2. Learned counsel for the applicant/respondent-objector submits as under:

(i) Copy of news item dated 28.01.2017 as referred by the election petitioner in the representation dated 28.01.2017 filed before the Returning Officer has not been filed along with the election petition. Page No. 37 of the original election petition, which is the reverse page of the stamp paper bearing seal of the Stamp Vendor, has not been annexed with the copy of the election petition served upon the respondent-objector. Therefore, the copy of the election petition served upon the respondent-objector can not be said to be true copy of the election petition. Therefore, the election petition deserves to be dismissed as per the provisions of Section 86(1) of the Representation of People Act, 1951.

(ii) The election petitioner has stated in Paragraph 25 (iii) and (iv) of the election petition that the respondent-objector has filled-up the examination form and admission form while appearing in Class X examination conducted by CBSE Board, 2007. He has sworn the said paragraph on the basis of record. Therefore, he must have filed copies of the examination form and the application form along with the election petition which has not been done. Thus, the election petition has been filed without annexing material documents and in the absence thereof, the election petition cannot be said to be true copy of the election petition in view of the law laid down by the Hon'ble Supreme Court in ***U. S. Sasidharan v. K. Karunakaran and another, AIR 1990 SC 924 (para 15, 16 and 17).***

(iii) No cause of action arose to the election petitioner to file the election petition, since the date of birth of the respondent is 30.09.1990 and at the time of filing of the nomination form, he had attained the age of 25 years in terms of the provisions contained in Article 173(b) of the Constitution of India. Thus, in absence of any cause of action, the election petition deserves to be dismissed under Order VII, Rule 11(a) C.P.C. and the pleadings made by the election petitioner deserves to be struck off under Order VI, Rule 16 C.P.C.

3. In support of his submissions Sri Pandey has relied upon the judgments of Hon'ble Supeme Court in ***Rajendra Singh v. Usha Rani, 1984 (3) SCC 339, Mithilesh Kumar Pandey v. Baidyanath Yadav and others, (1984) 2 SCC 1 (para 9, 15 and 17), M. Karunanidhi v. H. V. Handa and others, AIR 1983 SC 558 (para 13, 27 and 38 to 42), Jyoti Basu and others vs. Debi Ghosal and others, AIR 1982 SC 983(1) (para 7 and 8), Mulayam Singh Yadav v. Dharampal Yadav and others, 2001(5) SC 242 (paras 7, 11, 12 and 13)*** and a judgment of this Court passed by learned Single Judge, dated 10.02.1992 in Election Petition no. 6

of 1991(Jagram Singh v. Pritam Singh and others).

Submission of the Election Petitioner.

4. Sri Navin Sinha, learned Senior Advocate appearing for the election petitioner submits as under:-

(i) The election petition contains all material facts and particulars. **The election petition has been filed solely on the ground that the respondent was not qualified to contest the election for Member of Legislative Assembly, in view of the provision of Article 173(b) of the Constitution of India, inasmuch as the respondent was less than 25 years of age when he had filed nomination and contested from 34, Suar, District Rampur Constituency.** In support of the ground of challenge taken by the election petitioner, material facts have been stated in paragarph no. 25 of the Election Petition and along with the Election Petition, **the copy of Class X result, bearing Roll No. 5260139 has been filed in which the date of birth of the respondent is clearly mentioned as 01.01.1993**. The aforesaid copy of mark-sheet of the Class X result has been downloaded from the official website of CBSE Board. The respondent-objector has not said even a word in his entire preliminary objection or the application under Order VI Rule 16 read with Order VII Rule 11(a) C.P.C. disputing the genuineness of the aforesaid copy of the mark-sheet.

(ii) The relevant facts have been stated in the election petition which clearly discloses a cause of action to file the election petition. The application under Order VI, Rule 16 read with Order VII Rule 11(a) C.P.C. filed by the respondent is wholly without merit and, therefore, deserves to be dismissed. The preliminary objections are completely merit less and, therefore, it also deserves to be rejected.

(iii) The provision of Section 86(1) of the Representation of People Act, 1951, does not refer to Section 83 of the Act. Therefore, application under Section 86 (1) of the Act cannot be entertained with respect to the contents provided in Section 83 of the Act. Its scope is confined with reference to the provisions of Sections 81, 82 or Section 117 of the Act.

5. In support of his submissions Sri Sinha has relied upon the judgments of Hon'ble Supreme Court in ***Mahendra Pal v. Ram Dass Malanger and others, (2000) 1 SCC 261(para 4, 7 and 32), Anil Vasudev Salgaaonkar v. Naresh Kushali Shigaonkar, (2009) 9 SCC 310 (para 39, 40 to 43, 50 to 58 and 61), Sahodrabai Rai v. Ram Singh Aharwar and others, AIR 1968 SC 1079 (paras 1, 2, 10, 11 and 12), A. Madan Mohan v. Kalavakunta Chandrasekhara, (1984) 2 SCC 288 (paras 2, 3, 10 to 15) and T. M. Jacob v. C. Poulose and others, (1999) 4 SCC 274 (paras 38, 39 and 40).***

Discussion and findings.

6. The submissions of learned counsels for the parties as afore-noted gives rise to the following questions which are being formulated with the consent of learned counsels for the parties for determination in this appeal.

Question No. A Whether copy of election petition served by the election-petitioner upon the respondent is the true copy of the election petition filed by him?

Question No. B Whether no cause of action arose to the election-petitioner to file the election petition?

Question No. C Whether the election petition has not been filed with copies of material documents and whether it does not contain material facts and particulars?

Question No. 'A':

7. The only contention of the respondent-objector to allege that the copy of election petition served upon him is not the true copy of the election petition filed by the election-petitioner, is that Page No. 37 has not been annexed in the copy of the election petition served upon him. This allegation has been denied by the election Petitioner.

8. Page No. 37 is the back side of the Stamp paper of Rs. 10/- bearing stamp and seal of the Stamp Vendor put by him while selling the stamp paper to the respondent. Copy of the front page of the aforesaid stamp paper of Rs. 10/- **filed as Page 36 of the Election Petition** bears declaration of annexing affidavit in Form-26 along with Nomination Form. It bears signature of the respondent and stamp and seal of the Notary. That, apart the submission of the election-petitioner is that the copy of Form 26 filed by the respondent under Rule 4 which forms part of his nomination has been filed as Annexure-1 to the election petition.

9. Mere absence of copy of a page bearing seal and stamp of the Stamp Vendor in the true copy of the election petition supplied by the petitioner to the respondent can not be construed to be an omission or variation of vital nature. Therefore even if, it could be construed as a defect, it was not a defect of vital nature attracting the consequences of Section 86(1) of the Representation of People Act, 1951 (hereinafter referred to as the 'Act'). Therefore, I hold that there was no failure on the part of the election-petitioner to comply with the last part of Sub-Section 3 of Section 81 of the Act. Consequently, Section 86(1) of the Act is not attracted and the election petition cannot be dismissed on allegation of failure to comply the provisions of Section 81 of the Act. **It is not that every minor variation in form but it is only a vital defect in substance which can lead to a finding of non-compliance with the provisions of Section 81(3) of the Act with the consequences under Section 86(1) to follow.**

10. In ***Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore, AIR 1964 SC 1545,*** a Constitutional Bench of Hon'ble Supreme Court elaborately dealt with the question that the word "copy" occurring in Section 81(3) of the Act mean an absolutely exact copy or does it mean a copy so true that nobody could by any possibility misunderstand it. After referring to catena of authorities, the Constitution Bench held that the test to determine whether a copy was a true one or not was to find out whether any variation from the original was calculated to mislead a reasonable persons. The Constitution Bench opined :-

"Having regard to the provisions of Part VI of the Act, we are of the view that the word 'copy' does not mean an absolutely exact copy. It means a copy so true that nobody can by any possibility misunderstand it. ***The test whether the copy is a true one is whether any variation from the original is calculated to mislead an ordinary person.*** *Applying that test we have come to the conclusion that the defects complained of with regard*

to Election Petition No.269 of 1962 were not such as to mislead the appellant; therefore there was no failure to comply with the last part of sub-section (3) of section 81. In that view of the matter sub-section (3) of Section 90 was not attracted and there was no question of dismissing the election petition under that sub-section by reason of any failure to comply with the provisions of Section 81."

The Bench also opined :

"When every page of the copy served on the appellant was attested to be a true copy under the signature of the petitioner, a fresh signature below the word 'petitioner' was not necessary. Sub-section (3) of Section 81 requires that the copy shall be attested by the petitioner under his own signature and this was done. As to the second defect the question really turns on the true scope and effect of the word 'copy' occurring in sub-section (3) of Section 81. On behalf of the appellant the argument is that sub-section (3) of Section 81 being mandatory in nature all the requirements of the sub-section must be strictly complied with and the word 'copy' must be taken to be an absolutely exact transcript of the original. On behalf of the respondents the contention is that the word 'copy' means that which comes so near to the original as to give to every person seeing it the idea created by the original. Alternatively, the argument is that the last part of sub-section (3) dealing with a copy is merely directive, and for the reliance is placed on the decision of this Court in Kamaraja Nadar v. Kunju Thevar (AIR 1958 SC 687). ***We are of the view that the word 'copy' in sub-section (3) of Section 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it*** *(see Stroud's Judicial Dictionary, Third Edn., Vol. 4, p. 3098). In this view of the matter it is unnecessary to go into the further question whether any part of sub-section (3) of section 81 is merely directory."*

(Emphasis supplied by me)

11. Similar view was taken by another Constitution Bench in ***Ch. Subbarao v. Member, Election Tribunal, Hyderabad, AIR 1964 SC 1027,*** wherein it was held that the expression 'copy' occurring in Section 81(3) of the Act did not mean an exact copy but only one so true that no reasonable person could by any possibility misunderstand it as not being the same as the original.

12. This question was again considered by another Constitutional Bench of Hon'ble Supreme Court in ***T. M. Jacob v. C. Poulose and others (1999) 4 SCC 274*** and it held as under:-

*35.****The object of serving a "true copy" of an election petition and the affidavit filed in support of the allegations of corrupt practice on the respondent in election petition is to enable the respondent to understand the charge against him so that he can effectively meet the same in the written statement and prepare his defence. The requirement is, thus, of substance and not of form.***

*36.****The expression "copy" in section 81(3) of the Act, in our opinion, means a copy which is substantially so and which does not contain any material or substantial variation of a vital nature as could possibly mislead a reasonable person to understand and meet the charges/allegations made against him in the election petition. Indeed a copy which differs in material particulars from the***

original cannot be treated as a true copy of the original within the meaning of section 81(3) of the Act and the vital defect cannot be permitted to be cured after the expiry of the period of limitation.

39.Applying the test as laid down in Murarka Radhey Shyam Ram Kumars case (supra), to the fact situation of the present case, we come to the conclusion that the defects complained of in the present case were not such as could have misled the appellant at all. ***The non-mention of the name of the Notary or the absence of the stamp and seal of the Notary in the otherwise true copy supplied to the appellant could not be construed to be omission or variation of a vital nature and, thus, the defect, if at all it could be construed as a defect, was not a defect of any vital nature attracting the consequences of Section 86(1) of the Act.*** *Under the circumstances, it must be held that there was no failure on the part of the election petitioner to comply with the last part of sub-section (3) of Section 81 of the Act and, under the circumstances, Section 86(1) of the Act was not attracted and the election petition could not have been dismissed by reason of the alleged failure to comply with the provisions of Section 81 of the Act. In this connection,* ***it is also relevant to note that the appellant, neither in the memo of objections nor in the written objections or in C.M.P.No.2903 of 1996 has alleged that he had been misled by the absence of the name, rubber stamp and seal of the Notary on the copy of the affidavit supplied to him or that he had been prejudiced to formulate his defence.*** *Even during the arguments, learned counsel for the appellant was not able to point out as to how the appellant could have been prejudiced by the alleged omissions on the copy of the affidavit served on him.*

40. ***In our opinion it is not every minor variation in form but only a vital defect in substance which can lead to a finding of non-compliance with the provisions of Section 81(3) of the Act with the consequences under Section 86(1) to follow.*** *The weight of authority clearly indicates that a certain amount of flexibility is envisaged. While an impermissible deviation from the original may entail the dismissal of an election petition under Section 86(1) of the Act,* ***an insignificant variation in the true copy cannot be construed as a fatal defect.*** *It is, however, neither desirable nor possible to catalogue the defects which may be classified as of a vital nature or those which are not so. It would depend upon the facts and circumstances of each case and no hard and fast formula can be prescribed. The tests suggested in Murarka Radhey Shyam case (supra) are sound tests and are now well settled. We agree with the same and need not repeat those tests. Considered in this background, we are of the opinion that the alleged defect in the true copy of the affidavit in the present case did not attract the provisions of Section 86 (1) of the Act for alleged non-compliance with the last part of Section 81(3) of the Act and that there had been substantial compliance with the requirements of Section 81(3) of the Act in supplying "true copy" of the affidavit to the appellant by the respondent.*

(Emphasis supplied by me.)

13. Thus, absence of Page No. 37 in the copy of the election petition served upon the respondent which merely copy of back page of the stamp paper containining stamp and seal of the Stamp Vendor, cannot be said to be a variation in the copy of the election petition from the original calculated to mislead a reasonable person.

It is not a defect of vital nature or a substantial variation. Therefore, the copy of the election petition served by the election petitioner upon the respondent is the true copy of the election petition filed by the petitioner. Consequently, objection in this regard by the respondent is rejected. **Question No. 'A' is answered accordingly.**

Question No. 'B' - "Whether no cause of action arose to the election-petitioner to file the election petition?"

14. The present election petition has been filed solely on the ground that the respondent was not qualified to contest the election for Member of the Legislative Assembly in view of Article 173(b) of the Constitution of India, inasmuch as the respondent was less than 25 years of age when he filed his nomination paper and contested the election from 34, Suar, District Rampur constituency. The concise statement of material facts in support of the ground as aforesaid, have been stated by the election-petitioner in Sub paras (i) to (iv) of Paragraph No. 25 of the petition. In Sub para (iv) the election-petitioner has stated that the Central Board of Secondary Education has issued Secondary School Examination (Class X) result bearing the roll no., name, mother's name and father's name. Sub-paras (iv) and (v) of Para 25 of the Election Petition are reproduced below:

"(iv) That the Central Board for Secondary Education has issued the Secondary School Examination (Class-X) result bearing the roll number, name, mother's name and father's name and date of birth of respondent Mohd. Abdullah Azam Khan. As per the certificate, the mother of respondent is Tazeen Fatima and his father is Mohd. Azam Khan. The date of birth as recorded in the certificate for Secondary School Examination (Class-X) results of the respondent Mohd. Abdullah Azam Khan is 01.01.1993. A copy of the certificate for Secondary School Examination (Class-X) results of respondent Mohd. Abdullah Azam Khan obtained from the Central Board for Secondary Education is enclosed and marked as Annexure - 4 to this petition.

(v) That the respondent Mohd. Abdullah Azam Khan appeared in Intermediate examination in the year 2009 from St Paul's School, Rampur. The said papers and records are available with St. Paul's School, Rampur and the Central Board for Secondary Education (CBSE), Delhi."

15. Respondent has not disputed before me the correctness of the roll no., his name, parents name and date of birth as mentioned in the web copy of Secondary School Exam Result, 2007 available on the website of Central Board of Secondary Education. During the course of dictation of this order, learned counsel for the respondent interrupted and stated that the respondent has recently applied to the Central Board of Secondary Education for correcting his date of birth as 30.09.1990 in place of recorded date of birth i.e. 01.01.1993. Even this statement made by learned counsel for the respondent cannot take away the cause of action which arose to the election-petitioner to file the present election petition inasmuch as the date of birth of the respondent at the time of filing of the nomination paper and at the time of contesting the election in question was 01.01.1993, as per his Class X mark-sheet/ certificate and, thus, prima facie, the respondent was ineligible to contest the

election in view of the provisions of Article 173(b) of the Constitution of India. Thus, the objection of the respondent regarding cause of action, deserves to be rejected and is hereby rejected. **Question No. 'B' is answered accordingly.**

Question No. 'C' - "Whether the election petition has not been filed with copies of material documents and whether it does not contain material facts and particulars?"

16. In the preceding Paragraph Nos. 14 and 15, I have briefly noted the facts with regard to cause of action which arose to the election-petitioner to file the present election petition. The election-petitioner has brought on record copy of the Secondary School Exam Result, 2007 of the respondent which prima facie indicates that the date of birth of the respondent is 01.01.1993. Along with the election petition the election-petitioner has also filed copy of nomination papers alongwith supporting affidavit filed by the respondent which indicates that respondent has mentioned his date of birth in the nomination paper as 30.09.1990 on the basis of a birth certificate dated 21.01.2015 registered by the Registrar (birth and death) on 21.01.2015. In Sub para (vi) of Paragraph No. 25 of the election petition, the election-petitioner had stated as under:-

"(vi) That the petitioner has made best efforts to get the admission form, examination form as also documents pertaining to the Intermediate Examination of the respondent Mohd. Abdullah Azam Khan, but has not been able to get the same. The petitioner has only been able to get the certificate for Secondary School Examination (Class-X) results of the respondent from the Central Board of Secondary Education."

17. The election-petitioner has filed a list of documents to be relied upon by him, as under:-

"1. Complete set of nomination papers along with other documents of respondent - Mohd. Abdullah Azam Khan.

2. Certified copy of Affidavit in Form-26 filed by the respondent- Mohd. Abdullah Azam Khan.

3. Copy of the Secondary School Examination (Class X) Results of the respondent - Mohd. Abdullah Azam issued by the Central Board of Secondary Education.

4. Admission Form filled by respondent - Mohd. Abdullah Azam Khan in his own handwriting of St. Paul's School, Rampur.

5. Examination Form filled up by respondent - Mohd. Abdullah Azam Khan in his own handwriting for appearing in High School Examination conducted by the Central Board of Secondary Education.

6. Such order and further documents as may be necessary to prove the election petitioner's case."

18. Sections 81, 82, 83 and 86 are relevant for the purposes of deciding on the facts of the present case, Question No. C which are reproduced below:-

The Representation of the People Act, 1951.

*"81. **Presentation of petitions.**--(1) An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of section 100 and section 101 to the [High Court] by any candidate at*

such election or any elector [within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates].

Explanation.--In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) [omitted]

[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]

*82. **Parties to the petition.**--A petitioner shall join as respondents to his petition--*

(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.]

*[83. **Contents of petition.**--(1) An election petition--*

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

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

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

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

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

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

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

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to

security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation .--For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial."

19. Section 81(1) of the Act provide that an election petition calling in question any election may be presented on one or more of the grounds specified in Sub-Section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector. Undisputedly the election-petitioner was a candidate in the election in question. Clause (d) of of Sub section 1 of Section 100 of the Act are relevant for the purposes of the sole ground taken by the election-petitioner in the election petition to challenge the election of the respondent that he was not qualified to contest the election inasmuch as he has not attained the minimum age as prescribed in Article 173(b) of the Constitution of India. Section 83 of the Act provides for contents of the election petition. Clause (a) of Sub section 1 of Section 83 requires that an election petition shall contain **a concise statement of the material facts on which the petitioner relies. Perusal of sub paras of Para 25 of the election petition shows that the election petition contains a concise statement of material facts on which election-petitioner has relied.** Section 86(1) of the Act provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or 82 or 117 of the Act. Therefore under Section 86(1) of the Act, an election petition can be dismissed by the High Court only if it does not comply with the provisions of Section 81 or 82 or 117 of the Act.

20. In ***Sahodrabai Rai v. Ram Singh Aharwar and others (1968) 3 SCR 13 : AIR 1968 SC 1079,*** Hon'ble Supreme Court considered the provision of Section 81 read with Section 86(1) (Para 12) of the Act and held as under:-

10. An argument was raised in this case as to whether Section 86(1) is mandatory or merely directory. We need not go into this aspect of the case. In our opinion, the present matter can be resolved on an examination of the relevant facts and the contents of the election petition as detailed in Section 83 produced

above. It may be pointed out here that the ***trial of election petition has to follow as far as may be the provisions of the Code of Civil Procedure.*** *We are therefore of opinion that it is permissible to look into the Code of Civil Procedure to see what exactly would have been the case if this was a suit and not a trial of an election petition.*

11. Under the Code of Civil Procedure a suit is commenced by a plaint. This is provided by Order 4, Rule 1 which says that every suit shall be instituted by presenting a plaint to the Court. After the plaint is received O. V. provides the summoning of the defendants in the case and r. 2 of that order says that every summons shall be accompanied by a copy of the plaint, and if so permitted, by a concise statement. We then turn to the provisions of O. VII which deals with the contents of a plaint. The first rule mentions the particulars which must be in a plaint. It is not necessary to refer to them. The plaint has to be signed and verified. Rule 9 then provides that the plaintiff shall endorse on the plaint and annex thereto a list of documents, if any, which he has produced along with it and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants unless the Court by reason of the length of the plaint or the number of defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claims made etc. It will be noticed here that what is required to be provided are copies of the plaint itself or the concise statement according to the number of defendants. There is no mention here of any other documents of which a copy is needed to be presented to the Court for service to the defendants. Then we come to r. 14 which states that where a plaintiff sues upon a document in his possession or power he shall produce it in court when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint. It will be noticed that he is required to file only one copy of the document and not as many copies as there are defendants in the case. It would therefore follow that a copy of the document is not expected to be delivered with the copy of the plaint to the answering defendants when summons is served on them. In the schedules to the Code of Civil Procedure we have got Appendix B which prescribes the forms for summons to the defendants. There is only one form of summons in Appendix B, (Form No. 4) in which the copy of the negotiable instrument is to accompany the copy of the plaint. That is so, because of the special law applying to the negotiable instruments and the time limit within which pleas to that document have to be raised and this is only in summary suits. No other form makes any mention of any document accompanying the summons with the copy of the plaint. We need not go into more details. It is clear that the documents which are filed with the plaint have to be accompanied by one copy of those documents. This is because the copy is compared with the original and the copy is endorsed by the clerk of court and the document is sometimes returned to the party to be produced into Court later. The copy takes the place of the document concerned and is not to be sent out to the parties with the plaint.

12. We may now see whether the election law provides anything different. The only provision to which our attention has been drawn is sub-section (3) of Section 81 and sub-section (2) of section 83. The first provides that every election

petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and that ***every such copy shall be an authenticated true copy. The words used here are only "the election petition". There is no mention of any document accompanying the election petition.*** *If the matter stood with only this sub-section there would be no doubt that what was intended to be served is only a copy of the election petition proper. Assistance is however taken from the provisions of sub-section (2) of Section 83 which provides that any schedule or any annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition it is contended that since the pamphlet was an annexure to the petition. it was not only necessary to sign and verify it, but that it should have been treated as a part of the election petition itself and a copy served upon the respondents. In this way, non-compliance with the provisions of Section 86(1) is made out. In our opinion, this is too strict a reading of the provisions. We have already pointed out that Section 81(3) speaks only of the election petition. Pausing here, we would say that since the election petition itself reproduced the whole of the pamphlet in a translation in English, it could be said that the averments with regard to the pamphlet were themselves a part of the petition and therefore the pamphlet was served upon the respondents although in a translation and not in original. Even if this be not the case,* ***we are quite clear that sub-section (2) of Section 83 has reference not to a document which is produced as evidence of the averments of the election petition but to averments of the election petition which are put in not in the election petition but in the accompanying schedules or annexures.*** *We can give quite a number of examples from which it would be apparent that many of the averments of the election petition are capable of being put as schedules or annexures. For examples, the details of the corrupt practice there in the former days used to be set out separately in the schedules and which may, in some cases, be so done even after the amendment of the present law. Similarly, details of the averments too compendious for being included in the election petition may be set out in the schedules or annexures to the election petition.* ***The law then requires that even though they are outside the election petition, they must be signed and verified, but such annexures or schedules are then treated as integrated with the election petition*** *and copies of them must be served on the respondent if the requirement regarding service of the election petition is to be wholly complied with.* ***But what we have said here does not apply to documents which are merely evidence in the case but which for reasons of clarity and to lend force to the petition are not kept back but produced or filed with the election petitions. They are in no sense an integral part of the averments of the petition but are only evidence of those averments and in proof thereof.*** *The pamphlet therefore must be treated as a document and not as a part of the election petition in so far as averments are concerned. When the election petitioner said that it was to be treated as part of her election petition she was merely indicating that it was not to be thought that she had not produced the document in time. She was insisting upon the document remaining with the petition so that it could be available whenever the question of the election petition or its contents arose. It would be stretching the words of sub-s. (2) of Section 83 too far to*

think that every document produced as evidence in the election petition becomes a part of the election petition proper. In this particular case we do not think that the pamphlet could be so treated. We are, therefore, of the opinion that whether or not Section 86(1)is mandatory or directory there was no breach of the provisions of the Representation of the People Actin regard to the filing of the election or the service of the copies thereof and the order under appeal was therefore erroneous.

(Emphasis supplied by me.)

21. In ***A. Madan Mohan v. Kalavakunta Chandrasekhara, (1984) 2 SCC 288*** (Para 3, 11-15) Hon'ble Supreme Court followed the ratio of decision in the case of Sahodrabai Rai (supra).

22. In ***U. S. Sasidharan v. K. Karunakaran and another, AIR 1990 SC 924*** (Para 15, 16 and 17), Hon'ble Supreme Court considered the provisions of Section 81(3) of the Act and held as under:-

"15. We have already referred to Section 83 relating to the contents of an election petition. The election petition shall contain a concise statement of material facts and also set forth full particulars of any corrupt practice. ***The material facts or particulars relating to any corrupt prac- tice may be contained in a document and the election peti- tioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition.*** *Section 81(3) provides for giving a true copy of the election petition.* ***When a document forms an integral part of the election petition and a copy of such document is not furnished to the respond- ent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of Section 81(3) and, as such, the court has to dismiss the election petition under Section 86(1) for non-compliance with Section 81(3).***

16. ***On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of Section 81(3). The documentmay be relied upon as an evidence in the proceedings. In other words, when the document does not form an integral part of the election petition, but has been either referred to in the petition or filed in the proceedings as evidence of any fact, a copy of such a document need not be served on the respondent along with a copy of the election petition.***

17. There may be another situation when a copy of the document need not be served on the respondent along with the election petition. When a document has been filed in the proceedings, but is not referred to in the petition either directly or indirectly, a copy of such document need not be served on the respondent. What S. 81(3) enjoins is that a true copy of the election petition has to be served on the respondents including the elected candidate. ***When a document forms an integral part of an election***

petition containing material facts or particulars of corrupt practice, then a copy of the election petition without such a document is not complete and cannot be said to be a true copy of the elec- tion petition. Copy of such document must be served on the respondents."

(Emphasis supplied by me.)

23. In ***Mahendra Pal v. Ram Dass Malanger and others, (2000) 1 SCC 261,*** Hon'ble Supreme Court considered the provisions of Section 83(1)(a) of the Act and drawn the distinction between the words **"material facts"** and **"particulars"** and held that **the facts which are essential to disclose a complete cause of action are "material facts" and are essentially required to be pleaded.** On the other hand **"particulars" are details of the case set up by the party and are such pleas which are necessary to amplify, revise or explain material facts.** The function of "particulars" is, thus, to present a full picture of the cause of action to make the opposite party understand the case that has been set up against him which he has required to meet. In Paragraph No. 7 of the report in ***Mahendra Pal*** (supra), Hon'ble Supreme Court held as under:-

Section 83(1) (a) of the Act mandates that in order ***to constitute a cause of action, all material facts, that is, the basic and preliminary facts which the petitioner is bound under the law to substantiate in order to succeed, have to be pleaded in an election petition. Whether in an election petition, a particular fact is material or not and as such required to be pleaded is a question which depends upon the nature of the charge levelled and the facts and circumstances of each case.*** *The distinction between `material facts' and `particulars' has been explained by this Court in a large number of cases and we need not refer to all those decided cases. Facts which are essential to disclose a complete cause of action are material facts and are essentially required to be pleaded. On the other hand "particulars" are details of the case set up by the party and are such pleas which are necessary to amplify, refine or explain material facts. The function of particulars is, thus, to present a full picture of the cause of action to make the opposite party understand the case that has been set up against him and which he is required to meet. The distinction between `material facts' and `material particulars' is indeed important because different consequences follow from a deficiency of such facts or particulars in the pleadings. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. In the case of a petition suffering from deficiency of material particulars the Court has the discretion to allow the petitioner to supply the required particulars even after the expiry of limitation.* ***Thus, whereas it may be permissible for a party to furnish particulars even after the period of limitation for filling an election petition has expired, with permission of the Court, no material fact unless already pleaded, can be permitted to be introduced, after the expiry of the period of limitation.".***

(Emphasis supplied by me.)

24. In ***Anil Vasudev Salgaonkar (2009) 9 SCC 310*** (Para 61) Hon'ble Supreme Court considered the provisions of Section 83(1)(a) of the Act regarding

setting forth of the material facts of the alleged corrupt practice and held as under:-

"58.There is no definition of "material facts" either in the Representation of Peoples Act, 1951 nor in the Code of Civil Procedure. In a series of judgments, this court has laid down that all facts necessary to formulate a complete cause of action should be termed as "material facts". All basic and primary facts which must be proved by a party to establish the existence of cause of action or defence are material facts. "Material facts" in other words mean the entire bundle of facts which would constitute a complete cause of action. 64. This court in Harkirat Singh's case [Harkirat Singh v. Amrinder Singh, (2005) 13 SCC 51] tried to give various meanings of "material facts". The relevant paragraph 48 of the said judgment is reproduced as under: (SCC pp. 526-27)

"The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', indispensable', 'elementary' or 'primary'. [Burton's Legal Thesaurus, (3rd Edn.); p.349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party."

59. ***In the context of a charge of corrupt practice, "material facts" would mean all basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner (respondent herein) is bound to substantiate before he can succeed on that charge. It is also well-settled that if "material facts" are missing they cannot be supplied after expiry of period of limitation for filing the election petition and the pleading becomes deficient.***

60. According to the appellant, in the election petition, there was no averment whether the bore wells were dug with the consent and/or active knowledge of the appellant. This averment was absolutely imperative and the failure to mention such an important averment in the petition is fatal for the election-petitioner (respondent herein) and the election petition is liable to be summarily dismissed on that ground.

61. The legal position has been crystallized by a series of the judgments of this Court that all those facts which are essential to clothe the election petitioner with a complete cause of action are "material facts" which must be pleaded, and the failure to place even a single material fact amounts to disobedience of the mandate of Section 83(1)(a) of the Act."

(Emphasis supplied by me.)

25. It is relevant to mention at the cost of repetition that the present election petition has been filed by election-petitioner on the ground that the respondent- returned candidate was not qualified as his age was below the minimum age prescribed in Article 173(b)

of the Constitution of India. The present election petition has not been filed on the ground of corrupt practice committed by returned candidate as provided in Clause (b) of Sub- Section 1 of Section 100. The judgment in the case of ***Mulayam Singh Yadav v. Dharampal Yadav and others, 2001(5) SC 242 (paras 7, 10, 12 and 13)*** relied by learned counsel for the respondent was on the facts and questions that Schedule 14 to the election petition and video cassette therein referred to is an integral part of the election petition and whether the failure to file the original in Court along with the election petition attracts Section 81 and, thereafter, Section 86(1) of the Act. On the said facts Hon'ble Supreme Court held that video cassette mentioned and verified in Schedule 14 is an integral part of the election petition and that it should have been filed in Court along with copies thereof, first serving it upon the respondent to the election petition. Such are not the facts involved in the present election petition. The present election petition has been filed solely on the ground that respondent returned candidate was not qualified as on the date of filing the nomination paper and on the date of contesting the election inasmuch as his age was below the minimum prescribed age in Article 173(b) of the Constitution of India and in support, copy of Secondary School Exam Result, 2007 containing the date of birth of the respondent- returned candidate, has also been filed along with the election petition.

26. Learned counsel for the respondent has also relied upon a judgment of Hon'ble Supreme Court in ***Jyoti Basu and others vs. Debi Ghosal and others, AIR 1982 SC 983(1) (paras 7 and 8)*** which lays down the law that right to elect is neither a fundamental right nor a common law right but it is pure and simple a statutory right. The election petition is a statutory proceeding to which neither the common law nor the principles of equity apply but only applies to which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore subject to statutory limitation. This judgment of Hon'ble Supreme Court also does not support the case of the respondent inasmuch as the election-petitioner has set forth in the election petition a concise statement of the material facts on which he relied as is evident from Paragraph No. 25 of the election petition. The next judgment in the case of ***M. Karunanidhi v. H. V. Handa and others, AIR 1983 SC 558*** rendered by two Judges Bench and relied by learned counsel for the respondent was considered by a three Judges Bench of Hon'ble Supreme Court in the case of ***A. Madan Mohan*** (supra) and in Paragraph No. 14 and 15 of the report (SCC) the ratio of decision in three Judges Bench of Hon'ble Supreme Court in ***Sahodrabai Rai*** (supra) has been reiterated.

27. In view of the discussion made above, I find that material facts are not lacking in the election petition. Copies of material documents have also been filed along with the election petition. The election petition contains material facts and particulars. Therefore, the third objection of the respondent deserves rejection and is hereby rejected. **The Question No. C is answered accordingly.**

Conclusion:

28. (i) Mere absence of copy of a page bearing seal and stamp of the Stamp Vendor in the true copy of the election

petition supplied by the petitioner to the respondent can not be construed to be an omission or variation of vital nature. Therefore even if, it could be construed as a defect, it was not a defect of vital nature attracting the consequences of Section 86(1) of the Representation of People Act, 1951 (hereinafter referred to as the 'Act'). Therefore, I hold that there was no failure on the part of the election-petitioner to comply with the last part of Sub-Section 3 of Section 81 of the Act. Consequently, Section 86(1) of the Act is not attracted and the election petition cannot be dismissed on allegation of failure to comply the provisions of Section 81 of the Act. **It is not that every minor variation in form but it is only a vital defect in substance which can lead to a finding of non-compliance with the provisions of Section 81(3) of the Act with the consequences under Section 86(1) to follow.**

(ii) Thus, absence of Page No. 37 in the copy of the election petition served upon the respondent which merely copy of back page of the stamp paper containining stamp and seal of the Stamp Vendor, cannot be said to be a variation in the copy of the election petition from the original calculated to mislead a reasonable person. It is not a defect of vital nature or a substantial variation. Therefore, the copy of the election petition served by the election petitioner upon the respondent is the true copy of the election petition filed by the petitioner. Consequently, objection in this regard by the respondent is rejected. **Question No. 'A' is answered accordingly.**

(iii) Respondent has not disputed before me the correctness of the roll no., his name, parents name and date of birth as mentioned in the web copy of Secondary School Exam Result, 2007 available on the website of Central Board of Secondary Education. During the course of dictation of this order, learned counsel for the respondent interrupted and stated that the respondent has recently applied to the Central Board of Secondary Education for correcting his date of birth as 30.09.1990 in place of recorded date of birth i.e. 01.01.1993. Even this statement made by learned counsel for the respondent cannot take away the cause of action which arose to the election-petitioner to file the present election petition inasmuch as the date of birth of the respondent at the time of filing of the nomination paper and at the time of contesting the election in question was 01.01.1993, as per his Class X mark-sheet/ certificate and, thus, prima facie, the respondent was ineligible to contest the election in view of the provisions of Article 173(b) of the Constitution of India. Thus, the objection of the respondent regarding cause of action, deserves to be rejected and is hereby rejected. **Question No. 'B' is answered accordingly.**

(iv) When a document forms an integral part of an election petition containing material facts or particulars of corrupt practice, then a copy of the election petition without such a document is not complete and cannot be said to be a true copy of the election petition. Copy of such document must be served on the respondents.

(v) **The facts which are essential to disclose a complete cause of action are "material facts" and are essentially required to be pleaded.** On the other hand **"particulars" are details of the case set up by the party and are such pleas which are necessary to amplify, revise or explain material facts.** The function of "particulars" is, thus, to present a full picture of the cause of action

to make the opposite party understand the case that has been set up against him which he has required to meet. Whether in an election petition, a particular fact is material or not and as such required to be pleaded is a question which depends upon the nature of the charge levelled and the facts and circumstances of each case.

(vi) I find that material facts are not lacking in the election petition. Copies of material documents have also been filed along with the election petition. The election petition contains material facts and particulars. Therefore, the third objection of the respondent deserves rejection and is hereby rejected. **The Question No. C is answered accordingly.**

29. For all the reasons afore-stated I do not find any substance in Paper No. A-11 being application no. 3 of 2018 under Section 86(1) of the Act, 1951 and Paper No. A-10 being application no. 3 of 2018 under order VI Rule 16 read with Order 7 Rule 11(a) of the Code of Civil Procedure. Therefore, both the applications are rejected.

30. Written statement dated 11.11.2017 was filed by respondent on 14.11.2017 and the election-petitioner was granted three weeks' time to file reply to it. On 12.01.2018, the election-petitioner has filed the replication dated 10.01.2018.

List on 08.02.2019 for framing of issues.

(2020)1ILR 851

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

6th Phase of election	**- 16.04.209 to 27.05.2019**
Issue of Notification	16.04.2019
Last Date for making Nominations	23.04.2019 (11:00 AM to 03:00 PM)
Scrutiny of Nominations	24.04.2019 (11:00 AM to 03:00 PM)
Last date for Withdrawal of candidature	26.04.2019 (11:00 AM to 03:00 PM)
Date of Poll	12.05.2019 (07:00 AM to 06:00 PM)
Date of Counting of Votes	23.05.2019 (08:00 AM to till the end of counting)

Election Petition No. 11 OF 2019

Rangnath Mishra ...Election Petitioner
Versus
Shri Ramesh Chand ...Respondent

Counsel for the Petitioner:
Sri Man Mohan Mishra, Sri N.K. Pandey, Sri Narendra Kumar Pandey, Sri Rangnath Mishra (In Person)

Counsel for the Respondent:
Sri Manish Goyal, Sri Brajesh Pratap Singh, Sri P.K. Singhal

A. Election Petition - Civil Procedure Code – Order VI Rule 2 – Pleading – Meaning and Object – 'Pleading' means plaint or written statement - Every pleading shall contain only a statement in concise form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved – Thus in a pleading the facts and not evidence are required to be pleaded - Object is twofold - First is to afford the other side intimation regarding the particular of facts of the case so that it may be met by the other side and Second is to enable the court to determine what is really the issues between the parties. (Para 16, 17 & 21)

B. Election Petition – Representation of People Act, 1951 – 83(1)(A) - Civil Procedure Code – Order VI Rule 2(1) – Meaning of expression 'Material facts' - Section 83(1)(a) requires that an election petition shall contain a concise statement of material facts on which the petitioner relies - The expression 'material facts' and the expression 'full particulars' have not been defined in the Code and Act. These two expressions have been judicially interpreted by Hon'ble Supreme Court – It is settled that all those primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are 'material facts' – It must be pleaded and failure to plead even a single material fact amounts to disobedience of the mandate of sec. 83(1) (a) – 'Particulars' are the details of the case set up by the party – 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative. (Para 22 & 24)

C. Election Petition - Cause of Action – It implies a right to sue - Material facts which are imperative for the suitor to allege and prove, constitute cause of action - In every action, there has to be a cause of action, if not, the plaint or the writ petition shall be rejected summarily. (Para 35)

D. Election Petition –Civil Procedure Code – Order VI Rule 16, Order VII Rule 11 – Proceeding – Striking out the pleading - If the pleadings in various paragraphs are unnecessary or scandalous or frivolous or vexatious or tend to prejudice, embarrass or delay the fair trail of the suit or which is otherwise an abuse of the process of the Court, such paragraphs of the petition are liable to be struck out under Order VI Rule 16 C.P.C. at any stage of the proceedings - If after striking out the pleadings, the court finds that no triable issues remain to be considered, it has power to reject the election petition under Order VII Rule 11 (Para 36 and 37)

E. Election Petition - Representation of People Act, 1951 – Section 36 – Nomination - Defect of substantial character and Defect not of substantial character - Defect of substantial character are grounds for rejection of nomination paper which have been provided in sub-section (2) of Section 36 of the Act, 1951 - Section 33 provides for presentation of nomination paper and requirements for a valid nomination - Instances of defects which are not of substantial character, are provided in the proviso to sub-Section (4) of Section 33; the proviso to Rule 4 of the Rules, 1961 or any minor mistake - Generally all such defects which do not constitute grounds of rejection of nomination paper under 36(2) may be said to be the defects not of substantial character. (Para 48)

Applications in the Election Petition disposed of. (E-1)

List of cases cited :-

1. Surendra Kashinath Rawat vs. Vinayak N. Joshi, AIR 1999 SC 162

2. Raj Narain vs. Smt. Indira Nehru Gandhi and another, (1972) 3 SCC 850

3. Udhav Singh vs. Madhav Rao Scindia, (AIR 1976 SC 744)

4. Bharat Singh and others vs. State of Haryana and others, (1988) 4 SCC 534

5. Azhar Hussain vs. Rajiv Gandhi, AIR 1986 SC 1253 (1)

6. Dhartipakar Madan Lal Agarwal vs. Shri Rajiv Gandhi, AIR 1987 SC 1577

7. N.P. Ponnuswami v. Returning Officer, AIR 1952 SC 14

8. Jagan Nath v. Jaswant Singh, AIR 1954 SC 210

9. Joyti Basu v. Debi Ghosal, AIR 1982 SC 983

10. Mahendra Pal vs Ram Dass Malanger And Ors, (2000) 1 SCC 261

11. Hari Shankar Jain vs. Sonia Gandhi, (2001) 8 SCC 233

12. Mahadeorao Sukaji Shivankar vs. Ramaratan Bapu and others, (2004) 7 SCC 181

13. Pothula Rama Rao vs. Pendyala Venakata Krishna Rao and others, (2007) 11 SCC 1

14. Anil Vasudeo Salgaonkar vs. Naresh Shigaonkar, (2009) 9 SCC 310

15. Ram Sukh vs. Dinesh Aggarwal, (2009) 10 SCC 541

16. Jitu Patnaik vs. Santan Mohakud and others, 2012 (4) SCC 194

17. Samant N. Balkrishna and Another v. George Fernandez and Others, (1969) 3 SCC 238

18. Neelam Sonkar vs. Dr. Bali Ram, 2011 (11) ADJ 341 (Para-26)

19. Sathi Vijay Kumar Vs. Tota Singh and others (2006) 13 SCC 353

20. Abdul Razak (D) Through L.Rs and others Vs. Mangesh Rajaram Wagle and others JT 2010(1)SC 508

21. Roop Lal Sathi Vs. Nachhattar Singh Gill 1982(3)SCC 487

22. K.K. Modi Vs. K.N. Modi JT 1998(1)SC 407; (1998) 3 SCC 573

23. Union Bank of India Vs. Naresh Kumar (1996) 6 SCC 660

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Manish Goyal, learned senior advocate along with Sri P.K. Singhal, assisted by Sri Brijesh Pratap Singh, learned counsel for the applicant-respondent and Sri N.K. Pandey, learned counsel for the election petitioner on Applications filed by the respondent being Application A-9 (under Order VI Rule 16, C.P.C.), Application A-10 (under Order VII Rule 11, C.P.C.), and Application A-11 (under Order VIII Rule 1, C.P.C.).

FACTS:-

2. Briefly stated facts of the present case are that election for Member of Parliament, from 78-Bhadohi parliamentary constituency of District Bhadohi was held as per following program:-

3. In the aforesaid election, 32 candidates including the election petitioner and the respondent, filed their nomination. Nomination papers of 20 candidates were rejected by the returning officer. On 24.04.2019 after withdrawal of nomination papers, the returning officer issued list of contesting candidates i.e. 12 candidates in Form 7A dated 26.04.2019 along with symbols allotted to them and other requisite particulars including photographs of candidates etc. As per aforesaid list of contesting candidates, **the election petitioner was contesting the election as candidate of Bahujan Samaj Party and the respondent was contesting the election as candidate of Bhartiya Janta Party.** Copy of form 7A has been filed as Annexure-18 to the election petition. After counting, the returning officer declared the result. The election petitioner secured 4,66,414 votes while the respondent secured 5,10,029 votes. Thus, the respondent was declared elected.

4. In this election petition, the election petitioner sought the following **reliefs:**

"(i) The declaration of the election of respondent - Shri Ramesh Chand as a Member of Parliament from 78 - Bhadohi Parliamentary Constituency of District Bhadohi, be set aside and be declared null and void.

(ii) Grant any other and further relief which this Hon'ble Court may deem

fit and proper in the facts and circumstances of the case;

(iii) Award the cost of petition in favour of the election petitioner."

5. Grounds for filing the present election petition are stated in para-17 of the election petition, as under:-

"17. That, the election petitioner is challenging the validity of the election of Respondent -Ramesh Chand as a Member Parliament from 78 - Bhadohi Parliamentary Constituency of District Bhadohi on following amongst other grounds:

GROUNDS

(A) Because, the election of the returned candidate Shri Ramesh Chand as a Member Parliament from 78 - Bhadohi Parliamentary Constituency of District Bhadohi is illegal and void ***due to improper acceptance of his nomination paper*** *by the Returning Officer, which materially affect the result of the election.*

(B) Because, the election of the returned candidate Shri Ramesh Chand as a Member Parliament from 78 - Bhadohi Parliamentary Constituency of District Bhadohi is illegal and void ***due to improper rejection of the nomination paper of Shri Shrikant,*** *S/o Lal Bihari, R/o Village - Hariharpur, Post - Sanda Suriyawan, District - Bhadohi, and due to improper rejection of the nomination papers of other candidates.*

(C) Because, ***the result of the election, so far as it concern the returned candidate, is materially affected due to non-compliance of the provisions of the Constitution of India, Representation of People Act, 1951 and the Rules & Orders made therein, as well as due to non-compliance of the statuary orders and instructions & Orders made therein, as well as due non-compliance of the statutory orders and instructions & guidelines issued by the Election Commission of India*** *from time to time by exercising the powers under Article 324 of the Constitution of India."*

6. **In paragraph-18 of the election petition,** the election petitioner has stated as under:

"18. That, the concise statement of the material facts in respect of the Grounds - (A), (B) & (C) are as under:-"

7. Thereafter in **paragraphs-19 to 56,** the election petitioner has made averments which according to him, as stated in paragraph-18; are **the concise statement of the material facts in respect of grounds -(A), (B) and (C).**

8. **The Application A-9 under Order VI Rule 16, C.P.C.** has been filed **by the respondent winning candidate praying to strike down** paragraphs Nos.8, 9, 10, 14, 16,17, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 52 and 53. The election petitioner has filed objection A-15 and reply A-17 has been filed by the applicant-respondent.

9. **The Application A-10 under Order VII Rule 11, C.P.C.,** has been filed by the respondent winning candidate praying to dismiss the election petition being **barred by law** and also **for want of disclosure of material facts and disclosure of cause of action.** The election petitioner has filed objection A-16 and reply A-18 has been filed by the applicant-respondent.

10. **The Application A-11 under Order VIII Rule 1, C.P.C.** has been filed

by the respondent winning candidate praying to grant three months' time for filing written statement.

11. Since grounds for Application A-9 and Application A-10 filed by the respondent winning candidate are common or related to each other, therefore, with the consent of learned counsels for the parties, all the three applications have been heard together for disposal.

SUBMISSIONS:-

12. **Sri Manish Goyal, learned senior counsel for the applicant-respondent/ winning candidate submits,** as under:-

(i) Election petition is not a suit in common law or action in equity. Election of returned candidate cannot be lightly interfered with. It has to be seen whether the allegations made in the election petition constitute material facts and in absence thereof, election petition deserves to be dismissed.

(ii) As per own case of the election petitioner, the election petition has been filed on the grounds mentioned in Section 100(1)(c) and Section 100(1)(d)(i)/(iv) but the election petitioner has not stated material facts in the election petition in terms of Section 83 of The Representation of People Act, 1951 (hereinafter referred to as "The Act 1951') with respect to the grounds (A), (B) and (C) mentioned in paragraph-17 of the election petition.

(iii) Perusal of contents of paragraphs of the election petition (which he read extensively) makes it clear that it completely lacks averments which may constitute material facts to challenge the election on the Grounds (A), (B) and (C). Election petition also does not disclose cause of action. Therefore, the paragraphs as mentioned in prayer clause of the Application A-9 are liable to be struck out and the election petition deserves to be dismissed as barred by law and also for want of disclosure of material facts and cause of action.

(iv) The nomination paper of another candidate namely **Shri Shrikant** was rejected. It suffered from several defects. **Being independent candidate, he required 10 proposers** under Section 33 of the Act 1951 **but there were only eight proposers.** He has also left blank the columns 2 and 3 of his nomination paper and not mentioned even assembly constituency of the proposers. Material facts regarding Shrikant to be independent candidate is lacking.

(v) In **paragraphs 20 and 45** of the election petition, vague allegation of **dual standard** has been made with regard to 20 candidates whose nomination papers were rejected but it has not been disclosed what were the dual standards.

(vi) The election petitioner has also alleged that the nomination form of the respondent suffered from similar and identical defect on which the nomination of 20 candidates were rejected. Copies of the rejection orders have been filed but perusal thereof shows that the **nomination form of 20 candidates were rejected on the basis of such defects which are non-existent in the case of applicant-respondent.**

(vii) **In his objection, the election petitioner has alleged that material facts have been stated in paragraph Nos. 1 to 16** but perusal of paras-1 to 16 of the election petition shows that it contains no material facts. Vague averments have been made by the election petitioner in the election petition.

(viii) **Paragraph-16** of the election petition is vague. **Paragraph Nos. 8, 10, 16, 24, 25, 44 and 45 lacks material facts** with reference to Ground (B). Therefore, the statutory provisions of Section 100(1)(c) of the Act, 1951, are not satisfied.

(ix) **The averments made in election petition** with reference to Grounds (A) and (C), **do not contain reference of any provisions or circular or guidelines which stood violated.** Pleadings in this regard in **paragraph-28 of the election petition are vague.**

(x) The respondent was a candidate of BJP. He filed four sets of nomination papers, out of which three were not accepted and one was accepted by the returning officer. **There is no pleading that nomination paper of the respondent accepted by the returning officer suffers from any illegality.** Therefore, the Ground (A) taken by the election-petitioner referable to Section 100(1)(d)(i) of the Act, 1951 to hold the election of the respondent to be void due to alleged improper acceptance of nomination paper by the returning officer, has **no factual foundation** and completely lacks disclosure of material facts in this regard.

(xi) The averments made by the election petitioner with reference to Grounds (A) and (C) in the election petition are either irrelevant or vague or lack material facts.

(xii) **Paragraph-14** is irrelevant and not related to Grounds (A), (B) and (C).

(xiii) **Paragraph-16** is vague and vexatious. **Paragraphs 22 and 23** are not relevant for acceptance of nomination papers. **Paragraph-24 and 25** lacks material facts relating to Ground (B).

(xiv) It has not been stated that Shrikant was contesting election as independent candidate. Since he was independent candidate and there were not ten proposers. Hence his nomination paper was not a nomination in the eyes of law.

(xv) Contents of **paragraph-28 are vague** inasmuch as it has not been stated that which affidavit filed by the respondent was not proper.

(xvi) The alleged defect mentioned **in para-29** is not of substantial nature because the BJP has itself given certificate that respondent is the official candidate of BJP and thereafter list was published by the returning officer showing respondent as candidate of BJP.

(xvii) **Paragraphs 30 and 46** of the election petition **impute motive of corrupt practice,** i.e. undue influence upon voters but **it is not a ground to challenge the election** of the respondent in the election petition. Therefore, it has no material facts with reference to the grounds of the election petition.

(xviii) There is no pleading in the election petition **that the newspaper containing news item dated 26.04.2019** has circulation in the constituency and that the loyal voters of BSP read it. Therefore, pleadings are vague and do not constitute material facts.

(xix) **Form C-1 is for publication by candidate,** From C-2 is publication by political property, Form C-3 is the reminder by the returning officer to a candidate for publication. Therefore, these averments are not part of nomination paper.

(xx) **Paragraphs-44 and 45** of the election petition are vague. No material facts have been stated.

(xxi) **Para-47** are irrelevant to the Grounds (A), (B) and (C) of the election petition. **Para-48 refers to Form**

26 of a candidate of a different constituency therefore, which is not relevant. Hence, pleading is irrelevant. **Para-49 is vague** and lack material facts. **Paras 52 and 53 refers to the provisions of Section 33 and 33A of the Act, 1951 but there is no disclosure of fact that how these provisions have been violated by the respondent.**

(xxii) **Para-53** states contravention of provisions of Act, 1951, provision of the Conduct of Elections Rules, 1961 and contravention of orders, guidelines and instructions of the Election Commission of India issued from time to time in filing affidavit in Form 26 but **it has not been disclosed which provision,** order or guideline has been violated and how it has been violated.

(xxiii) Pleadings can be struck down in part under Order VI Rule 16, C.P.C. The distinct ground must have distinct material fact.

(xxiv) If paragraphs as mentioned in Application A-9 are struck down, then remaining paragraphs shall not constitute material facts to give a cause of action to challenge the election of the respondent returned candidate. Therefore, the election petition is liable to be dismissed under Order VII Rule 11(a), C.P.C.

(xxv) **Mentioning of BSP in clause (4) of part-kha of From 26 stood rectified in view of Section 38 of the Act, 1951 on allotment of symbol of BJP and on issuance of list of candidates under Rule 10(4)** of The Conduct of Election Rules, 1961 in Form-7A. That apart there was no error in Form-26 and it was **merely a typographical error** which is not of substantial nature which will result in substantial defect.

IN REJOINDER:-

(xxvi) In **paragraph 8** of the election petition, the election petitioner has not disclosed material facts with regard to allegation of pre-planned mechanism.

(xxvii) In **paragraph 9** of the election petition, the election petitioner has not disclosed any material facts for the allegation of improper acceptance of nomination paper of Sri Ramesh Chandra (the respondent returned candidate). The objection in this regard has been raised by the applicant returned candidate in paragraph 7 of the Application A-9.

(xxviii) Pleadings **in paragraph-10** of the election petition are vague. In paragraph 6, it has been stated that election petitioner and 31 other candidates, total 32 candidates have filed nomination papers. In paragraph 8, it has been stated that nomination papers of 20 candidates were rejected. It has not been disclosed who withdrawn his nomination.

(xxix) In Paragraph 10, it has been stated that after withdrawal of nomination papers, the Returning Officer prepared list of contesting candidates containing 12 names. Therefore, the pleadings are quite vague with regard to the rejection of nomination papers and withdrawal of nomination papers. The applicant - respondent has made averments in this regard in paragraph 8 of the application A-9.

(xxx) In **paragraph-14** of the election petition, the pleadings are incomplete as it does not disclose at which polling booth, polling was done through ballot paper votes.

(xxxi) Contents of **paragraph-16** of the election petition are absolutely vague inasmuch as it does not contain any specific pleading as to which provision of Act, 1951 was violated by the Returning Officer by accepting nomination of the respondent winning candidate and how it

materially affected the result of the election. Averments in this regard have been made in paragraph-10 of the Application A-9.

(xxxii) The nomination papers of 20 candidates whose nomination was rejected by the Returning Officer, have not been filed except one candidate, namely, **Sri Shrikant as referred in Ground-B under paragraph-17** of the election petition. Thus, with respect to the **remaining 19 candidates, there is no material facts have been stated in relation to their nomination paper.** With regard to nomination of Sri Shrikant, there is complete absence of material facts in the election petition that the said Sri Shrikant was an independent candidate and that his nomination paper was supported by ten proposals, who were electors of the constituency. Thus, there is absence of material facts in the election petition.

(xxxiii) Averments of **paragraphs-22 and 23** of the election petition are not relevant for any of the ground of the election petition inasmuch as these paragraphs only disclose the nomination paper filed by the election petitioner which was accepted by the Returning Officer. Objection in this regard has been taken in paragraphs 12 and 13 of the Application A-9.

(xxxiv) **Paragraph 28** of the election petition is wholly vague, irrelevant and frivolous inasmuch this paragraph does not disclose at all that which conditions as prescribed under the Act or the Rules or under any instructions, have not been followed. Merely vague allegations have been made. Objection in this regard has been taken in paragraph 15 of the Application A-9 .

(xxxv) The averments in paragraph-29 of the election petition are wholly irrelevant inasmuch as it refers to affidavit of the respondent filed by him while contesting election for member of U.P. Legislative Assembly from Majhwa constituency District Mirzapur in the year 2017 as a candidate of Bahujan Samaj Party. The controversy involved in the election petition is with respect to the election of the applicant-respondent for member of Lok Sabha.

(xxxvi) Pleadings **in para-30** of the election petition are vague and irrelevant as has also been stated in para-17 of the Application A-9.

(xxxvii) In Part-A, **Clause-23 in the affidavit in Form-26 as well as in nomination paper, the applicant-respondent has clearly mentioned and declared that he is a candidate of Bhartiya Janta Party.** He was set up by the Bhartiya Janta Party and proof in this regard in the form of symbols etc. as given by the National President and the State President were also filed before the Returning Officer. Therefore, mention of the words 'Bahujan Samaj Party' in Part-B, Clause 11(4) of the affidavit in Form-26, is by inadvertence and has no consequence.

(xxxviii) Averments in **paragraphs-32 and 33** of the election petition are the allegation of corrupt practice which is not a ground in the present election petition. The pleading so made are vague and frivolous. Objection in this regard has been taken in paragraph-18 of the Application A-9.

(xxxix) **Clause (6A) in Form-26 (Affidavit)** was inserted by amendment dated 10.10.2018 (Pages-115 to 121) of the election petition which requires a candidate to give full and upto date information to his political party about all pending criminal cases against him and all cases of conviction as given in paragraphs-5 and 6 in Form-26 of affidavit. **This clause (6A) is referable to Forms-C1, C2**

and C3, which are not part of affidavit and which are supplied to a candidate along with nomination paper for submission to his political party. The words 'Not Applicable' as per instructions printed just below the said clause requires merely a candidate to whom this was not applicable. The candidate to whom it is applicable, need not to write any thing in Clause (6A) inasmuch as he had to make a declaration in the form C1, C2 and C3 to his political party.

(xl) Pleadings in **paragraphs-35 to 41, 43 to 49, 52 to 53 are vague** and do not disclose material facts. Objection in this regard has been taken in the relevant paragraphs of the Application A-9.

(xli) Clauses left blank in **Part-3A of the nomination papers were not required to be filled inasmuch as in the preceding clause,** the applicant-respondent has mentioned 'No'. The further clauses were required to be filled only if the answer was in 'Yes'. Therefore, the averments made in paragraph-41 of the election petition are wholly vague and do not disclose any material facts.

(xlii) For the purposes of Application A-9 under Order VI Rule 16, C.P.C., only the pleadings are to be seen and not the arguments. On bare reading of the pleadings made in the election petition, it is evident that it does not disclose material facts or cause of action.

13. Sri **N.K. Pandey, learned counsel for the election-petitioner submits** as under:-

(i) In none of the paragraphs of the Application A-9 and A-10, the applicant-respondent has pointed out or stated that which paragraphs of the election petition are unnecessary or vexatious and how they are unnecessary or vexatious.

(ii) The applicant respondent has not mentioned in his application that which material facts are lacking in the election petition.

(iii) The requirements of valid nomination paper are given in Section 33 of the Act, 1951, which were not complied with by the respondent winning candidate. The affidavit was filed in old formate and not in the revised prescribed formate as circulated by the Election Commission of India, vide circular dated 28.02.2019 (Annexure-6 to the election petition).

(iv) The **affidavit in Form-26 filed by the applicant-respondent suffered from the following defects:-**

(a) Newly added clause (6A) is missing

(b) In clause 10 of Part-A of the affidavit, description of the educational qualification has not been given and although it has been mentioned in Part-B Clause 11 of the affidavit.

(c) In part-B clause 11, the name of constituency and number has been wrongly mentioned as 397 Majhawa Uttar Pradesh instead of 78 Parliamentary Constituency, Bhadohi.

(d) In Part-B clause 11(4), the name of political party has been mentioned as Bahujan Samaj Party.

(e) In Part-B Clause 11(7)(ga) regarding last income tax return of dependants has been left blank.

(v) The Election Commission of India has issued orders, instructions and circulars in exercise of powers conferred under Article 324 of the Constitution of India. But para 5.2 of the said circular contained in the handbook for returning officer, has not been followed.

(vi) The election petitioner has filed this election petition on the grounds

as provided under Section 100(1)(c) and Section 100 (1)(d)(i) and (iv), which are existing in the present election petition on the basis of material facts stated therein. Therefore, the pleadings cannot be struck off as prayed in Application A-9 and the election petition cannot be dismissed under Order VII Rule 11(a), C.P.C. as prayed in Application A-10. Both the applications deserve to be rejected.

(vii) Since the election petitioner has complied with the provisions of Sections 81 and 82 of the Act, 1951, therefore, the election petition cannot be dismissed in view of provisions of Section 86 of the Act.

(viii) The **concise statement of facts relating to Grounds (A), (B) and (C) have been given in different paragraphs of the election petition, as under:**

Relevant Paragraphs of election petition	Ground (A) under Section 100(1)(d)(i)	Ground (B) under Section 100(1)(c)	Ground (C) under Section 100(1)(d)(iv)
	Paras-19 to 21, 26 to 43 and 46 to 52	Paras-24, 25, 44, and 45	Para-53

(ix) **Paras 1 to 16** are relevant as it **contain general information** relating to the Parliamentary Election, 2019.

(x) While rejecting the nomination of paper, another candidate Shrikant, no opportunity was afforded to him under the proviso to Section 36(5) of the Act, 1951 so as to rectify the errors whereas opportunity was afforded to the respondent winning candidate. This shows that the returning officer adopted dual standard.

(xi) While considering primary objection as raised in Applications A-9 and A-10, **only pleadings are to be seen** as per provisions of Order VI Rule 2 and Order VII Rule 14, C.P.C.

(xii) In Part 3-ka of nomination paper in Form 2A, the clauses- 3, 4, 8 and 9, have been left blank. Therefore, the said nomination paper of the applicant-respondent winning candidate was incomplete and was improperly accepted by the returning officer.

(xiii) Forms C-1, C-2 and C-3, were left blank by the respondent winning candidate.

(xiv) The District Election Officer made a communication to the Chief Electoral Officer, Uttar Pradesh Lucknow dated 25.04.2019 that *in Part-kha at serial No.4 of the affidavit, the applicant respondent/ winning candidate has mentioned Bahujan Samaj Party whereas in Part ka at Serial No.1 of the said affidavit. Along with the nomination paper he filed Form-A issued by Sri Amit Anil Chandra Shah, the National President of Bhartiya Janta Party and Form-'B' issued by Dr. Mahendra Nath Pandey, State President of the Bhartiya Janta Party mentioning the applicant-respondent to be the candidate of the Bhartiya Janta Party. None objected to the aforesaid news at the time of scrutiny of the nomination paper. Therefore, the nomination paper of the applicant respondent was valid.* The news item with regard to mentioning of Bahujan Samaj Party by the applicant respondent in Clause 4 Part-kha of From 26, was published in the newspaper 'Amar Ujala' Varanasi Edition on 26.04.2019 in which it was mentioned that the election petitioner is the candidate set up by the Bahujan Samaj Party. The electors of the constituency read the newspaper Amar Ujala which created doubts and confusion amongst weaker, down-trodden and illiterate people of constituency, specially

of Scheduled Caste community, who voted in favour of the applicant-respondent in all five assembly of 78 Parliamentary Constituency, Bhadohi, that the returned candidate, i.e. the applicant-respondent is set up by Bahujan Samaj Party. Therefore, the communication made by the District Election Officer, Bhadohi to the Chief Electoral Officer, U.P. Lucknow dated 25.04.2019 that the matter came to his notice through media, was incorrect inasmuch as the election petitioner has sent a letter dated 24.04.2019 to the District Election Officer, Bhodohi, Observer, 78 Parliamentary Constituency, Bhadohi, the Chief Electoral Officer, U.P. Lucknow and the Chief Election Commission of India, New Delhi by registered post on 25.04.2019 at 17:17 hours from Allahabad. This objection was also submitted before the Returning Officer at the time of scrutiny but no acknowledgement was taken.

(xv) In paragraph-53 of the election petition, the election petitioner has mentioned the provisions of the R.P. Act, 1951, the Conduct of Elections Rules, 1961 and the orders, guidelines and instructions issued by the Election Commission of India from time to time, to have been violated by the applicant-respondent, which resulted in improper acceptance of nomination paper by the returning officer.

(xvi) Although clause (b) of sub-Section (2) of Section 36 of the Act, 1951 provides for rejection of nomination paper on failure to comply with any of the provisions of Sections 33 or 34 of the Act, **yet for deficiency in the affidavit in Form-26 under Section 33A read with Rule 4A, the nomination paper was liable to be rejected** as also held by Hon'ble Supreme Court in **Resurgence India vs. E.C.I. And another, AIR 2014 SC 344** (Paras-13, 14, 18, 19, **20** and 27).

(xvii) Once it has been established that the nomination paper of the applicant-respondent/ winning candidate was improperly accepted by the returning officer, there is no requirement to prove that the result of the election of the returned candidate is materially affected. Reliance is placed upon the judgment of Hon'ble Supreme Court in **Sri Mairembam Prithviraj alias Prithviraj Singh vs. Sri Pukhrem Sharat Chandra Singh, AIR 2016 SC 5087** (Paras-8, 20, 19, 22 and 23).

(xviii) Pleadings has to be read as a whole and not in isolation. Reliance is placed upon the judgment of Hon'ble Supreme in **Udhav Singh vs. Madhav Rao Scindia, (AIR 1976 SC 744) (para 30).**

(xix) An election petition or a suit cannot be dismissed on the ground that the pleadings are weak. The submission of learned counsel for the applicant-respondent/ winning candidate merely illustrates that allegedly the pleadings are weak. Therefore, the election petition cannot be dismissed on this ground. Learned counsel for the applicant has contradicted to it and said that it is not the argument of the applicant-respondent that the pleadings are weak rather it was submitted that it does not contain material facts relatable to Grounds (A), (B) and (C).

(xx) Cause of action is a bundle of facts which are required to be proved for obtaining relief and for which the material facts are required to be stated but not the evidences. Reliance is placed on the judgment of Hon'ble Supreme court in **Mayar (H.K.) Ltd. Vs. Owners & Parties Vessels M.V Fortune Express & others, 2006 (3) SCC 100 (Paras-11, 12 and 18), Sopan Sukhdeo Sable vs. Assistant Charity Commissioner &**

others, 2004 (3) SCC 137 (Paras-17, 18 and 19), D. Ramachandran vs. P.V. Jankiraman and others, JT 1999 (2) SC 94 (Paras-8, 9 and 10) and Sri H.D. Revanna vs. Sri G. Putta Swami Gowda and others, JT 1999 (1) SC 126 (para-27).

(xxi) Pleadings of election petition are not required to be deleted under Order VI Rule 16, C.P.C. The reliance is placed upon the judgment of Hon'ble Supreme Court in **Madiraju Venkata Ramana Raju vs. Peddireddigari Ramachandra Reddy and others, AIR 2018 SC 3012 (Paras-10, 11, 14, 22, 24, 25, 29, 30 and 33).**

DISCUSSION AND FINDINGS:

14. I have carefully considered the submissions of learned counsels for the parties.

15. Before I proceed to examine rival submissions, it would be appropriate to reproduce relevant provisions of the Act, 1951 and the Conduct of Elections Rules, 1961 (hereinafter referred to "The Rules, 1961') and settled legal position on the point of material facts, striking out pleadings and rejection of election petition under Order VII Rule 1, C.P.C. The relevant provisions of the Act, 1951, the Rules 1961 and C.P.C. are reproduced below:

"(A)- The Representation of People Act, 1951

"Section 33. Presentation of nomination paper and requirements for a valid nomination. *--(1) On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer :*

Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election form a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency:

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday:

Provided also that in the case of a local authorities' constituency, graduates' constituency or teachers' constituency, the reference to "an elector of the constituency as proposer" shall be construed as a reference to ten per cent of the electors of the constituency or ten such electors, whichever is less, as proposers.

(1A) Notwithstanding anything contained in sub-section (1) for election to the Legislative Assembly of Sikkim (deemed to be the Legislative Assembly of that State duly constituted under the Constitution), the nomination paper to be delivered to the returning officer shall be in such form and manner as may be prescribed :

Provided that the said nomination paper shall be subscribed by the candidate as assenting to the nomination, and--

(a) in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, also by at least twenty electors of the constituency as proposers and twenty electors of the constituency as seconders;

(b) in the case of a seat reserved for Sanghas, also by at least twenty

electors of the constituency as proposers and at least twenty electors of the constituency as seconders;

(c) in the case of a seat reserved for Sikkimese of Nepali origin, by an elector of the constituency as proposer:

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday.

(2) In a constituency where any seat is reserved, a candidate shall not be deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State.

(3) Where the candidate is a person who, having held any office referred to in section 9 has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls : 3

***Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to** the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and **no clerical, technical or printing error in regard to** the electoral roll numbers of any such person in the electoral roll or **the nomination paper, shall affect the full operation of the** electoral roll or the **nomination paper** with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.*

(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

(6) Nothing in this section shall prevent any candidate from being nominated by more than one nomination paper:

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the returning officer for election in the same constituency.

(7) Notwithstanding anything contained in sub-section (6) or in any other provisions of this Act, a person shall not be nominated as a candidate for election,--

(a) in the case of a general election to the House of the People (whether or not held simultaneously from all Parliamentary constituencies), from

more than two Parliamentary constituencies;

(b) in the case of a general election to the Legislative Assembly of a State (whether or not held simultaneously from all Assembly constituencies), from more than two Assembly constituencies in that State;

(c) in the case of a biennial election to the Legislative Council of a State having such Council, from more than two Council constituencies in the State;

(d) in the case of a biennial election to the Council of States for filling two or more seats allotted to a State, for filling more than two such seats;

(e) in the case of bye-elections to the House of the People from two or more Parliamentary constituencies which are held simultaneously, from more than two such Parliamentary constituencies;

(f) in the case of bye-elections to the Legislative Assembly of a State from two or more Assembly constituencies which are held simultaneously, from more than two such Assembly constituencies;

(g) in the case of bye-elections to the Council of States for filling two or more seats allotted to a State, which are held simultaneously, for filling more than two such seats;

(h) in the case of bye-elections to the Legislative Council of a State having such Council from two or more Council constituencies which are held simultaneously, from more than two such Council constituencies.

Explanation.-- For the purposes of this sub-section, two or more bye-elections shall be deemed to be held simultaneously where the notification calling such bye-elections are issued by the Election Commission under section 147, 149, 150 or, as the case may be, 151 on the same date.

Section 33-A. Right to information.--*(1) A* ***candidate shall,*** *apart from any information which he is required to furnish, under this Act or the rules made thereunder,* ***in his nomination paper*** *delivered under sub-section (1) of section 33,* ***also furnish the information as to whether -***

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8 and sentenced to imprisonment for one year or more.

(2) The candidate of his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

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

(a) in the case of an election from a Parliamentary constituency, [a sum of twenty-five thousand rupees or where

the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of twelve thousand five hundred rupees ; and

(b) in the case of an election from an Assembly or Council constituency, a sum of ten thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of five thousand rupees :

Provided that where a candidate has been nominated by more than one nomination paper for election in the same constituency, not more than one deposit shall be required of him under this sub-section.

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

***Section 36. Scrutiny of nominations.**--(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.*

*(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, **reject any nomination on any of the following grounds:--***

*(a) that on the date fixed for the scrutiny of nominations the candidate either is **not qualified or is disqualified for being chosen** to fill the seat under any of the following provisions that may be applicable, namely:--*

Articles 84, 102, 173 and 191,

Part II of this Act and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of

1963)]; or

***(b)** that there has been a **failure to comply with any of the provisions of section 33 or section 34** ; or*

*(c) that the **signature of the candidate or the proposer** on the nomination paper **is not genuine.***

(3) Nothing contained in clause (b) or clause (c) of sub-section (2) shall be deemed to authorise the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or

open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.

Section 38. Publication of list of contesting candidates.-- *(1) Immediately after the expiry of the period within which candidatures may be withdrawn under sub-section (1) of section 37, the returning officer shall prepare and publish in such form and manner as may be prescribed a list of contesting candidates, that is to say, candidates who were included in the list of validily nominated candidates and who have not withdrawn their candidature within the said period.*

(2) For the purpose of listing the names under sub-section (1), the candidates shall be classified as follows, namely:--

(i) candidates of recognised political parties;

(ii) candidates of registered political parties other than those mentioned in clause (i);

(iii) other candidates.

(3) The categories mentioned in sub-section (2) shall be arranged in the order specified therein and the names of candidates in each category shall be arranged in alphabetical order and the addresses of the contesting candidates as given in the nomination papers together with such other particulars as may be prescribed.

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

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

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

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

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an

affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

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

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

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

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80-A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.--For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

*(6) The **trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion,** unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.*

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.

Section 87. Procedure before the High Court.**--(1) Subject to the provisions of this Act and of any rules made thereunder, **every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908** (5 of 1908) **to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party

tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1972), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

***Section 100. Grounds for declaring election to be void.**--(1) Subject to the provisions of sub-section (2) if the High*

Court is of opinion--

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

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

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

*(**d**) that the **result of the election,** in so far as it concerns a returned candidate, **has been materially affected--***

*(i) by the **improper acceptance** of any nomination, or*

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

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

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

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice but the High Court is satisfied--

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and 5 without the consent, of the candidate or his election agent;

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the High Court may decide that the election of the returned candidate is not void.

(B) The Conduct of Elections Rules, 1961

***Rule 4. Nomination paper.**--Every nomination paper presented under sub-section (1) of section 33 shall be completed in such one of the Forms 2-A to 2-E as may be appropriate:*

*Provided that a **failure to complete or defect in completing,** the declaration as to symbols in a nomination paper in Form 2-A or Form 2-B **shall not be deemed to be a defect of a substantial character** within the meaning of sub-section (4) of section 36.*

***Rule 4A. Form of affidavit to be filed at the time of delivering nomination paper.--**The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of*

section 33 of the Act, also deliver to him an affidavit sworn by the candidate before a Magistrate of the first class or a Notary in Form 26.

Rule 10. Preparation of list of contesting candidates.*----(1) The list of contesting candidates referred to in sub-section (1) of section 38 shall be in Form 7-A or Form 7-B as may be appropriate and shall contain the particulars set out therein and shall be prepared in such language or languages as the Election Commission may direct.*

(3) If the list is prepared in more languages than one, the names of candidates therein shall be arranged alphabetically according to the script of such one of those languages as the Election Commission may direct.

(4) At an election in a parliamentary or assembly constituency, where a poll becomes necessary, the returning officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall, subject to any general or special direction issued in this behalf by the Election Commission,--

(a) allot a different symbol to each contesting candidate in conformity, as far as practicable, with his choice; and

(b) if more contesting candidates than one have indicated their preference for the same symbol decide by lot to which of such candidates the symbol will be allotted.

(5) The allotment by the returning officer of any symbol to a candidate shall be final except where it is inconsistent with any directions issued by the Election Commission in this behalf in which case the Election Commission may revise the allotment in such manner as it thinks fit.

(6) Every candidate or his election agent shall forthwith be informed of the symbol allotted to the candidate and be supplied with a specimen thereof by the returning officer.

(C) Code of Civil Procedure

ORDER VI Rule 1. Pleading.*- "Pleading" shall mean plaint or written statement.*

ORDER VI Rule 2. Pleading to state material facts and not evidence.*-(1) Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.*

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

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

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

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

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

Order VII Rule 11. Rejection of plaint

The plaint shall be rejected in the following cases :-

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

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the

valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Order VIII Rule 1. Written statement.- *(1) The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:*

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

PLEADINGS:

16. "Pleading' means plaint or written statement. As per Order VI Rule 2, C.P.C. every pleading shall contain, and contain only **a statement in concise form of the material facts on which the party pleading relies for his claim or defence,** as the case may be **but not the evidence by which they are to be proved.** Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph. Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

17. The object of Order VI Rule 2(1) is twofold. First is to afford the other side intimation regarding the particular of facts of the case so that it may be met by the other side. Second is to enable the court to determine what is really the issues between the parties. The words in the sub-rule ***"a statement in a concise form" do suggest that brevity should not be at the cost of setting out necessary facts but it does not mean niggling in the pleadings,*** vide ***Surendra Kashinath Rawat vs. Vinayak N. Joshi, AIR 1999 SC 162.***

18. In **Raj Narain vs. Smt. Indira Nehru Gandhi and another, (1972) 3 SCC 850 (para-19);** Hon'ble Supreme Court held as under:-

"19. Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulaes to be observed as rituals. Beneath the words of a provision of law generally speaking, there lies a juristic principle. *It is the duty ' of the court to ascertain that principle and implement it. ....."*

19. In **Udhav Singh vs. Madhav Rao Scindia, (AIR 1976 SC 744) (para 30),** Hon'ble Supreme Court held that a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole.

20. In **Bharat Singh and others vs. State of Haryana and others, (1988) 4 SCC 534 (para-13),** Hon'ble Supreme Court held as under:

"13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. ***In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point.*** *In this context, it will not be out of place to point out that in this regard* ***there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded,*** *in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.* ***So, the point that has been raised before us by the appellants is not entertainable.*** *But, in spite of that, we have entertained it to show that it is devoid of any merit."*

21. Thus pleadings in a plaint or a written statement are statement in concise form of the material facts on which the party relies for his claim or defence. In a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands, without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily, from the tenor and terms of his pleading taken as a whole. Similar principles shall apply to pleadings in an Election Petition in view of Section 83 of the Act, 1951.

WHAT CONSTITUTE MATERIAL FACTS:-

22. The expression '**material facts**' used in Rule 2(1) of Order VI C.P.C., **has not been defined in the Code.** Section

83(1)(a) requires that an election petition shall contain a **concise statement of material facts** on which the petitioner relies. In the Act, 1951 also, the expression 'material facts' has not been defined. Clause (b) of sub-section (1) of Section 83 mandates that an election petition shall set-forth full **particulars of any corrupt practice** that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The expression 'material facts' and the expression 'full particulars' have not been defined in the Act, 1952. These two expressions have been judicially interpreted by Hon'ble Supreme Court in various judgments.

23. In **Raj Narain vs. Smt. Indira Nehru Gandhi and another, (supra);** Hon'ble Supreme Court held as under:

*18. ..... **'Material facts' and 'particulars' may overlap but the word 'material' shows that the ground of corrupt practice and the facts necessary to formulate a complete cause, of action must be stated. ..... If the facts stated fail to satisfy the hat requirement then they do not give rise, to a triable issue. ..... In other words the facts must bring out all the ingredients of the corrupt practice alleged. If the facts stated fail to satisfy the that requirement then they do not give rise, to a triable issue. Such a defect cannot be cured by any amendment after the period of limitation for filing the election petition. But even if all the material facts are stated in the election petition. For a proper trial better particulars may still be required. If those particulars are not set out in the election petition, they may be incorporated into the election petition with the permission of the court even after the period of limitation.***

19. Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulaes to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the court to ascertain that principle and implement it..... "

24. In **Udhav Singh vs. Madhav Rao Scindia, (supra) (paras-38, 39 and 40),** Hon'ble Supreme Court held that all those primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are "material facts". All facts which are essential to clothe the petitioner with a complete cause of action are "material facts" which must be pleaded and **failure to plead** even a single material fact amounts to disobedience of the mandate of sec. 83(1) (a). "**Particulars**" are the details of the case set up by the party. "**Material particulars**" are the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative.

25. In **Azhar Hussain vs. Rajiv Gandhi, AIR 1986 SC 1253 (1) (paras-11 and 14),** Hon'ble Supreme Court held that material facts are facts which if established would give the petitioner the relief asked for. **The test required to be**

answered is whether the Court could have given a direct verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition. If an election petition does not furnish cause of action, then it can be summarily dismissed. Omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts is not an election petition at all.

26. In **Dhartipakar Madan Lal Agarwal vs. Shri Rajiv Gandhi, AIR 1987 SC 1577** (para-14), Hon'ble Supreme Court held that the Representation People Act is a complete and self contained code within which any rights claimed in relation to an election or an election dispute must be found. Right to contest election or to question the election by means of an election petition is neither common law nor fundamental right, instead it is a statutory right regulated by the statutory provisions of the Representation of the People Act, 1951. There is no fundamental or common law right in these matters as settled vide **N.P. Ponnuswami v. Returning Officer, AIR 1952 SC 14; Jagan Nath v. Jaswant Singh, AIR 1954 SC 210 and Joyti Basu v. Debi Ghosal, AIR 1982 SC 983.** These decisions have settled the legal position that outside the statutory provisions that there is no right to dispute an election. The provisions of the Civil Procedure Code are applicable to the extent as permissible by Section 87 of the Act, 1951. Section 83 is a mandatory provision which regulate the pleadings. If the election petitioner fails to make out a ground under Section 100 of the Act, it must fail at the threshold. If the allegations in the election petition are vague and general and **the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action.**

27. In **Mahendra Pal vs Ram Dass Malanger And Ors, (2000) 1 SCC 261 (para-7),** Hon'ble Supreme Court explained the provisions of Section 83(1)(a) of the Act, 1951 and held as under:

"Section 83(1) (a) of the Act mandates that in order to constitute a cause of action, all material facts, that is, the basic and preliminary facts which the petitioner is bound under the law to substantiate in order to succeed, have to be pleaded in an election petition. Whether in an election petition, a particular fact is material or not and as such required to be pleaded is a question which depends upon the nature of the charge levelled and the facts and circumstances of each case. The distinction between `material facts' and `particulars' has been explained by this Court in a large number of cases and we need not refer to all those decided cases. Facts which are essential to disclose a complete cause of action are material facts and are essentially required to be pleaded. On the other hand "particulars" are details of the case set up by the party and are such pleas which are necessary to amplify, refine or explain material facts. The function of particulars is, thus, to present a full picture of the cause of action to make the opposite party understand the case that has been set up against him and which he is required to meet. The distinction between `material facts' and `material particulars' is indeed important because different consequences follow from a deficiency of such facts or particulars in the pleadings. Failure to

plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. In the case of a petition suffering from deficiency of material particulars the Court has the discretion to allow the petitioner to supply the required particulars even after the expiry of limitation. Thus, whereas it may be permissible for a party to furnish particulars even after the period of limitation for filling an election petition has expired, with permission of the Court, no material fact unless already pleaded, can be permitted to be introduced, after the expiry of the period of limitation."

28. In **Hari Shankar Jain vs. Sonia Gandhi, (2001) 8 SCC 233 (para-23),** Hon'ble Supreme Court held as under:

*"23. .....**Merely quoting the words of the Section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary.** In V.S. Achuthanandan Vs. P.J. Francis & Anr., (1999) 3 SCC 737, this Court has held, on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. **Failure to plead material facts is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time-limit prescribed for filing the election petition.***

*24. **It is the duty of the Court to examine the petition irrespective of any written statement or denial and reject the petition if it does not disclose a cause of action.** To enable a Court to reject a plaint on the ground that it does not disclose a cause of action, it should look at the plaint and nothing else. Courts have always frowned upon vague pleadings which leave a wide scope to adduce any evidence. No amount of evidence can cure basic defect in the pleadings.*

32. In both the election petitions there are averments made touching the contents of respondents application filed for grant of certificate of citizenship so as to point out alleged infirmities in the application and the proceedings taken thereon but without disclosing any basis for making such averments. None of the petitioners states to have inspected or seen the file nor discloses the source of knowledge for making such averments. Clearly such allegations are bald, vague and baseless and cannot be put to trial. "

29. In **Mahadeorao Sukaji Shivankar vs. Ramaratan Bapu and others, (2004) 7 SCC 181 (paras-6 and 7),** Hon'ble Supreme Court held as under:

*"6. **Now, it is no doubt true that all material facts have to be set out in an election petition. If material facts are not stated in a plaint or a petition, the same is liable to be dismissed on that ground alone as the case would be covered by clause (a) of Rule 11 of Order VII of the Code.** The question, however, is as to whether the petitioner had set out material facts in the election petition. The expression "material facts" has neither been defined in the Act nor in the Code. It may be stated that the material facts are those facts upon which a party relies for his claim or defence. **In other words, material facts are facts upon which the plaintiff s cause of action or defendant's defence depends.** What particulars could*

be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that ***all basic and primary facts which must be proved at the trial by the party to establish existence of cause of action or defence are material facts and must be stated in the pleading of the party.***

7. But, it is equally well settled that there is distinction between "material facts" and "particulars". ***Material facts are primary or basic facts which must be pleaded by the party in support of the case set up*** *by him either to prove his cause of action or defence. Particulars, on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving finishing touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. Particulars ensure conduct of fair trial and would not take the opposite party by surprise."*

30. In **Pothula Rama Rao vs. Pendyala Venakata Krishna Rao and others, (2007) 11 SCC 1** (paras 8 and 9), Hon'ble Supreme Court held that the plea of election petitioner that nomination was improperly rejected, is a ground for declaring an election to be void with reference to provisions of Section Section 33(1) and Section 100 of the Act, 1951 and lack of material facts to make out a cause of action and held as under:

"8. ***If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground. The reason given by the Returning Officer for rejection and the facts necessary to show that the rejection was improper, should be set out. If the nomination had been rejected for non-compliance with the first proviso to sub-section (1) of section 33, that is, the candidate's nomination not being subscribed by ten voters as proposers, the election petition should contain averments to the effect that the nomination was subscribed by ten proposers who were electors of the Constituency*** *and therefore, the nomination was valid. Alternatively, the election petition should aver that the candidate was set up by a recognized political party by issue of a valid 'B' Form and that his nomination was signed by an elector of the Constituency as a proposer, and that the rejection was improper as there was no need for ten proposers. In the absence of such averments, it cannot be said that the election petition contains the material facts to make out a cause of action.*

9. In this case the election petition contained an averment that the nomination of Atchuta Ramaiah was rejected on the untenable ground that he was a dummy or substitute candidate set up by TDP. But there is no averment that he was 'set up' as a candidate by TDP in the manner contemplated in para 13 of the Symbols Order, that is, by issuing a valid B-Form in his favour. Nor did the election petition aver that his nomination paper was subscribed by ten proposers. ***Therefore, the petition was lacking in material facts necessary to make out a cause of action under section 100(1)(c) of the Act.*** *The High Court, therefore,* ***rightly struck off the said ground of challenge*** *contained in para 8 of the election petition."*

31. In **Anil Vasudeo Salgaonkar vs. Naresh Shigaonkar, (2009) 9 SCC 310**

(Paras-42, 50, 51, 52, 61 and 62), Hon'ble Supreme Court considered the question "Whether the election petition is liable to be dismissed because of lack of material facts" and after referring to various judgements, held that the word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad. Omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts relating to a corrupt practice is not an election petition at all. All those facts which are essential to clothe the election petitioner with a complete cause of action are "material facts" which must be pleaded, and the failure to place even a single material fact amounts to disobedience of the mandate of section 83(1)(a) of the Act. Tn election petition can be summarily dismissed if it does not furnish the cause of action if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with. The election petition which lacks material facts, is liable to be dismissed.

32. In **Ram Sukh vs. Dinesh Aggarwal, (2009) 10 SCC 541 (Paras-14, 23 and 24),** Hon'ble Supreme Court considered the provisions of Section 81, 83, 86 and 100 of the Act, 1951 and discussed material facts and vague pleadings and held, as under:

"14. The requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure with reference to Sections 81, 83 and 86 of the Act came up for consideration before a three-Judge Bench of this Court in Samant N. Balkrishna & Anr. Vs. George Fernandez & Ors4. Speaking for the three-Judge Bench, M. Hidayatullah, C.J., inter-alia, laid down that: (i) Section 83 of the Act is mandatory and requires first a concise statement of material facts and then the fullest possible particulars; (ii) omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad; (iii) the function of particulars is to present in full a picture of the cause of action and to make the opposite party understand the case he will have to meet; (iv) material facts and particulars are distinct matters - material facts will mention statements of fact and particulars will set out the names of persons with date, time and place and (v) in stating the material facts it will not do merely to quote the words of the Section because then the efficacy of the material facts will be lost.

23. There is no quarrel with the proposition that the instructions contained in the Handbook for the Returning Officers are issued by the Election Commission in exercise of its statutory functions and are, therefore, binding on the Returning Officers. They are obliged to follow them in letter and spirit. But the question for consideration is whether the afore-extracted paragraphs of the election petition disclose material facts so as to constitute a complete cause of action. In other words, the question is whether the alleged omission on the part of the Returning Officer ipso facto "materially affected" the election result. It goes without saying that the averments in the said two paragraphs are to be read in conjunction with the preceding paragraphs in the election petition. What is stated in the preceding paragraphs, as can be noticed from grounds (i) and (ii)

reproduced above, is that by the time specimen signature of the polling agent were circulated 80% of the polling was over and because of the absence of the polling agent the voters got confused and voted in favour of the first respondent. ***In our opinion, to say the least, the pleading is vague and does not spell out as to how the election results were materially affected because of these two factors. These facts fall short of being "material facts" as contemplated in Section 83(1)(a) of the Act to constitute a complete cause of action in relation to the allegation under Section 100(1)(d)(iv) of the Act.*** *It is not the case of the election petitioner that in the absence of his election agent there was some malpractice at the polling stations during the polling.*

24. It needs little reiteration that for purpose of Section 100(1)(d)(iv), ***it was necessary for the election petitioner to aver specifically in what manner the result of the election insofar as it concerned the first respondent, was materially affected due to the said omission on the part of the Returning Officer.*** *Unfortunately, such averment is missing in the election petition."*

33. In **Jitu Patnaik vs. Santan Mohakud and others, 2012 (4) SCC 194 (paras 45, 51, 52, 53, 54 and 57),** Hon'ble Supreme Court held has under:

"45.A bare perusal of the above provisions would show that the first part of Order VI Rule 2, CPC is similar to clause (1)(a) of Section 83 of the 1951 Act. It is imperative for an election petition to contain a concise statement of the material facts on which the election petitioner relies. What are material facts? All basic and primary facts which must be proved at the trial by a party to establish the existence of cause of action or defence are material facts. ***The bare allegations are never treated as material facts. The material facts are such facts which afford a basis for the allegations made in the election petition.*** *The meaning of 'material facts' has been explained by this Court on more than one occasion. Without multiplying the authorities, reference to one of the later decisions of this Court in Virender Nath Gautam v. Satpal Singh and others (2007) 3 SCC 617 shall suffice.*

51. The averment that in Form 17-C, certified copy, it has been deliberately shown as 772 making a deliberate suppression of 319 votes hardly improves the pleading in the election petition. There is no averment that the election petitioner or his agents challenged part II of Form 17-C before authorities. ***At least, there are no facts pleaded concerning that.***

52. There is no pleading that there was any challenge by the election petitioner or his agents in respect of the counting figure in Form 20. The only pleading is that the illegality has been deliberately committed by the counting personnels while recording the counting figure in Form 20 with respect to Booth No. 179. There is, thus, no disclosure of material facts in respect of the challenge to the correctness of Form 20 and Form 17-C.

53. The pleading of material facts with regard to suppression of 319 votes in paragraph 7(D) is also incomplete as ***it has not been disclosed as to who suppressed 319 votes; who was the counting agent present on behalf of the election petitioner at the time of counting; how 319 votes were suppressed and why recounting was not demanded.*** *Moreover,* ***there is no express pleading as to how the result of the election has been***

materially affected by less counting of 319 votes.

54. In ***Samant N. Balkrishna and Another v. George Fernandez and Others, (1969) 3 SCC 238*** *while dealing with the requirement in an election petition as to the* ***statement of material facts and the consequences of lack of such disclosure, this Court, inter alia, exposited the legal position that omission of even a single material fact leads to an incomplete cause of action and statement of claim 11 1969 (3) SCC 238 becomes bad.***

57. The High Court has already struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G). The remaining two paragraphs 7(A) and 7(D), as noted above, do not disclose any cause of action and are liable to be struck out. After striking out paragraphs 7(A) and 7(D), we find that nothing remains in the election petition for trial and, therefore, election petition is liable to be rejected in its entirety."

34. In **Neelam Sonkar vs. Dr. Bali Ram, 2011 (11) ADJ 341 (Para-26),** a coordinate bench of this court followed the law laid down by Hon'ble Supreme Court in **Dhartipakar Madan Lal Agarwal (supra)** and held, as under:

"26. It is in this context that in Dhartipakar Madan Lal Agarwal (Supra) the Court said that if an election petition does not disclose cause of action, i.e., ***the pleadings in various paragraphs are so vague and general and lack material facts and particulars so as to disclose the cause of action under 1951 Act, such paragraphs of the petition are liable to be struck off under Order 6 Rule 16 C.P.C. at any stage of the proceedings. It is the duty of the Court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the court is satisfied that the election petition does not make out any cause of action and the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement but can proceed.*** *If after striking out the pleadings it finds that no triable issues remain to be considered, it has power to reject the election petition under Order VII Rule 11 CPC."*

CAUSE OF ACTION:-

35. Cause of action implies a right to sue. Cause of action is not defined in any statute. It has been judicially interpreted by Hon'ble Supreme Court in several decisions laying down the law that **cause of action implies a right to sue.** The material facts which are imperative for the suitor to allege and prove, constitute cause of action. It means that every fact which would be necessary for the plaintiff to prove, if traversed in order to support his right to the judgment of the court. **Negatively put, it would mean that every thing which if not proved, gives the defendant a right to judgment, would be part of cause of action. In every action, there has to be a cause of action, if not, the plaint or the writ petition, as the case may be, shall be rejected summarily.** Those facts, which have nothing to do with the prayer made therein, cannot be said to give rise to a cause of action which would confer jurisdiction on the court.

36. **Thus, settled legal position with regard to Section 83(1)(a) of the Act, 1951, Order VI Rules 2 and 16 and Order VIII Rule 11 of the Civil**

Procedure Code, may be summarised, as under:-

PLEADINGS:-

(i) "Pleading' means plaint or written statement. As per Order VI Rule 2, C.P.C. every pleading shall contain, and contain only **a statement in concise form of the material facts on which the party pleading relies for his claim or defence,** as the case may be **but not the evidence by which they are to be proved.** Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph. Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

(ii) All those primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are "material facts". All facts which are essential to clothe the petitioner with a complete cause of action are "material facts" which must be pleaded. **The test required to be answered is whether the Court could have given a direct verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition. If an election petition does not furnish cause of action, then it can be summarily dismissed. Omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts is not an election petition at all.**

(iii) **"Particulars"** are the details of the case set up by the party. **"Material particulars"** are the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative.

Consequences of lack of pleadings in Election Petition:

(iv) Section 83 is a mandatory provision which regulate the pleadings. If the election petitioner fails to make out a ground under Section 100 of the Act, it must fail at the threshold. If the allegations in the election petition are vague and general and **the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action.**

(v) Section 83(1) (a) of the Act mandates that in order to constitute a cause of action, all material facts, that is, the basic and preliminary facts which the petitioner is bound under the law to substantiate in order to succeed, have to be pleaded in an election petition.

(vi) **Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order VI, Rule 16, Code of Civil Procedure.**

(vii) **Failure to plead material facts is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time-limit prescribed for filing the election petition.**

(viii) **It is the duty of the Court to examine the petition irrespective of any written statement or denial and reject the petition if it does not disclose a cause of action.**

(ix) **If material facts are not stated in a plaint or a petition, the same is liable to be dismissed on that ground**

alone as the case would be covered by clause (a) of Rule 11 of Order VII of the Code.

(x) **If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground.**

(xi) **The bare allegations are never treated as material facts. The material facts are such facts which afford a basis for the allegations made in the election petition.**

(xii) **If the pleadings in various paragraphs are so vague and general and lack material facts and particulars so as to disclose the cause of action under 1951 Act, such paragraphs of the petition are liable to be struck off under Order VI Rule 16 C.P.C. at any stage of the proceedings. It is the duty of the Court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the court is satisfied that the election petition does not make out any cause of action and the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement but can proceed.** If after striking out the pleadings it finds that no triable issues remain to be considered, it has power to reject the election petition under Order VII Rule 11 CPC.

WHEN PLEADINGS CAN BE STRUCK OUT UNDER ORDER VI RULE 16:-

37. Bare perusal of Order VI Rule 16, C.P.C., shows that court may at any stage of the proceedings strike out any pleading:- **(a)** which may be **(i)** unnecessary, **(ii)** scandalous, **(iii)** frivolous **(iv)** vexatious, or, **(b)** which may tend to prejudice, embarrass or delay the fair trail of the suit, or **(c)** which is otherwise an abuse of the process of the Court.

38. As per Ramanatha Aiyar's Law Lexicon, The Encyclopaedic Law Dictionary (2nd Edition Reprint 2007) published by Wadhwa and Company Nagpur, the word **'unnecessary' means:**

*"**Unnecessary:** Not required under certain circumstances. Not necessary."*

39. Henry Campbell Black's Law Dictionary, Fifth Edition by St. Paul Minn. West Publishing Co. 1979 it defines the word **'unnecessary'**, as under:

"Not required by the circumstances of the case."

40. As per P. Ramanatha Aiyar's Law Lexicon, The Encyclopaedic Law Dictionary (2nd Edition Reprint 2007) published by Wadhwa and Company Nagpur, the word **'scandalous'** means:

*"**Scandalous.** A pleading is said to be "Scandalous', if it alleges anything unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges a crime immaterial to the issue. But the statement of a scandalous fact that is material to the issue is not a scandalous pleading. (Millington v. Loring, 50 LJ QB 214 ; 6 QBD 190).*

Of the nature of a scandal, containing defamatory information [S. 151, Indian Evidence Act].

Facts not material to the decision are impertinent, and, if reproachful, are scandalous.

The term "scandalous", as applied to the pleading of scandalous matter, cannot be applied to any matter which is not also impertinent and unnecessary."

41. In Concise Oxford English Dictionary 11th Edition (Revised) 2008 the words **'frivolous'** and **'vexatious'** have been defined as under:

*"**frivolous:** adj. not having any serious purpose or value. (of a person) carefree and superficial."*

*"**Vexatious.** Adj. 1. Causing annoyance or worry. 2. Law (of an action) brought without sufficient grounds for winning, purely to cause annoyance to the defendant. "*

42. In the Law Lexicon (The Encyclopaedia Law Dictionary) by P. Ramanatha Aiyar IInd Edition 1997 the words **'frivolous'** and **'vexatious'** have been defined as under:

*"**Frivolous.** Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense. Liebowitz v. Aimexco incident. Colo, App. 701 p. 2d 140, 142. Frivolous pleadings may be amended to proper form, or ordered stricken, under federal and state Rules of Civil Procedure.*

Of little or no weight or importance; not with serious attentions; manifestly futile"

*"**Vexatious.** Includes false. 1904 AWN 116=1 ALJ 450=25 All 512) An accusation cannot be said to be vexatious unless the main intention of the complainant was to cause annoyance to the person accused, and not merely to further the ends of justice. (11 SLR 55 Appr. ; 94IC, 271=27 Cr LJ 607=AIR 1926 lah. 365.) ."*

43. In Black's Law Dictionary, Fifth Edition 1979, the words **'frivolous'** and **'vexatious'** have been defined as under:

*"**Frivolous.** Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. Frivolous pleading may be amended to proper form, or ordered stricken under federal and state Rules of Civil Procedure."*

*"**Vexatious.** Without reasonable or probable cause or excuse. Gardener v. Queen Ins. Co. of America 232 Mo. App. 1101, 115 S.W.2d 4, 7."*

44. In The New Lexicon Webster's Dictionary (Deluxe Encyclopedic Edition), the words **'frivolous'** and **'vexatious'** have been defined as under:

*"**Frivolous.** Adj. gay and lighthearted in pursuit of trivial or futile pleasures; lacking in proper seriousness; empty, without importance."*

*"**Vexatious.** Adj. Causing vexation; (law, of actions) instituted without real grounds and meant to cause trouble or annoyance."*

45. **Thus, if the pleadings are unnecessary, scandalous, frivolous or vexatious, it may be struck out by the**

court under Order VI Rule 16. If the pleadings are such as may tend to prejudice the fair trial of the suit, embarrass the trial of the suit or delay the fair trial of the suit or if it constitute an abuse of process of court, then also the pleadings may be struck out by the court.

46. In **Sathi Vijay Kumar Vs. Tota Singh and others (2006) 13 SCC 353,** (Para-13) Hon'ble Supreme Court held, as under:

"Since the general principles as to pleadings in civil suits apply to election petitions as well, the pleadings which are required to be struck off under Rule 16 of order 6 in a suit can also be ordered to be struck off in an election petition. In appropriate causes, therefore, an election Tribunal (High Court) may invoke the power under Order 6 Rule 16 of the Code."

47. In **Abdul Razak (D) Through L.Rs and others Vs. Mangesh Rajaram Wagle and others JT 2010(1)SC 508** after referring to Boven, L.J.'s observation in Knowles Vs. Roberts (supra) the Court said that **power to strike down pleadings is extraordinary in nature.** It must be exercised sparingly and with extreme care, caution and circumspection. The above observations were made following earlier decisions in **Roop Lal Sathi Vs. Nachhattar Singh Gill 1982(3)SCC 487; K.K. Modi Vs. K.N. Modi JT 1998(1)SC 407=(1998) 3 SCC 573 and Union Bank of India Vs. Naresh Kumar (1996) 6 SCC 660.**

DEFECT OF SUBSTANTIAL CHARACTER WARRANTING REJECTION OF NOMINATION PAPER UNDER SECTION 36 OF 1951

48. **Defect of substantial character are grounds for rejection of nomination paper** which have been provided in sub-section (2) of Section 36 of the Act, 1951, namely, (a) that on the date fixed for scrutiny of nominations, the candidate either **is not qualified** or **is disqualified** for being chosen to fill the seat any of the applicable provisions of Articles 84, 102, 173 and 191 of the Constitution of India or Part-II of the Act and Sections 4 and 14 of the Government of Union Territories Act, 1963 or; **(b)** there has been **failure to comply with any of the provisions of Section 33 or 34;** or **(c)** the **signature of the candidate or proposer on the nomination paper is not genuine.** Section 33 provides for presentation of nomination paper and requirements for a valid nomination. It contains complete requirements of a valid nomination which has to be complied with. In case of a candidate for election of a parliamentary constituency nomination paper is to be filed in Form 2A as per Rule 4 of the Rules 1961. Affidavit in Form-26 is required to be filed under Rule 4A. **Instances of defects which are not of substantial character, are provided in the proviso to sub-Section (4) of Section 33; the proviso to Rule 4 of the Rules, 1961, or any minor mistake. Therefore, generally all such defects which do not constitute grounds of rejection of nomination paper under sub-Section (2) of Section 36 of the Act, 1951, may be said to be the defects not of substantial character.**

49. In the present set of facts, the election petitioner has not mentioned in any of the paragraphs of the election petition that which provision of Section 33 or Section 34 of the Act has not been complied with by the respondents or that mention of name of another political party in clause (4) under Part-B of the affidavit

in Form-26 falls under any of the grounds of rejection provided in sub-Section (2) of Section 36 of the Act, with reference to specific provision of Section 33 of the Act.

50. **Instances of defect of substantial character** requiring rejection of nomination paper and **defects of non-substantial character** which do not constitute grounds for rejection of nomination paper, as held by Hon'ble Supreme Court; are summarised as under:

SUBSTANTIAL DEFECT	NON-SUBSTANTIAL DEFECT
(i) Name of constituency not stated in a nomination paper, therefore, such a nomination form cannot be treated as having been completed in the prescribed form as required by Section 33(1). Therefore, defect was essentially of a substantial character which would result in rejection of nomination paper, vide **Prahalad Das Kandelwal vs. Narendra Kumar, (1973) 3 SCC 104 (Para-12)**	(i) Defects covered by the proviso to Section 33(4) of the Act, 1951 could easily be resolved if people authorised under Section 36(1) is present at the the time of scrutiny. If, however, the co-relation has not been made and the returning officer has no assistance to fix up the identification, it cannot be said to be a defect not of substantial character. Moreover, it could not be statutory obligation of the Returning Officer to scrutinize the electoral roll for finding out the identity of the proposer when the serial number turns out to be wrong. But if interested and competent persons point out to the Returning Officer that it is a mistake, it would certainly be his obligation to look into the matter to find out whether the mistake, is inconsequential and has, therefore, either to be permitted to be corrected or to be overlooked, vide **Lila Krishna vs. Mani Ram Godara, 1985 (Sup.) SCC 179 (Paras-13 to 16)**
(ii) In case of non-compliance with the requirement of Section 33(5) of the Act, 1951, nomination paper is liable to be rejected, vide **Viradmal Singhwi vs. Anand Purohit, 1988 (Sup.) SCC 604**	(ii) It is well known that in Indian society the name of a person consists of the first name, the second name and the surname or the family name. While first name and surname or family name of the returned candidate mentioned in the nomination paper is tallied with the voters list, the second name mentioned there in the nomination paper but is not found to be mentioned in the voters' list and the candidate already moved application for rectification of the defect in the voter list and no objection was raised by anybody at the time of scrutiny of nomination paper and the Returning Officer on suo motu enquiry, satisfied himself about the identity of the candidate, then such a defect was not of substantial character vide **Hari Kishan Lal vs. Babulal Marandi, (2003) 8 SCC 613**
(iii) Candidate's serial number in electoral roll not mentioned. Opportunity given to candidate or his representative and yet defect was not removed, then rejection of nomination is justified, vide **Mathura Prasad vs. Azim Khan, (1990) 3 SCC 659 and Bhogendra Jha vs. Manoj Kumar Jha, (1997) 2 SCC 236**	(iii) Absence of seal of party in nomination paper is inconsequential. Defect is not of substantial character and shall fall within Section 36(4) of the Act, 1951, vide **Ramphal Kundu vs. Kamal Sharma, (2004) 2 SCC 759**
(iv) Candidate failing to furnish the requisite information on the proforma and also failing to present personally or through representative. On such omission, rejection of nomination is valid, vide **Saligram Shrivastava vs. Naresh Singh Patel, (2003) 2 SCC 176**	(iv) Failure to complete a defect or not completing, the declaration as to symbols in a nomination paper in Form-2A or Form-2B by a candidate set by a recognised political party or a candidate set up by a registered unrecognised political party or a candidate seeks to contest the election as an independent candidate is not a defect of substantial nature. To illustrate, few examples: description of symbols, omission to fill blank spaces and in proforma in respect of choice of symbols or selecting a symbol which is reserved etc. fall in category of defects not of substantial character, vide **Krishna Mohini vs. Mohindra Nath Sofat, (2000) 1 SCC 145 and Ramesh Rout vs. Rabindra Nath Rout, (2012) 1 SCC 762 (Paras-36 and 37)**
(v) Candidate filing affidavit with blank particulars is a ground on which nomination paper can be rejected by returning officer.	(v) Non-disclosure of government dues by the candidate in his affidavit filed along with his nomination form was not a material lapse when there was a pending dispute about those dues at the time of filing nomination paper. But non-disclosure of assets of spouse is a material and substantial

Candidate failing to fill blanks even after reminder by returning officer, shall invite consequence of rejection of his nomination papers. Particulars in affidavit should not be left blank. Candidate must take minimum effort to explicit remark as 'NIL' OR 'NOT APPLICABLE' OR 'NOT KNOWN' in columns vide **Resurgence vs. Election Commission of India (2014) 14 SCC 189**	lapse, vide **Kisan Shankar Kathore vs. Arun Dattatray, (2014) 14 SCC 162**
(vi) False declaration of educational qualification by a candidate in his nomination paper is a defect of substantial character vide **Pukhrem Sharatchandra Singh vs Mairembam Prithviraj, (2017) 2 SCC 487**	

51. Having summarised/ settled the legal position on the legal issues, now I proceed to examine whether the election petition contains material facts and discloses cause of action for the grounds of challenge and whether various paragraphs of the election petition as mentioned in the Application A-9 can be struck out under Order VI Rule 16, C.P.C. and the Application A-10 under Order VII Rule 11(a), C.P.C. deserves to be allowed or both the applications deserve to be rejected.

Analysis of facts of Application A-9 under Order VI Rule 16, C.P.C. (Striking out pleadings)

52. In paragraph-8 of the election petition, the election petitioner has alleged that *"the returning officer illegally and arbitrarily rejected the nomination papers of 20 candidates in a pre-planed mechanism which vitiates all election of 78-Bhadohi Parliamentary Constituency."* In this paragraph, the election petitioner has neither disclosed the names of the alleged 20 candidates nor disclosed as to whether the said alleged candidates were set up by any political party or were independent candidates nor disclosed ground of alleged rejection of their nomination papers nor disclosed the alleged "Pre-Planned Mechanism". Thus, this paragraph lacks disclosure of primary facts so as to establish the existence of a cause of action. Failure to plead even a single material fact amounts to disobedience of the mandate by Section 83(1)(a) of the Act, 1951. Therefore, this paragraph is struck out.

53. In paragraph-9 of the election petition, the election petitioner has stated that *"The returning officer also improperly accepted the nomination paper of Ramesh Chand, which materially affected the result of the election of 78-Bhadohi Parliamentary Constituency."* The averments so made are the reproduction of Section 100(1)(d)(i) of the Act, 1951 with the only difference that in place of the word "Returned Candidate", the name of the respondent and name of constituency have been mentioned. That apart, the election petitioner has himself stated in paragraph-18 of the election petition that "the concise statement of the material facts in respect of the grounds- (A), (B) and (C)

from are as under. (from paragraph-19 onwards.)" No facts have been disclosed for alleged improper acceptance of the nomination paper of the respondent winning candidate. These averments in paragraph-9, do not constitute pleadings within the meaning of Order VI Rules (1)/(2), C.P.C. read with Section 83(1) of the Act, 1951.

54. In paragraph-10 of the election petition, the election petitioner has alleged that *"after withdrawal of nomination papers, the returning officer issued the list of contesting candidates containing 12 names."* In paragraph-6 of the election petition, the petitioner has shown that 32 candidates including him have filed nomination papers. In paragraph-8, he stated that nomination papers of 20 candidates were rejected. Thus, after rejection of nomination papers as alleged, 12 candidates remained but the election petitioner has alleged that list of 12 contesting candidates was issued by the returning officer after withdrawal of nomination papers. There is no disclosure of facts that who withdrew nomination papers. Therefore, the pleadings made in paragraph-10 are frivolous and vexatious and deserve to be struck out.

55. Paragraph-14 of the election petition is irrelevant. It has no relevance to the grounds of challenge stated in para-17. Therefore, para-14 deserves to be struck out.

56. In paragraph-16, the election petitioner has alleged that the returning officer committed error in accepting the nomination paper of the returned candidate Sri Ramesh Chand by overlooking the provisions of the Act, 1951 and the Rules and acted contrary to the instructions, guidelines and adopted dual standard while scrutinizing the nomination papers and improperly rejected the nomination of Shri Shrikant and 19 other candidates but improperly accepted the nomination paper of the respondent, which materially affected the result of election. This paragraph completely lacks material facts as to what error was committed by the returning officer, which provisions, guidelines or instructions were overlooked by him and what dual standard was adopted by the retuning officer in accepting the nomination paper of the respondent and rejecting the nomination paper of others, which materially affected the result of election. Thus, pleadings of paragraph-16 are frivolous and vexatious and deserve to be struck out.

57. In paragraph-17 of the election petition, the election petitioner has mentioned Grounds (A), (B) and (C), which have been reproduced in paragraph (8) above. In Ground (B), the petitioner has sated that the election of the returned candidate is illegal and void due to improper rejection of nomination paper of Shri Shrikant. The election petitioner has completely concealed the fact that the aforesaid Shri Shirkant was an independent candidate as evident from a copy of his nomination paper filed as Annexure-4 to the election petition. The copy of the order of rejection of nomination paper of the independent candidate Shri Shrikant has also been filed along with Annexure-4 to the election petition which shows that the returning officer confronted him with the material defects found in his nomination paper and in Form-26 but he had not turned up to remove the defects. The Ground (C) does not disclose which provision of the Constitution of India or the Act, 1951 or

Rules and Orders or Instructions/ Guidelines, have not been complied with. Thus, these sub-paras being frivolous and vexatious, deserves to be struck out.

58. In paragraph-22, the election petitioner has sated that he filed his nomination paper which was duly proposed by recorded elector of the parliamentary constituency. The election petitioner has not disclosed the names of the proposers. Thus, the pleadings in paragraph-22 are incomplete.

59. In paragraphs-24 and 25 of the election petition, the election petitioner has stated that *the candidate Shri Shrikant being duly qualified and eligible to contest the election for the post of Member of Parliament from the parliamentary constituency in question, filed his nomination paper which was improperly rejected by the returning officer vide order dated 24.04.2019 on the ground of defect in affidavit in Form-26 though the said defects are not substantial in nature and can be cured by providing opportunity to the candidate.* The election petitioner has very conveniently concealed the fact that the aforesaid candidate Shri Shrikant was an independent candidate as evident from Annexure-4 to the election petition. The election petitioner has made false and misleading averments that the defects found by the returning officer in nomination paper of the candidate Shri Shrikant, could be cured by providing opportunity to the candidate, whereas in the order of the returning officer dated 24.04.2019 filed as Annexure-4 to the election petition, it is recorded that the candidate Shri Shrikant was confronted with the defects in the nomination paper on 18.04.2019 and was requested to remove the defects upto 3 P.M. on 23.04.2019 but despite intimation he has not removed the defects in the nomination paper and consequently the nomination paper is rejected. Thus, the pleadings in paragraph-25 of the election petition are frivolous and vexatious and also not relevant for the purpose of acceptance of nomination paper of the returned candidate. The averments in these two paragraphs are relatable to Ground (B) of Para-17. Therefore, paragraphs-24 and 25 deserve to be struck out.

60. Paragraphs-28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41 and 43, disclose material facts relatable to grounds mentioned in Para-17(A) and, therefore, these paragraphs cannot be struck out. The question whether the nomination paper of the respondent was improperly accepted by the returning officer or whether the nomination paper suffered from any substantial or non-substantial defect, are the questions, which can be properly answered after adjudication of ground of challenge being Ground (A) as mentioned in para-17 of the election petition. The above mentioned referred paragraphs of the election petition, disclose a cause of action with reference to Ground (A) mentioned in para-17 of the election petition. Therefore, these paragraphs cannot be struck out under Order VI Rule 16, C.P.C. Consequently, to this extent, the Application A-9 deserves to be rejected.

61. Paragraphs-44, 45, 52 and 53 of the election petition are more or less repetition of earlier paragraphs 8, 16, 24 and 25 of the election petition, which have been found by me to be liable to be struck out. It is further relevant to mention that the orders of rejection of 19 candidates collectively filed as Annexure-16 and

rejection order of nomination of the independent candidate Shri Shrikant filed as Annexure-4 to the election petition, contain different grounds of rejection. Despite required by the returning officer such 20 candidates could not remove defects as pointed out by the returning officer and consequently, their nomination papers were rejected. Election petitioner has not mentioned at all in the aforesaid paragraphs that which provisions of the Act, 1951 or the Rules 1961 or guidelines or instructions of the Election Commission of India, have not been acted upon by the returning officer which materially affected the result of the election. In view of this, averments made in paragraph-44, 45, 52 and 53 of the election petition deserves to be struck out.

62. Paragraphs-46, 47, 48 and 49 are unnecessary, frivolous and vexatious and do not constitute material facts with regard to the grounds stated by the petitioner in paragraph-17 of the election petition. Whether the election petitioner is popular or not or some persons other than the respondent winning candidate has filed nomination papers from some other parliamentary constituency are wholly irrelevant for the purposes of grounds of challenge of the election of the respondent in the present election petition.

63. For all the reasons afore-stated, paragraphs-8, 9, 10, 14, 16, 24, 25, 44, 45, 46, 47, 48, 49, 52, 53 and para-17(B) and Para 17(C) of the election petition, are struck out under Order VI Rule 16, C.P.C. The Application A-9 filed by the respondent returned candidate under Order VI Rule 16, C.P.C., is partly allowed.

64. The rest of the paragraphs of the election petition disclose material facts and cause of action relatable to Ground 17(A), which needs to be adjudicated. Therefore, the Application A-10 under Order VII Rule 11, C.P.C. filed by the respondent returned candidate, is rejected.

65. Service of election petition upon the respondent was made sufficient by this court by order dated 23.09.2019 on which date the respondent winning candidate has filed Application A-9 under Order VI Rule 16, C.P.C., Application A-10 under Order VII Rule 11, C.P.C. and Application A-11 under Order VIII Rule 1, C.P.C., all dated 23.09.2019. After exchange of affidavits, the parties argued on the Application A-9 and A-10, which have been decided by this order. Therefore, considering the entire facts and circumstances of the case, the Application A-11 under Order VIII Rule 1, C.P.C. filed by the respondent winning candidate praying for grant of time for filing written statement, is allowed. The respondent winning candidate may file written statement within 30 days.

66. **In result, the Application A-9 is partly allowed, the Application A-10 is rejected and the Application A-11 is allowed,** as discussed above.

67. List on 05.03.2020 at 2 P.M. for framing of issues.

(2020)1ILR 887

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.11.2019

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

FAFO No. 364 of 2000

The Oriental Insurance Co. Ltd.
...Appellant
Versus
Kishwar Ali & Ors. ...Respondents

Counsel for the Appellant:

Sri Subhash Chandra Srivastava

Counsel for the Respondents:
Sri Shailendra Pratap Singh

A. Motor Accident Act, 1988 – Compensation – Liability to pay - Driving licence – Genuineness - Issue as to who will be responsible to pay the compensation - Tribunal rightly held that the driving licence cannot be held to be either fake or not genuine - Driving licence bore on its face, the signature of the concerned transport authority – Burden to proof contrary was never discharged – Finding recoded by the tribunal that the driver of the aforesaid offending vehicle was possessing valid and effective driving licence, cannot be faulted with at this juncture. (Para 20 & 21)

First Appeal From Order dismissed. (E-1)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Subhash Chandra Srivastava, learned counsel for the appellant, Sri Shailendra Pratap Singh, learned counsel for claimants-respondents no.1 and 2 and perused the judgment and order impugned.

2. This first appeal from order has been filed by the appellant against the judgment and decree dated 18.12.1999 passed by Motor Accident Claims Tribunal/Special Judge, Ghaziabad in M.A.C.T. No. 53 of 1997.

3. The only legal point urged before this Court pertains to the non-existence of any driving licence purportedly held or possessed by the driver of the offending vehicle opposite party no.3- Udaiveer Tyagi (Driver of Truck No. U.G.U.-8058).

4. Contention is that in this case, as per Form No.54, there is no mention of any such licence having been issued in favour of respondent no.3- Udaiveer Tyagi. It is specific testimony of the witness for the concerned transport department that there is no mention of any renewal as such of any such licence in question in the relevant register meant for renewal of the licences, and in the wake of above, claim is that obviously it cannot be held that the truck driver was holding or possessing a valid and effective driving licence and he ever got the same renewed at any point of time. The driving licence produced is fake and not genuine.

5. Apart from that, the learned counsel has also challenged the amount of compensation to the tune of Rs. 1,28,000/- along with 12 % interest claiming it to be excessive under facts and circumstances of the case.

6. Counsel for the claimants-respondents has refuted the aforesaid contention by claiming that the witness of the concerned transport department was itself brought by the Insurance Company. As per his testimony, it is nowhere established that the licence is fake. The total exercise required to be undergone in this context was not followed and mere perfunctory reference of certain missing entry in certain register meant and kept for renewal of the licences alone was made before the tribunal that would by no sketch of imagination establish things satisfactorily branding the driving licence to be fake and illegal. In that regard, the tribunal was justified when it held that there was non production of the concerned register meant for renewal of the driving licences and this indicates that the burden of proof as was required to be discharged by the Insurance Company regarding fact pertaining to non renewal of the driving

license in question, thus it being fake driving license, was not properly discharged by it. In such scenario, the insurance company itself is to be blamed. Nothing prevented the appellant-insurance company from proving the fact of driving licence being fake. But it tried to establish this particular fact merely by leading verbal testimony and not producing the relevant register before the tribunal.

7. I have considered the rival submissions and also perused the impugned award dated 18.12.1999, whereby overall compensation amount Rs. 1,28,000/- along with accrued interest @ 12% per annum has been awarded to the claimants-respondent nos.1 and 2- Kishwar Ali and Rahul Khan.

8. But before proceeding with this case, it would be appropriate in the fitness of things that a sketch of the incidents leading to the filing of the claim petition before the tribunal and this appeal before this Court be referred here for the sake of convenience.

9. Bare perusal of the record shows that the accident in question allegedly took place on 20.12.1996, when Smt. Neksee (deceased), who was going to purchase fodder for her animals along with her father-in-law sustained injuries by rash and negligent driving (of the offending vehicle) at 11:30 a.m. at place 100 feeta, tri-crossing, Meerut Road, Ghaziabad within Police Station Singhani Gate by Truck No. U.G.U.-8058, thus causing serious injuries to her. She was taken to the government hospital at Ghaziabad and got admitted, where she succumbed to her injuries on 21.12.1996 around 3 a.m. in the night. The matter was reported at the aforesaid police station on 21.12.1996. The post-mortem examination on the dead body of Smt. Neksee was done at the mortuary.

10. On the basis of aforesaid accident, claim has been raised by filing petition that the deceased at the time of the alleged accident was pregnant aged 22 years and she was earning Rs.3,000/- per month from various works including animal husbandry and out of this income, the claimants-respondents were being maintained and they are the dependents of the deceased.

11. It has been claimed that opposite party no.1, namely respondent no.3 of this appeal- Udaiveer Tyagi was driving the offending vehicle at that point of time being Truck No. U.G.U.-8058. The truck was owned by defendant-respondent no.4- Sri Rajvansh Bajaj and at that relevant point of time, this truck was insured with the present appellant. Under various heads, overall compensation amount to the tune of Rs. 18,50,000/- was demanded as compensation.

12. Joint written statement was filed by the owner and the driver of the offending Truck No. U.G.U. No.-8058, wherein the factum of accident was denied. In the written statement, the factum of ownership of the truck and the truck being driven by the aforesaid Udaiveer Tyagi was admitted apart from fact that the offending truck was insured with the insurance company- the present appellant. The insurance company also filed its written statement, whereby it denied all the claims and claimed immunity on various counts. After perusing the pleadings of both the sides, the following three issues were framed by the tribunal:-

13. Issue No.1 related to fact, whether the accident in question was caused by rash and negligent driving of Truck No. U.G.U.-8058 by driving it rashly and negligently by its driver on 20.12.1996 at 11:30 a.m. at place 100 feeta, tri-crossing, Meerut Road, Ghaziabad within Police Station - Singhani Gate ?

14. Issue no.2 related to fact, as to what amount, if any are the claimants entitled to receive ?

15. Issue no.3 related to fact, whether the deceased herself contributed towards the accident as has been averred in para no.23 of the written statement of the opposite party no.3- (the present appellant), If yes, its affect ?

16. In so far as issue no. 1 and issue no.3 are concerned, both these issues being interconnected were decided by common finding by the tribunal.

17. In so far as finding on issue no.1 is concerned, then both the sides had opportunity to lead evidence and to file documentary proof pros and cons as per their respective claim, which they did.

18. The tribunal after appreciating the evidence and particularly the testimony of P.W.1 and P.W.2 recorded finding that the accident in question was in fact caused by the aforesaid offending vehicle by driving the same rashly and negligently at the aforesaid time and place within Police Station - Singhani Gate, District - Ghaziabad and there was no contributory negligence whatsoever caused by the deceased (Neksee).

19. In so far as issue no.2 is concerned, it primarily related to the fact of the amount of compensation, if any, to be awarded to the claimants, then it is noticeable from the award itself that the incident took place in the year 1996 and at that point of time after perusing the testimony and the documentary evidence, it was opined by the tribunal that the monthly income of the deceased was Rs.1,000/-. Accordingly, the annual income was assessed after slicing off 1/3rd of the overall amount i.e. to say annual income being Rs. 12,000/- and after deducting 1/3rd, it comes to Rs. 7,800/- (1000-350=650 x 12= 7,800/-) per annum. After making point wise calculation as per the aforesaid statistics, the tribunal applied multiplier of 16 to the annual dependency Rs. 7,800/-, thus aggregating to Rs. 1,28,000/-, which finding does not suffers from any infirmity and is liable to be confirmed, at this stage. Accordingly, confirmed.

20. The next point decided by the tribunal regarding aforesaid finding relates to fact as to who will be the person responsible to pay the aforesaid amount of compensation, when obviously after analytical and analogical approach and after perusing the evidence on record and primarily the testimony produced by the insurance company- the present appellant. On point of effectiveness of the driving licence, it was rightly held by the tribunal that the driving licence in question cannot be held to be either fake or not genuine and this analytical exercise was properly conducted by the tribunal primarily on ground that the relevant document, the licence renewal register of the concerned transport authority was never produced so as to give credence to the claim made by the witness produced by the insurance company on the point of entry made in the renewal register kept for renewal of licences.

21. Next, the driving licence itself was produced by the driver of the

offending truck, which bore on its face, the signature of the concerned transport authority which in fact, issued the driving licence. Under these circumstaces, it was incumbent on the transport authority to have satisfactorily and reasonably denied endorsement of that particular transport authority on the driving licence as such, but this burden was never discharged properly and in view of the fact that claim raised by producing the driving licence itself and the copy of the application for renewal of the licence in qeustion moved before the concerned transport authority and in view of the various directions and views expressed by the Hon'ble Apex Court in various cases referred in the judgment of the tribunal it recorded finding that the driver of the aforesaid offending vehicle was possessing valid and effective driving licence, which finding cannot be faulted with, at this juncture, as the scrutiny done by the tribunal appears to be based on material on record and the verbal claim against non renewal does not carry substance.

22. Considering the age of the deceased and the entirety of this case, this Court is of the considered opinion that the amount of overall compensation Rs.1,28,000/- carrying 12% interest per annum cannot be said to be either excessive or unreasonable amount. But it is just compensation.

23. Consequently, the finding recorded by the claims tribunal in Claim Petition No. 53 of 1997 (Kishwar Ali and another vs. Udaiveer Tyagi and others) on all the three issues is hereby upheld.

24. Therefore, the appeal being devoid of merit is hereby rejected.

25. Office is directed to remit the amount of appeal Rs. 25,000/- back to the tribunal, so that proper compliance of the tribunal's order may be ensured.

26. Cost easy.

27. The lower court record may be remitted back to it for ensuring proper compliance.

(2020)1ILR 891

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 473 of 2016

UPSRTC, Bhaisali Road, Depot Meerut ...Appellant

Versus

Mohd. Azad & Anr. ...Respondents

Counsel for the Appellant:
Sri Rahul Agarwal, Sri Shantam Madhyan

Counsel for the Respondents:
Sri Bed Kad Mishra, Sri Raghuvansh Chandra, Sri Ram Jee Saxena

A. Motor Accident Act, 1988 - Disability and Permanent Disability – Assessment of loss - Principle to be followed by Tribunal - Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being - Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation - What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of

money, to arrive at the future loss of earnings - Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. (Para 18)

B. Motor Accident Act, 1988 – Compensation - Computation in injury cases - In injury cases, the claimants are entitled to pecuniary as well as non-pecuniary damages - General principles for computation of compensation in injury laid down by Apex Court in R.D. Hatangadi's case - Tribunal assessed the monthly income of claimant to be Rs. 4500/- considering that he was working as weigh man, which is reasonable and in the lower side - Correct multiplier of 17 applied taking into note the judgement in Sarla Verma's case - Thereafter 75% deduction in view of 25% disability made and after adding the medical expenses to it Tribunal awarded the compensation with 7% simple interest - No perversity or illegality in the impugned judgement and award. (Para 17 & 19)

Appeal dismissed. (E-1)

List of cases cited :-

1. UPSRTC v Shanti Devi 2007 (3) TAC 261 and New India Insurance Co v Lekhraj 2009 ACC 96 (DB)

2. U.P. State Road Transport Corporation v. Rani Srivastava; 2006 ACJ 1864)

3. Municipal Corporation of Greater Bombay v. Laxman Iyer; AIR 2003 SC 4182

4. Gujarat State Road Transport Corporation Vs. Thacker Narottam Kalyanji; 2006(1) TAC 678

5. Sudhir Kumar Rana Vs. Surinder Singh; AIR 2008 SC 2405), (2007) ACJ 2268 (MP) (DB)

6. Muthaiah Sekhar v Nesamony Tpt Corporation AIR 1998 SC 3064

7. Rajesh Kumar Raju vs Yudhveer Singh 2008 ACJ 2131 (SC)

8. R.D. Hatangadi v. Pest Control (India) Pvt. Ltd., (1995) 1 SCC 551

9. Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343

10. Sayyad Sadiq v Divisional Manager, United Insurance Company 2014 (1) TAC 369 (SC)

11. Sheela Pandey v New India Insurance (1) ACCD 276 (All)

12. Ramchandrappa v Manager, Sunderam Royal Insurance Company 2011 (4) TAC (SC)

13. Sarla Verma v DTC Ltd., AIR 2009 SC 3104

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

1. Heard Shri Rahul Agarwal, learned counsel for the appellant and Shri Bed Kant Mishra, learned counsel for the opposite parties.

2. This appeal has been filed against the judgement and award dated 31.10.2015 passed by Motor Accident Claims Tribunal /Additional District Judge, Court no. 18, Meerut, in MAC No. 619 of 2014 by which the learned tribunal has awarded a compensation of Rs. 3,64,500/- with 7% simple interest per annum from the date of filing of this claim petition.

3. Aggrieved by the impugned award, the UPSRTC/appellant has filed this appeal stating that the plea of contributory negligence on the part of TATA-407 was not properly considered. The claimant was driving a motor cycle without a valid driving license and there was contributory negligence on his part. The disability certificate was not issued by the CMO, it was issued by a private doctor and the same should not have been relied. The compensation amount has been arbitrarily assessed and is in the higher side. The injury sustained by the claimant is not in the nature of permanent disability. It was also not shown that after the accident the claimant was terminated or

removed from his job. The injury which was sustained by the claimant was on his jaw and it could not effect the job of the claimant weigh man clerk. There was no cogent evidence with regard to income of the claimant. The compensation and interest is highly excessive and the award being not acceptable under law should be set aside.

5. In respect of an accident dated 11.05.2014 which took place at about 6:30 AM when the claimant was going on his motor cycle from Hapur to Meerut. When he reached to town Kharkhauda, the Roadways Bus No. UP 15 AT -0814 which was driven by driver very rashly and negligently came from the side of Meerut and dashed the motor cycle and the claimant sustained serious injuries. The claimant remained under treatment for a very long period and it resulted in permanent disability. He was working in the Suger Mill Modi Nagar as claimant clerk and he was aged about 28 years. Therefore, this petition has been filed for compensation.

6. The defendant UPSRTC filed a written statement denying the allegations of the petition and stating that the accident did not occurred because of the rashness and negligence of the driver of the Bus. The driver was having valid and effective driving license. The said accident took place because of rash and negligent driving of a truck U.P. 37-T-0371 which dashed the bus resulting collision with the motor cycle. The claimant was not having the valid driving license. He was not wearing the helmet. There was contributory negligence on his part, the driver of the truck and the owner has not been made party.

7. The driver Satyaveer Singh has also filed written statement who has stated that at the time of the accident, he was having a valid driving license. He has denied that the accident took place by his bus and has stated that, if at all, there is any responsibility of paying compensation the same should be paid by the UPSRCT.

8. On the basis of pleadings of parties, following issues have been framed, the English translation thereof is as follows:

1. Whether on 11.05.2014, at 6:30 a.m. when the claimant was going on his motor cycle from Hapur to Meerut and when he reached to town Kharkhauda, the Roadways Bus No. U.P. 15 AT -0814 which was driven by driver very rashly and negligently came from the side of Meerut, dashed the motor cycle and the claimant sustained serious injuries?

2. Whether the accident occurs due to rash and negligent driving of Truck no. U.P. 37 T-0371 by the driver who dashed the motor cycle of the claimant?

3. Whether the said accident is the result of rash and negligent driving of claimant itself?

4. Whether the accident is the result of contributory negligence?

5. Whether the driver of Roadways Bus No. U.P. 15 AT-0814 was having valid and effective driving license on the date of accident?

6. Whether the petition is having fault of non-formulation of necessary parties.

7. Whether the claimants are entitled for any relief, if yes, then how much and from whom?

9. The claimant PW-1 and PW-2 Dr. R.N. Gupta have been examined in support. The documentary evidence has also been filed showing his disability and

treatment. The defendant no. 2 has examined himself as DW-1 and DW-2 conductor Hukum Singh has also been examined.

10. After hearing both the sides and perusing evidence on record, the learned tribunal passed the impugned award.

11. The learned counsel for the UPSRTC has confined his argument to the fact of contributory negligence and that the truck owner of TATA 407 and the driver were not made party and there is non-joinder of necessary party. Further argument is that no eyewitness has been examined and the disability certificate is not valid as it has been issued by a private doctor and relied upon by the learned tribunal. He has however, not disputed the quantum of compensation.

12. It was the case of appellant that it was TATA 407 which dashed the motorcycle of the claimant while overtaking THELA and in the process, it also hit the bus of the appellant and the bus collided with a tree and got badly damaged. From the appellant side DW-1 and DW-2 were examined to prove this fact. On the other hand, the case of the claimant was that the bus hit his motorcycle and the driver of the bus was driving the bus very rashly and negligently at the time of accident. FIR was lodged against driver of the offending bus and after investigation charge-sheet was submitted by police against the driver of the bus who has stated himself in his evidence that in that case he appeared and was released on bail. The claimant-injured examined himself and supported the version of petition. He is an injured witness and obviously his testimony assumes greater weight and therefore much reliance was placed by the Tribunal. The learned Tribunal on the basis of evidence on record and also referring the judgements of this Court in **UPSRTC v Shanti Devi 2007 (3) TAC 261** and **New India Insurance Co v Lekhraj 2009 ACC 96 (DB)** came to the conclusion that that the accident took place because of rash and negligent driving of the driver of the bus. It was also rightly concluded by the Tribunal that, as this was established that the accident occurred due to rash and negligent driving of the bus driver, there was no need to implead the driver and owner of TATA 407.

13. The learned counsel for the appellant has raised the issue of contributory negligence on the part of the claimant. There appears to be no evidence given by the appellant side on this point and even DW-1 and DW-2 have also not stated anything about it. But the learned counsel has submitted that the claimant was not having valid driving licence to drive motorcycle at the time of accident and therefore, it should be inferred that the claimant contributed towards accident.

14. It needs to be mentioned that where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, could have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be liable for the accident. It is now well settled that in the case of contributory negligence, Courts have power to apportion the loss between the parties as seems just and equitable. The

question raised is that the claimant was not having driving licence and therefore, he is liable for contributory negligence. This argument is of no help to the appellant as it has been settled legal position that the party taking such plea is required to prove the same by adducing evidence. On the contrary, the appellant and the witnesses examined have denied that any such accident took place by the bus. In **U.P. State Road Transport Corporation v. Rani Srivastava; 2006 ACJ 1864),** it has been held that where the factum of accident is denied by the opposite party, plea of contributory negligence is not available. Moreover, it has been also held in **Municipal Corporation of Greater Bombay v. Laxman Iyer; AIR 2003 SC 4182** that mere breach of traffic regulation by injured/victim cannot be a ground to fix responsibility for accident on such injured/victim and there should be concrete, clinching, positive and legally acceptable material for that. In **Gujarat State Road Transport Corporation Vs. Thacker Narottam Kalyanji; 2006(1) TAC 678** and **Sudhir Kumar Rana Vs. Surinder Singh; AIR 2008 SC 2405), (2007) ACJ 2268 (MP) (DB),** it was held that if a person drives a vehicle without a driving licence, he commits offence, but merely because he had no driving licence, the same alone cannot be sufficient to attribute contributory negligence to that driver when the evidence had disclosed him to be an efficient driver. Moreover, the claimant has stated before the Tribunal that he has driving licence and the same is on record which has been issued by RTO, Ghaziabad for driving motor vehicle except transport vehicle. Thus, there is no force in this argument of appellant.

15. Another argument is with regard to the disability certificate of the claimant which has not been issued by CMO or Medical Board but by a private hospital. In **Muthaiah Sekhar v Nesamony Tpt Corporation AIR 1998 SC 3064** and **Rajesh Kumar Raju vs Yudhveer Singh 2008 ACJ 2131 (SC),** though the disability certificate was not issued by authorized medical officer or board and it has been held that what is necessary is that the doctor who has issued the certificate of disability must be examined to prove it. Unless the author of the certificate examined himself ,it was not admissible in evidence .it was also not known whether the person issued the certificate was competent to to issue such certificate. It is also necessary that such doctor must have treated the injured. If the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. In **Rajesh Kumar Raju (supra)** certificate was issued after two years of Accident and it was not known whether the doctor issuing certificate treated the injured, on what basis such certificate was issued two years after the accident was not known and the author of the certificate ass not examined, hence it was held that the same could not be relied upon.

16. In this case, the doctor has been examined as PW-2 and he has stated the claimant remained under his treatment for a substantial period. On the basis of x-ray reports, and treatment, he has stated that the injured sustained serious injuries, his jaws was fractured and plate was inserted by operation. Three upper teeth were also broken. The learned Tribunal has discussed in detail the seriousness of injury and the impact thereof on the functional and physical ability in day to

day activities. He was under prolonged treatment and record shows that the learned Tribunal found that as per bills, Rs. 145000/- was spent on his treatment, though, the claimant has stated that Rs. 400000/- were spent on his treatment.

17. In injury cases, the claimants are entitled to pecuniary as well as non-pecuniary damages. In **R.D. Hatangadi v. Pest Control (India) Pvt. Ltd., (1995) 1 SCC 551** and **Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343,** the Supreme Court laid down the general principles for computation of compensation in injury.

"The provision of the Motor Vehicles Act, 1988 ("Act" for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner."

18. Accordingly, disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability.

19. The doctor has determined the disability of the claimant to be 35% in this case. The learned Tribunal has, however, determined the same to be 25% on the basis of evidence on record. The learned Tribunal assessed his monthly income to be Rs. 4500/- considering that he was working as weigh man in Modi Sugar Mills and also in view of judgement in **Sayyad Sadiq v Divisional Manager, United Insurance Company 2014 (1) TAC 369 (SC)** determining the income of vegetable seller in view of price rise to be Rs. 6500/- monthly, in **Sheela Pandey v New India Insurance (1) ACCD 276 (All)** of milkman to be Rs. 6500/- per month and in **Ramchandrappa v Manager, Sunderam Royal Insurance Company 2011 (4) TAC (SC),** of a coolie to be Rs. 4500/- monthly. Thus the income determined by the learned Tribunal is also reasonable and in the lower side. Correct multiplier of 17 has been applied taking into note the judgement in **Sarla Verma v DTC Ltd., AIR 2009 SC 3104** and thereafter 75% deduction in view of 25% disability has been made and after adding the medical expenses Rs. 364500/- has been awarded as compensation with 7% simple interest which cannot be said to be in higher side.

20. In view of above discussion, I find no perversity or illegality in the impugned judgement and award and consequently, the appeal has got no force and is liable to be dismissed.

21. The appeal is **dismissed**.

22. The office is directed to send a copy of this judgement along with lower court record to the Court concerned for information and necessary compliance.

23. Stay, if any, shall stand vacated. Remit back the amount of Rs. 25000/-

deposited by the appellant to the learned Tribunal to be adjusted against the awarded compensation.

(2020)1ILR 897

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 2011 of 2014

Royal Sundaram Alliance Insurance ...Appellant

Versus

Smt. Shakuntla Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri S.K. Mehrotra, Sri Archit Mehrotra

Counsel for the Respondents:
Sri B.N. Pathak, Smt. Kiran Gupta, Sri Dharmendra Kumar Gupta, Sri Pawan Giri

A. Employee's Compensation Act, 1923 - Claim – Liability of Employer - Necessity of proving negligence - Employer shall be liable to pay compensation for personal injuries caused to the employee by an accident arising out of and in the course of his employment - To hold the liability, it is not necessary to prove negligence on the part of employer - It is to be established only that the injured or deceased employee, at the time of accident was in the employment and was engaged in employer's work - Liability of the employer to pay compensation is absolute subject to those three exceptions viz. first employee was under the influence of drinks or drugs, second he has wilfully disobeyed an order given and third where the workman has wilfully removed a safety guard or other devices provided for his safety - (Para 12 & 18)

B. Employee's Compensation Act, 1923 - Section 2 (n) and 3 - Determination of 'course of employment' - The words in the course of employment mean in the course of the work which the workman is employed to do and which is incidental to it - The words arising out of employment are understood to mean that during the course of employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. (Para 13)

C. Claim - Procedure – Non-framing of issue – Effect - Not framing of issues by Commissioner will not vitiate the decision unless it caused prejudice to the affected party - Non-framing of issues is not regarded as fatal where parties had gone to trial fully knowing the rival case and had led evidence in support of their contentions - Commissioner discussed all the pleas raised and opportunities were given to adduce evidence - No prejudice caused to the appellant by non-framing of issue. (Para 23)

First Appeal From Order dismissed. (E-1)

List of cases cited :-

1. Mackinnon Mackenzie & Co.(P). Ltd v Ibrahim Mahammad Issak, AIR 1970 SC 1906

2. Talcher Thermal Station v Bijuli Naik, 76 (1993) CLT 699 (Orrisa)

3. Shakuntala Chandrakant Shreshti v Prabhakar Maruti Garvali AIR 2007 SC 248

4. Employees' State Insurance Corporation v Francis De Costa, 1997 (1) TAC 646 (SC)

5. S.D. Manager, National Insurance Company v Shaibarani Mohanta, 2019 (2) TAC 115

6. S.D. Manager, National Insurance Company v Suresh Kumar Behera, 2019 (2) TAC 461

7. New India Assurance Company v Braja Kishore Sutar, 1992 ACJ 715

8. Nedupuri v Sampati, AIR 1963 SC 684

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

1. Heard Shri. S.K. Mehrotra, learned counsel for the appellant and Shri Pawan Giri, Advocate holding brief of Shri B.N. Pathak, learned counsel for the respondent.

2. This appeal has been filed against judgement and award dated 31.05.2014 passed by Workmen's Compensation Commissioner/ Assistant Labour Commissioner, Bulandshahr in E.C.A Case No. 24 of 2011 (Smt. Shakuntla Devi and another Vs. Veerpal Singh and another) by which the learned Commissioner has compensation of Rs. 4,42,740/- along-with 12% simple interest from the date of filing of the petition.

3. Before the learned Commissioner an application was given under Section ¾ Workmen Compensation Act (Employee Compensation Act), 1923, stating that the son of the claimant Naresh Kumar Sharma, aged about 22 years was employed as conductor/cleaner on TATA LPT No. U.P 75-A/4115 and he was given a salary of Rs. 4,000/- per month with Rs. 50 per day for diet. The accident took place on 24.01.2009, when as per direction of the vehicle owner the deceased after loading vegetables on the said vehicle was going to Noida with the driver Bhanu Prakash. The vehicle reached in between Kasna-Tuglakpur, some noise started coming from the gear box of the vehicle whereupon driver Bhanu Prakash stopped the vehicle on the road side and sought direction from the vehicle owner on telephone and on his direction sent the deceased to village Tuglakpur to bring mechanic. The deceased took lift on a motor-cycle and while going to Tuglakpur, when the motor-cycle reached close to Pari Chauk, some unknown motor-cycle dashed on the motor-cycle and the motor-cycle slipped on the road side and the deceased sustained serious injuries on his head. He was taken to Kailash Hospital, Noida. His condition was serious and when the family members of the deceased reached, he was admitted to Sharda Hospital, Noida and on 24.01.2009 in the midnight the head of the deceased was put to serious operation and during treatment on 01.02.2009, he died in the hospital. FIR was lodged, inquest was prepared and the other police papers were submitted with the application. The deceased died during the course of employment of the vehicle owner and the said vehicle was insured at the time of accident, therefore, this petition has been filed.

4. Defendant no. 1 filed written statement and admitted the contents of para no. 1 to 4 and denied the contents of para no. 6 to 7. He admitted that the deceased was in his employment and on his direction he and the driver along-with the said vehicle went to Sikandraband and after loading vegetables they were going to Noida, when the accident took place and the deceased died because of injuries sustained in the accident and he was in the course of employment. He was paid Rs. 4,000/- a month. The RC, Insurance, fitness and driving license were valid at the time of accident. If the claimant is entitled for compensation, the responsibility to pay compensation is on the Insurance Company.

5. Insurance Company filed written statement denying the allegations of the petition and also denying the employment of the deceased, his age and his salary. The Insurance Company has further stated in order to obtain compensation in a planned way, the deceased have been shown to be conductor/cleaner in the said vehicle. The accident has not been caused by the said

vehicle but by some unknown motor-cycle and therefore, the petition is liable to be dismissed.

6. After taking evidence and hearing both the sides the learned Commissioner has passed the impugned award and the same has been challenged by the appellant.

7. The appellant has challenged the impugned award on the ground that the award is arbitrary, illegal and against the evidence on record. There was no evidence regarding the deceased being in the employment of the car owner. Substantial questions of law was raised on the basis of which it was requested that the impugned award is liable to be set aside.

8. Vide order dated 08.07.2014 of this Court the appeal has been admitted on the following substantial questions of law:

1. Whether in the absence of any evidence in regard to employment of deceased as Cleaner on truck in question, the relationship of employer and employee between the owner of truck in question and deceased could be assumed?

2. Whether it was mandatory on the part of Commissioner to have first frame the issues before deciding the claim filed by respondent-claimant?

3. Whether in the absence of any evidence in regard to relationship of employer and employee the claim petition was entertain-able before the Workmen's Compensation Commissioner?

9. Heard the learned counsel for the both the side and perused the lower court record.

10. The first ground of attack has been that the deceased was not employee of the car owner and he was not even driving the car at the time of incident. Section 2 (n) of the Employee's Compensation Act, 1923 defines 'employee' as below:

"(n) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is -

(i) a railway servant as defined in Section 3 of the Indian Railways Act 1890 (9 of 1890) not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II or

(ia)(a) a master seaman or other member of the crew of a ship.

(b) a captain or other member of the crew of an aircraft

(c) a person recruited as driver helper mechanic cleaner or in any other capacity in connection with a motor vehicle

(d) a person recruited for work abroad by a company and who is employed outside India in any such capacity as is specified in Schedule II and the ship aircraft or motor vehicle or company as the case may be is registered in India or;

(ii) employed in any such capacity as is specified in Schedule II whether the contract of employment was made before or after the passing of this Act and whether the contract is expressed or implied oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall where the workman is dead includes a reference to his dependants or any of them."

11. Item XXV of Schedule II includes driver within the definition of the employee and it has been admitted by the vehicle owner that the deceased was employed by him as conductor/cleaner on the said vehicle Tata on payment of Rs. 4000/- as monthly wages. Section 3 of the Act deals with the Employer's liability for compensation and provides as below:

(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment his employer shall be liable to pay compensation in accordance with the provisions of this Chapter :

***Provided** that the employer shall not be so liable -*

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) in respect of any injury not resulting in death or permanent total disablement caused by an accident which is directly attributable to -

the workman having been at the time thereof under the influence of drink or drugs or the wilful disobedience of the workman to an order expressly given or to a rule expressly framed for the purpose of securing the safety of workmen or the wilful removal or disregard by the workman of any safety guard or other device he knew to have been provided for the purpose of securing the safety of workman. (2) If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment or if a workman whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months (which period shall not include a period of service under any other employer in the same kind of employment) in any employment specified in Part B of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment or if a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify in respect of each such employment contracts any disease specified therein as an occupational disease peculiar to that employment the contracting of the disease shall be deemed to be as injury by accident within the meaning of this section and unless the contrary is proved the accident shall be deemed to have arisen out of and in the course of the employment :

***Provided** that if it proved -*

that a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment; and that the disease has arisen out of and in the course of the employment the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section : Provided further that if it is proved that a workman who having served under any employer in any employment specified in Part B of Schedule III or who having served under one or more employers in any employment specified in Part C of that Schedule for a continuous period specified under this sub-section for that employment and he has after the cessation of such service contracted any disease specified in the said Part B or the said Part C as the

case may be as an occupational disease peculiar to the employment and that such disease arose out of the employment the contracting of the disease shall be deemed to be injury by accident within the meaning of this section.

(2A) If a workman employed in any employment specified in Part C of Schedule III contracts any occupational disease peculiar to that employment the contracting whereof is deemed to be an injury by accident within the meaning of this section and such employment was under more than one employer all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may in the circumstances deem just.

(3) The Central Government or the State Government after giving by notification in the Official Gazette not less than three months' notice of its intention so to do may by a like notification add any description of employment to the employments specified in Schedule III and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively and thereupon the provisions of sub-section (2) shall apply in the case of a notification by the Central Government within the territories to which this Act extends or in case of and notification by the State Government within the State as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.

Save as provided by sub-sections (2), (2A) and (3) no compensation shall be payable to a workman in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment. Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury - (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

12. Thus, section 3 incorporates that the employer shall be liable to pay compensation for personal injuries caused to the employee by an accident arising out of and in the course of his employment. To hold the liability, it is not necessary to prove negligence on the part of employer and as such, the liability of the employer to pay compensation is absolute subject to those three exceptions which have been carved out in the section itself. The employer is absolved from the liability of paying compensation if the employee at the relevant time was under the influence of drinks or drugs or who has wilfully disobeyed an order given or rule framed for the safety of workman, or in cases where the workman has wilfully removed a safety guard or other devices provided for his safety. In this case, there is nothing on record to show that the case is covered under any of the exceptions.

13. Now, the next question is with regard to the determination of 'course of employment' and whether the deceased employee was in the course of

employment when the accident took place. In **Mackinnon Mackenzie & Co.(P). Ltd v Ibrahim Mahammad Issak, AIR 1970 SC 1906,** the Supreme Court held:

"The words in the course of employment mean in the course of the work which the workman is employed to do and which is incidental to it. The words arising out of employment are understood to mean that during the course of employment, ***injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered.*** *In other words there must be a causal relationship between the accident and the employment. The expression arising out of employment is again not confined to the mere nature of the employment. The expression applies as such to its nature, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises out of employment. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act."*

14. In **Talcher Thermal Station v Bijuli Naik, 76 (1993) CLT 699 (Orrisa),** the Court has observed:

"The pre-conditions for attracting the provisions of section 3(1) of the Act are that death or injury must be caused to a employee; the said injury must have been caused by accident; and the accident must have arisen out of and in course of his employment. A casual connection between the employment and the injury caused by the accident must exist. If after looking the at the entire facts, a fair inference can be drawn that the employment caused the injury, then the employer would be liable to pay the compensation. The liability under section 3(1) of the Act would accrue, if it is established that an injury has been caused to an employee and the accident arose out of and in the course of his employment."

The Court further laid down following principles to determine the course of employment and arising out of employment:

"(i) there must be a causal connection between the injury and the accident and the accident and the work done in the course of employment; (ii) the onus is upon the appellant to show that it was the work and the resulting strain which contributed to or aggravated the injury; (iii) it is not necessary that the workman must be actually working at the time of his death or that death must occur while he was working or had just ceased to work; and (iv) where the evidence is balanced, if the evidence shows a greater probability which satisfies a reasonable man that the work contributed to the causing of personal injury, it would be enough for the workman to succeed. But where the accident involved a risk common to all humanity and did not involve any peculiar or exceptional danger resulting from the nature of the employment, or where the accident was the result of an added peril to which the workman, by his own conduct, exposed himself and which peril was not in the normal performance of the duties of his employment, then the employer will not be liable under section 3 of the Act."

15. In **Shakuntala Chandrakant Shreshti v Prabhakar Maruti Garvali AIR 2007 SC 248,** it has been reiterated by the Court that there has to be a

proximate nexus between cause of death and employment instead of a stray mention that death took place during the course of employment. The Court laid down following principles to determine the course of employment:

"1.There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

2. The onus is upon the appellant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

3. If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case."

16. Section 30 of the Act provides for appeal against order of Commissioner. It lays down as follows:

"(1) An appeal shall lie to the High Court from the following orders of a Commissioner namely :-

(a) an order as awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

(a) an order awarding interest or penalty under section 4A;

(b) an order refusing to allow redemption of a half-monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased workman or disallowing any claim of a person alleging himself to be such dependant;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions :

***Provided** that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and in the case of an order other than an order such as is referred to in clause (b) unless the amount in dispute in the appeal is not less than three hundred rupees :*

***Provided** further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner or in which the order of the Commissioner gives effect to an agreement come to by the parties :*

***Provided** further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.*

The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of section 5 of the Limitation Act 1963 (36 of 1963) shall be applicable to appeals under this section."

17. In **Shakuntala Chandrakant Shreshti (supra)**, the Supreme Court has explained the expression 'question of law' which is inherently required for maintaining an appeal against the order of compensation passed under the Act. The Court laid down as follows:

"A question of law would arise when the same is not dependent upon examination of evidence, which may not require any fresh investigation of fact. A question of law would, however, arise when the finding is perverse in the sense that no legal evidence was brought on record or jurisdictional facts were not brought on record."

18. It is clear from the scheme of the Act that for extending the benefit of the beneficial provision, the contract of employment may be express, implied, written or oral and to succeed in the claim for compensation, it is to be established only that the injured or deceased employee, at the time of accident was in the employment and was engaged in employer's work or for the furtherance of the employer's work and was not doing something for his own benefit or accommodation. It was found established by the learned Commissioner that, in absence of any otherwise evidence on record and in view of admission of the employer, the the accident took place in the course of employment and the probabilities are more in the favour of the deceased to infer that the accident arose out of and in the course of employment. The learned counsel to appellant has referred the judgement in **Employees' State Insurance Corporation v Francis De Costa, 1997 (1) TAC 646 (SC)** and has submitted that the employee cannot succeed in a claim based on employment injury unless the claimant establishes that the injury or death was caused in the course of employment and had its origin in the employment. In this referred case, the injury was sustained while the employee was on his way to his factory where he was employed from his home and the accident took place one kilometre away from his factory. Therefore. It was held that the said injury was not caused by an accident arising out of his employment. The facts of this instant case is seemingly different as the nature of the employment of the deceased was not confined to a premises and the very nature of his employment was based on a vehicle movement on the road as cleaner/conductor.

19. The learned counsel to the respondent-claimant has referred to two judgements, both of Orissa High Court, namely, **S.D. Manager, National Insurance Company v Shaibarani Mohanta, 2019 (2) TAC 115 and S.D. Manager, National Insurance Company v Suresh Kumar Behera, 2019 (2) TAC 461** to show that in both the cases, driver of the truck died when he stopped the truck and stepped down to take food and was dashed by another truck and the Court applying the doctrine of notional extension and held that there was casual connection between the employment of the deceased and his accidental death and the accident took place in the course of employment.

20. Clearly, it was found on the basis of evidence on record that as per direction of the employer, the deceased was going on the said vehicle after loading vegetables from Sikandrabad to Noida at the time of accident when some noise started coming from the gear box of the vehicle which was got broken whereupon driver Bhanu

Prakash stopped the vehicle on the road side and sought direction from the vehicle owner on telephone and on his direction sent the deceased to village Tuglakpur to bring mechanic. The deceased took lift on a motor-cycle and while going to Tuglakpur, when the motor-cycle reached close to Pari Chauk, some unknown motor-cycle dashed on the motor-cycle and the motor-cycle slipped on the road side and the deceased sustained serious injuries on his head. During treatment, he died. Despite several opportunities given, the Insurance Company did not give any evidence to rebut this evidence.

21. The fact that the deceased was not inside the vehicle on which he was working as cleaner/conductor will not make any difference as the deceased would certainly continue to be in course of employment as he went to bring mechanic on the instruction of driver so that vehicle could be repaired. Unless he returned after completing the assigned work for which repair of the vehicle was necessary, he was in the course of employment. There was no occasion for him to take lift on the motor-cycle which was passing through nor he was to be at the place of occurrence unless he was asked by the driver to bring mechanic. When a vehicle gets out of order, it is the responsibility of the employee to get the same repaired and effort to bring mechanic is very much covered in the employment condition particularly when the driver had sought telephonic instruction from the owner.

22. The next question raised from the side of the appellant is that there was no FIR in respect of of incident. In the impugned judgement, the learned Commissioner has mentioned that photo-estate copy of GD and inquest report was on record and from the perusal thereof, it is clear that a report was given in the PS Kasana and the police took the dead body in possession and inquest report was prepared. For the purpose of claim petition, I find it enough as registration of offence and FIR is the responsibility of the police. It has been found sufficient by the learned Commissioner and the Insurance Company, by any evidence, has not been able to show that no such accident took place. It is also pertinent to mention that to succeed under Act, it is not necessary to show and prove negligence. The driver has been examined to prove the event and to prove that when the accident took place he was involved in a work which was in the course of his employment. No evidence was given by the Insurance Company and even a surveyor was not deputed to bring facts as alleged to contradict the version of claim. As such, I find no force in the argument.

23. It has been also argued from the side of appellant that the learned Commissioner disposed of the claim without framing issues and this error leads to illegality. A support from judgement in **New India Assurance Company v Braja Kishore Sutar, 1992 ACJ 715** has been sought, but, in the referred judgement, the law has been clarified that not framing of issues by Commissioner will not vitiate the decision unless it caused prejudice to the affected party. In **Nedupuri v Sampati, AIR 1963 SC 684,** it has been held that non-framing of issues is not regarded as fatal where parties had gone to trial fully knowing the rival case and had led evidence in support of their contentions. In this case, the learned Commissioner has discussed all the pleas raised by the appellant and opportunities were given to adduce evidence. Therefore, no prejudice

has been caused to the appellant by non-framing of issues and this argument has no force.

24. On the basis of above discussion, I find that the learned Commissioner has given finding on the basis of evidence that at the time of accident, the deceased was performing his duties and was in the course of his employment. He was employed on the vehicle as cleaner/conductor on payment of 4000/- rupees monthly wages. The learned Commissioner has rightly calculated the compensation after applying multiplier and making due deduction against personal expences. The issues raised as substantial question of law relate to facts and they have been duly considered disposed in the impugned judgement on the basis of facts evidence and after applying correct law. There is no perversity or illegality in the impugned judgement and award nor any substantial question of law is involved in this appeal. The appeal lacks merit and is liable to be dismissed.

25. Accordingly, the first appeal from order is dismissed.

(2020)1ILR 906

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 3397 of 2013

Reliance General Insurance Co. Ltd. ...Appellant

Versus

Smt. Warishan & Ors. ...Respondents

Counsel for the Appellant:
Sri Rahul Sahai

Counsel for the Respondents:
Sri Ved Mani Sharma

A. Employee's Compensation Act, 1923 - Claim – Liability of Employer - Necessity of proving negligence - Employer shall be liable to pay compensation for personal injuries caused to the employee by an accident arising out of and in the course of his employment - To hold the liability, it is not necessary to prove negligence on the part of employer - It is to be established only that the injured or deceased employee, at the time of accident was in the employment and was engaged in employer's work - Liability of the employer to pay compensation is absolute subject to those three exceptions viz. first employee was under the influence of drinks or drugs, second he has wilfully disobeyed an order given and third where the workman has willfully removed a safety guard or other devices provided for his safety - (Para 12 & 17)

B. Employee's Compensation Act, 1923 - Section 2 (n) and 3 - Determination of 'course of employment' - The words in the course of employment mean in the course of the work which the workman is employed to do and which is incidental to it - The words arising out of employment are understood to mean that during the course of employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. (Para 12)

First Appeal From Order dismissed. (E-1)

List of cases cited :-

1. Mackinnon Mackenzie & Co.(P). Ltd v Ibrahim Mahammad Issak, AIR 1970 SC 1906

2. Talcher Thermal Station v Bijuli Naik, 76 (1993) CLT 699 (Orrisa)

3. Shakuntala Chandrakant Shreshti v Prabhakar Maruti Garvali AIR 2007 SC 248

4. Mamtajbi Bapusab Nadaf v United India Insurance Co, 2010(10) SCC 536

5. S.D. Manager, National Insurance Company v Shaibarani Mohanta, 2019 (2) TAC 115

6. S.D. Manager, National Insurance Company v Suresh Kumar Behera, 2019 (2) TAC 461

7. Municipal Corporation of Greater Bombay v Kisan Gangaram Hire, (2009) 16 SCC 259

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

1. Heard Shri. Rahul Sahai, learned counsel for the appellant and Shri Ved Mani Sharma, learned counsel for the respondents.

2. This first appeal has been filed against award dated 30.10.2013 passed by Workmen'sCompensationCommissioner/Assistant Commissioner, Bareilly, in Case No. 16/E.C.A/12 (Smt. Warishan and others Vs. Reliance General Insurance Co. Ltd. and another) by which the learned Commissioner has awarded compensation of Rs. 5,19,154/- along-with 8% simple interest per annum from the date of award.

3. Before the learned Commissioner an application was filed under Employees Compensation Act, 1923 as amended in the year 2010 for award of compensation. In the application it was alleged that the husband of the claimant Shakeel Shah alias Shakir Shah was driver of defendant no. 2 in his private car bearing registration no. U.P 25-E/4065 on payment of Rs. 6,000/- per month with other expenses. On 15.09.2011, the deceased was coming from Pilibhit to Bareilly by that car, at about 7 p.m, on the turn of village Gotiya the car suddenly became out of order and stopped. The deceased came out of the car and standing on the road side, he started giving information on phone to the car owner. While he was giving information, some unknown vehicle dashed the deceased because of which he sustained serious and fatal injuries. He was taken to Mahajan Hospital, Bareilly for treatment from where he was referred to Lucknow Medical College where he was admitted and died on 22.09.2011. FIR was lodged in respect of the accident and offence was registered as crime no. 962/2011 under Section 279, 338, 304-A I.P.C. The car owner gave Rs. 25,000/- for the treatment of the deceased and nothing more was provided despite the demand raised by the claimant. The car owner said that the compensation can be claimed from the Insurance Company and relevant papers was given by him to the claimant. The said car was insured with the Insurance Company at the time of accident. Therefore, the petition was filed for compensation.

4. Notices were sent and despite service the car owner did not appear and the case was proceeded against him ex-parte on 1.09.2012. Insurance Company filed written statement denying the allegations of the application and stating that the deceased was not an employee with the car owner nor any accident took place by that car nor at the time of accident, the deceased was in the course of employment of the car owner. The age and salary was also denied. The petition has been filed by framing false story and the petitioners are not dependant of the deceased. The said car was being driven in violation of the Insurance policy.

5. The following issues (translated in English) were framed on the basis of pleadings of the parties:

1. Whether the deceased Shakeel Shah alias Shakir Shah was employed as

driver of defendant no. 2 for his car bearing registration no. U.P 25-E/4065 and in the course of employment on 15.09.2011, the accident took place and because of sustained injuries during treatment he died on 22.09.2011?

2. Whether the car U.P 25-E/4065 of defendant no. 2 was insured on the date of accident and was been driven by driver having valid and effective driving licence?

3. Whether the claimants are dependants of the deceased at the time of accident?

4. Whether the defendant no. 2, the car owner was giving monthly salary of Rs. 6,000/- to the deceased and what was the age of the deceased at the time of accident?

5. Whether the claimants are entitled for compensation, if yes, how much and from which defendant.

6. From the side of claimant the mother of the deceased was examined and as documentary evidence registration certificate of the car, insurance policy, driving licence of the deceased, the copy of FIR, site map, final report, post-mortem report, inquest report, papers relating to treatment of the deceased, written report given in respect of accident, X-Ray and Ultrasound report of the deceased, bills of purchase of medicines, information given by Lucknow Medical College regarding death of deceased to police and other papers have been filed.

7. After hearing both the sides the learned Commissioner passed the impugned award and aggrieved by that this appeal has been filed.

8. The appellant has challenged the impugned award on the ground that the award is arbitrary, illegal and against the evidence on record. There was no evidence regarding the deceased being in the employment of the car owner. Following substantial questions of law was raised on the basis of which it was requested that the impugned award is liable to be set aside:

1. Whether in the facts and circumstances of the case, as well as evidence on record, in the absence of there being any cogent material to determine the employment of the deceased as a driver with the owner respondent, the Commissioner below recorded an erroneous and a perverse finding holding him to be employed as a driver with the owner respondent?

2. Whether in the absence of records of employment being produce (as required to be maintained under clause 28(3) of Indian Motor Tariff Section 13A of the Payment of Wages Act, 1936 and Section 18 if the Minimum Wages Act, 1948 adverse inference was liable to be drawn against the claimant and the Commissioner below erred in placing reliance upon wholly irrelevant consideration, while determining issue no. 1?

3. Whether in the facts and circumstances of the case and in light of the fact that at the time of the accident, the deceased was not seated in the insured vehicle in question, which in turn did not meet with any accident, the Commissioner below was unjustified in holding the Insurance Co./Appellant as liable to pay the amount under the award?

4. Whether in the facts, circumstances as well as evidence brought on record, the Commissioner below erred in discarding the contents of the inquest report and erred in placing reliance upon

highly belated First Information Report in concluding that the death of the deceased had arisen arising out of the course of his employment?

5. Because the Commissioner below erred in law in assessing compensation even beyond what was claimed by the claimant?

9. The first ground of attack has been that the deceased was not employee of the car owner and he was not even driving the car at the time of incident. Section 2 (n) of the Employee's Compensation Act, 1923 defines 'employee' as below:

"(n) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is -

(i) a railway servant as defined in Section 3 of the Indian Railways Act 1890 (9 of 1890) not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II or

(ia)(a) a master seaman or other member of the crew of a ship.

(b) a captain or other member of the crew of an aircraft

(c) a person recruited as driver helper mechanic cleaner or in any other capacity in connection with a motor vehicle

(d) a person recruited for work abroad by a company and who is employed outside India in any such capacity as is specified in Schedule II and the ship aircraft or motor vehicle or company as the case may be is registered in India or;

(ii) employed in any such capacity as is specified in Schedule II whether the contract of employment was made before or after the passing of this Act and whether the contract is expressed or implied oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall where the workman is dead includes a reference to his dependants or any of them."

10. Item XXV of Schedule II includes driver within the definition of the employee. Section 3 of the Act deals with the Employer's liability for compensation and provides as below:

(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment his employer shall be liable to pay compensation in accordance with the provisions of this Chapter :

***Provided** that the employer shall not be so liable -*

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) in respect of any injury not resulting in death or permanent total disablement caused by an accident which is directly attributable to -

the workman having been at the time thereof under the influence of drink or drugs or the wilful disobedience of the workman to an order expressly given or to a rule expressly framed for the purpose of securing the safety of workmen or the wilful removal or disregard by the workman of any safety guard or other device he knew to have been provided for the purpose of securing the safety of

workman. (2) If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment or if a workman whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months (which period shall not include a period of service under any other employer in the same kind of employment) in any employment specified in Part B of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment or if a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify in respect of each such employment contracts any disease specified therein as an occupational disease peculiar to that employment the contracting of the disease shall be deemed to be as injury by accident within the meaning of this section and unless the contrary is proved the accident shall be deemed to have arisen out of and in the course of the employment :

***Provided** that if it proved -*

that a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment; and that the disease has arisen out of and in the course of the employment the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section : Provided further that if it is proved that a workman who having served under any employer in any employment specified in Part B of Schedule III or who having served under one or more employers in any employment specified in Part C of that Schedule for a continuous period specified under this sub-section for that employment and he has after the cessation of such service contracted any disease specified in the said Part B or the said Part C as the case may be as an occupational disease peculiar to the employment and that such disease arose out of the employment the contracting of the disease shall be deemed to be injury by accident within the meaning of this section.

(2A) If a workman employed in any employment specified in Part C of Schedule III contracts any occupational disease peculiar to that employment the contracting whereof is deemed to be an injury by accident within the meaning of this section and such employment was under more than one employer all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may in the circumstances deem just.

(3) The Central Government or the State Government after giving by notification in the Official Gazette not less than three months' notice of its intention so to do may by a like notification add any description of employment to the employments specified in Schedule III and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively and thereupon the provisions of sub-section (2) shall apply in the case of a notification by the Central Government within the territories to which this Act extends or in case of and notification by the State Government within the State as if such diseases had

been declared by this Act to be occupational diseases peculiar to those employments.

Save as provided by sub-sections (2), (2A) and (3) no compensation shall be payable to a workman in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment. Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury - (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

11. Thus, section 3 incorporates that the employer shall be liable to pay compensation for personal injuries caused to the employee by an accident arising out of and in the course of his employment. To hold the liability, it is not necessary to prove negligence on the part of employer and as such, the liability of the employer to pay compensation is absolute subject to those three exceptions which have been carved out in the section itself. The employer is absolved from the liability of paying compensation if the employee at the relevant time was under the influence of drinks or drugs or who has wilfully disobeyed an order given or rule framed for the safety of workman, or in cases where the workman has wilfully removed a safety guard or other devices provided for his safety. In this case, there is nothing on record to show that the case is covered under any of the exceptions.

12. Now, the next question is with regard to the determination of 'course of employment' and whether the deceased employee was in the course of employment when the accident took place. In **Mackinnon Mackenzie & Co.(P). Ltd v Ibrahim Mahammad Issak, AIR 1970 SC 1906,** the Supreme Court held:

*"The words in the course of employment mean in the course of the work which the workman is employed to do and which is incidental to it. The words arising out of employment are understood to mean that during the course of employment, i**njury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered.** In other words there must be a causal relationship between the accident and the employment. The expression arising out of employment is again not confined to the mere nature of the employment. The expression applies as such to its nature, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises out of employment. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act."*

13. In **Talcher Thermal Station v Bijuli Naik, 76 (1993) CLT 699 (Orrisa),** the Court has observed:

"The pre-conditions for attracting the provisions of section 3(1) of the Act are that death or injury must be caused to a employee; the said injury must have been caused by accident; and the accident must have arisen out of and in course of his employment. A casual connection between the employment and the injury caused by the accident must exist. If after looking the at the entire facts, a fair inference can be drawn that the employment caused the injury, then the employer would be liable to pay the compensation. The liability under section 3(1) of the Act would accrue, if it is established that an injury has been caused to an employee and the accident arose out of and in the course of his employment."

The Court further laid down following principles to determine the course of employment and arising out of employment:

"(i) there must be a causal connection between the injury and the accident and the accident and the work done in the course of employment; (ii) the onus is upon the appellant to show that it was the work and the resulting strain which contributed to or aggravated the injury; (iii) it is not necessary that the workman must be actually working at the time of his death or that death must occur while he was working or had just ceased to work; and (iv) where the evidence is balanced, if the evidence shows a greater probability which satisfies a reasonable man that the work contributed to the causing of personal injury, it would be enough for the workman to succeed. But where the accident involved a risk common to all humanity and did not involve any peculiar or exceptional danger resulting from the nature of the employment, or where the accident was the result of an added peril to which the workman, by his own conduct, exposed himself and which peril was not in the normal performance of the duties of his employment, then the employer will not be liable under section 3 of the Act."

14. In **Shakuntala Chandrakant Shreshti v Prabhakar Maruti Garvali AIR 2007 SC 248,** it has been reiterated by the Court that there has to be a proximate nexus between cause of death and employment instead of a stray mention that death took place during the course of employment. The Court laid down following principles to determine the course of employment:

"1.There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

2. The onus is upon the appellant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

3. If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case."

15. Section 30 of the Act provides for appeal against order of Commissioner. It lays down as follows:

"(1) An appeal shall lie to the High Court from the following orders of a Commissioner namely :-

(a) an order as awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

(a) an order awarding interest or penalty under section 4A;

(b) an order refusing to allow redemption of a half-monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased workman or disallowing any claim of a person alleging himself to be such dependant;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions :

***Provided** that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and in the case of an order other than an order such as is referred to in clause (b) unless the amount in dispute in the appeal is not less than three hundred rupees :*

***Provided** further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner or in which the order of the Commissioner gives effect to an agreement come to by the parties :*

***Provided** further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.*

The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of section 5 of the Limitation Act 1963 (36 of 1963) shall be applicable to appeals under this section."

16. In **Shakuntala Chandrakant Shreshti (supra),** the Supreme Court has explained the expression 'question of law' which is inherently required for maintaining an appeal against the order of compensation passed under the Act. The Court laid down as follows:

"A question of law would arise when the same is not dependent upon examination of evidence, which may not require any fresh investigation of fact. A question of law would, however, arise when the finding is perverse in the sense that no legal evidence was brought on record or jurisdictional facts were not brought on record."

17. It is clear from the scheme of the Act that for extending the benefit of the beneficial provision, the contract of employment may be express, implied, written or oral and to succeed in the claim for compensation, it is to be established only that the injured or deceased employee, at the time of accident was in the employment and was engaged in employer's work or for the furtherance of the employer's work and was not doing something for his own benefit or accommodation. It was found established by the learned Commissioner that, in absence of any otherwise evidence on record, the the accident took place in the course of employment and the probabilities are more in the favour of the deceased to infer that the accident arose out of and in the course of employment. The learned counsel to the appellant has taken reference of the judgement in **Mamtajbi Bapusab Nadaf v United India Insurance Co, 2010(10) SCC 536**

where the deceased was a workman engaged in uploading and unloading food-grains from a tractor. While unloading to underground storage, he climbed up to the grocery pit to clean the same and fell into the pit and died because of suffocation. His claim was rejected on facts of the case finding that the vehicle was not involved in the accident. It is evident that the facts of this case is very different and is based on the non involvement of the vehicle and the accident took place when the deceased was engaged in entirely different work to that of his employment. Hence, the referred judgement cannot be applied in the factual matrix of this case.

18. On the other hand, the learned counsel to the respondent-claimant has referred to two judgements, both of Orissa High Court, namely, **S.D. Manager, National Insurance Company v Shaibarani Mohanta, 2019 (2) TAC 115** and **S.D. Manager, National Insurance Company v Suresh Kumar Behera, 2019 (2) TAC 461** to show that in both the cases, driver of the truck died when he stopped the truck and stepped down to take food and was dashed by another truck and the Court applying the doctrine of notional extension and held that there was casual connection between the employment of the deceased and his accidental death and the accident took place in the course of employment.

19. Clearly, at the time of accident, the driver was talking on phone giving information about the car going out of order. As the driver of the car, he was coming back driving the car from Pilibhit and on the way, when the car went out of order and stopped, he came down from the car to inform the car owner. This fact has been nowhere rebutted by any evidence from the side of Insurance Company. The insurance company neither gave any evidence nor made any effort to summon and produce the car owner in evidence. The fact that the deceased was not inside the car will not make any difference as the deceased would certainly continue to be in course of employment unless he returned to the car owner. There was no occasion for him to be at the place of occurrence unless he was returning from Pilibhit to his destination driving the car of the car owner.

20. The next question raised from the side of the appellant is in respect of delay in FIR and stipulation in respect of cause of death in inquest report and also submission of FR in the matter by police after investigation. It appears that the accident took place on 15.9.2011, deceased died on 22.9.2011 and FIR was lodged on 12.11.2011. The FIR itself contains that the FIR was lodged after the religious ritual which takes place after 40 days from the date of death amongst Muslims. The explanation is convincing for the purpose of compensation claim. So far as the stipulation in inquest report is concerned, the purpose of preparing inquest report is to despatch the dead body for post-mortem and it has been correctly pointed out by the learned Commissioner that the Insurance Company, by any evidence, has not been able to show that the witnesses were eyewitnesses of the accident nor anyone of them have been examined. The learned Commissioner has also mentioned that, though, FR has been submitted by police after investigation, the case is pending before the court of A.C.J.M and moreover, in the FR, the fact of accident has been mentioned and because no witness of accident was found due to lapse of time, FR has been

submitted. It has been also rightly concluded by the learned Commissioner that no evidence was given by the Insurance Company and even a surveyor was not deputed to bring facts as alleged by the Insurance Company.

21. The further submission is that the claim petition was filed for Rupees five lacs and the learned Commissioner has awarded Rs. 519154/- with 8%interest and as such the impugned judgement suffers from illegality as it goes beyond what was claimed by the claimants. The award amount has been calculated on the basis of legally permissible yardsticks and what is expected is that the amount of compensation should be just and reasonable. In **Municipal Corporation of Greater Bombay v Kisan Gangaram Hire, (2009) 16 SCC 259,** compensation claim for Rs. 75000/- was filed but the Tribunal awarded Rs 105000/- finding the same to be just and the same was upheld. As such, there is no illegality in it.

22. On the basis of above discussion, I find that the learned Commissioner has given finding on the basis of evidence that at the time of accident, the deceased was performing his duties and was in the course of his employment. He was employed on the vehicle as driver on payment of 6000/- rupees monthly wages. The learned Commissioner has rightly calculated the compensation after applying multiplier and making due deduction against personal expenses. The issues raised as substantial question of law relate to facts and they have been duly considered disposed in the impugned judgement on the basis of facts evidence and after applying correct law. there is no perversity or illegality in the impugned judgement and award nor any substantial question of law is involved in this appeal. The appeal lacks merit and is liable to be dismissed.

23. Accordingly, the first appeal from order is dismissed.

(2020)1ILR 915

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

FAFO No. 4130 of 2017

Smt. Heema Gill @ Hema Gill & Anr. ...Appellants

Versus

Ashish Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Devendra Gupta

Counsel for the Respondents:
Sri Pawan Kumar Singh

A. Motor Accident Act, 1988 – Compensation - Calculation of loss of dependency - Tribunal erred in taking into consideration the deceased's income from the agricultural property despite of his noticing that the deceased was earning from business or profession - While calculating the loss of dependency, the income from business or profession ought to have been made the basis. (Para 10)

B. Motor Accident Act, 1988 - Compensation – Future Prospect – Its relevance while determining the income of deceased - Addition of 25% of the established income should be made where the deceased is aged between 40 to 50 years – Held, Tribunal failed to award any amount towards the future prospect, though the deceased was aged about 42 years. (Para 10)

C. Motor Accident Act, 1988 – Compensation – Conventional heads viz. loss of estate, loss of consortium and funeral expenses – It should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively as per the guidelines of Apex Court in Pranay Sethi's case – Held, Amount awarded by the Tribunal under the conventional heads are too meager and not in consonance with the guidelines. (Para 10)

First Appeal From Order partly allowed. (E-1)

List of cases cited :-

1. National Insurance Company Limited Versus Pranay Sethi and Others reported in 2017 (4) T.A.C. 637 (S.C.)

(Delivered by Hon'ble Bala Krishna Narayana, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard learned counsel for the claimants-appellants and Sri Pawan Kumar Singh, learned counsel for the respondent no. 4.

2. None has appeared on behalf of the defendants-respondent nos. 1 to 3 despite service.

3. By means of this first appeal from order, the claimants-appellants, Smt. Heema Gill @ Hema Gill and her son-Aadi Gill are seeking enhancement of amount of compensation awarded by M.A.C.T./Addl. District Judge, Court No. 8, Saharanpur in M.A.C.P. No. 244 of 2015 (Smt. Heema Gill @ Hema Gill and Another Vs. Ashish Kumar and 3 others) for the death of one Vikram Gill @ Vikram Gill husband of claimant-appellant no. 1 and father of claimant-appellant no. 2.

4. The facts of the case are that on 29.6.2015 at about 6 A.M. while deceased-Vikram Gill who was aged about 42 years was going on his Scooter (Activa) bearing registration no. U.P. 11P-5256, his Activa was hit from behind by a Truck Container bearing registration no. R 58-3886 (hereinafter referred to as the "offending vehicle") which was being driven rashly and negligently by it's driver near P.S. Kutubsher, District Saharanpur causing fatal injuries to the deceased who died during treatment in Government Hospital Saharanpur on the same day.

5. The written report of the incident was lodged at P.S. Kutubsher on the basis of which case crime no. 225 of 2015, under Sections 279 and 304A IPC was registered. The offending vehicle was seized by the police and the deceased's body was sent to postmortem. The claimants-appellants who are the heirs of the deceased filed M.A.C.P. No. 244 of 2015 before M.A.C.T./Addl. District Judge, Court No. 8, Saharanpur claiming a sum of Rs. 84,70,000/- as compensation and Rs. 50,000/- towards interim compensation for the death of Vikram Gill as a result of the injuries sustained by him in an accident on 29.6.2015 due to rash and negligent driving of the driver of the offending vehicle.

6. The claimants-appellants' claim was contested by the respondent nos. 1 to 3 denying the allegations made in the claim petition. The respondent no. 4, Magma H.D.I. G.I.C. Limited also filed a written statement under Rule 24B of Chapter IV of The Patents Rules, 2003 denying the allegations made in the claim petition and in the additional pleas, respondent no. 4 stated that the driver of the Truck Container did not possess a valid driving license on the date of occurrence and the other documents

pertaining to the vehicle namely registration fitness certificate permit and insurance policy were neither valid nor effective at the time of the incident. The vehicle was not being driven as per the terms and conditions of the insurance policy. The parties also adduced oral as well as documentary evidence in support of their respective claims before the tribunal to which we shall refer as and when the context so requires.

7. The M.A.C.T after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record allowed the claim petition in part and awarded a sum of Rs. 6,82,000/- as compensation to the claimants-appellants. The tribunal held that the deceased at the time of his death was aged about 42 years and his personal income was Rs. 2,16,000/- and after deducting 1/3rd amount from his personal income amounting to Rs. 72,000/- which the deceased would have spent towards his living and personal expenses, he would have spent Rs. 48,000/- per year on his family. By applying the multiplier of 14, the tribunal calculated the loss of dependency at Rs. 6,72,000/- and further awarded sums of Rs. 2500/-, 5000/- and 2500/- respectively under the conventional heads of funeral expenses, loss of consortium and loss of estate. Notice may be taken to the fact that none of the defendant-respondent have preferred any appeal against the impugned judgment and award. In fact none has appeared before us on behalf of the respondent nos. 1 to 3 despite service.

8. Learned counsel for the appellants has challenged the impugned judgment and award on the following grounds :

(i) The tribunal committed a patent error of law in calculating the loss of dependency by taking into account the agricultural income of the deceased instead of his income of Rs. 1,20,000/- per year from the business or professional income.

(ii) The tribunal has failed to award any amount towards the future prospective.

(iii) The amount awarded under the conventional heads is too meager and not in consonance with the directions given by the Apex Court in the Constitutional Bench' decision referred in the case of ***National Insurance Company Limited Versus Pranay Sethi and Others reported in 2017 (4) T.A.C. 637 (S.C.).***

(iv) The interest has been awarded erroneously at the rate of 7% in place of 9%.

9. Sri Pawan Kumar Singh, learned counsel appearing for the respondent no. 4 has made submissions in support of the impugned judgment and award and further submitted that Rule 220A of the Uttar Pradesh Motor Vehicle Rules 1998 clearly provides that the rate of interest shall not exceed 7% and hence the tribunal did not commit any illegality in awarding interest at the rate of 7%.

10. After having heard the learned counsel for the parties present and perused the impugned judgment and award as well as the law reports cited before us by the learned counsel for the parties, we find that there is force in the submission made by the learned counsel for the appellants qua ground nos. 1, 2 and 3.

(i) Coming to the first ground of challenge, the tribunal while calculating the loss of dependency erred in taking into

consideration the deceased's income from the agricultural property despite of his noticing that the deceased was earning Rs. 1,20,000/- per annum from business or profession. In our opinion while calculating the loss of dependency, the income from business or profession ought to have been made the basis. Thus, we hold that the deceased was earning Rs. 1,20,000/- per annum and not Rs. 72,000/- as held by the tribunal.

(ii) Coming to the second ground of challenge, we find that although Apex Court in the case of ***National Insurance (supra)*** has held that while determining the income, an addition of 25% of the established income should be made where the deceased is aged between 40 to 50 years but the tribunal had failed to award any amount towards the future prospect. In this case the deceased at the time of his death was aged about 42 years and was self-employed and earning Rs. 1,20,000/- per annum from business or profession. We therefore, add 25% of the established income of the deceased towards future prospect and hold that the annual income of the deceased was Rs. 1,50,000/- per annum (25% of Rs. 1,20,000/-). After deducting 1/3rd amount towards the living and personal expenses of the deceased, he would have contributed Rs. 1,00,000/- to his family.

(iii) Coming to the third ground of challenge, we find that there is merit in the said ground also. In sub-paragraph (viii) of paragraph 61 of the judgment rendered by the Apex Court in the case of ***National Insurance (supra)*** has held that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. Thus, in our opinion, the amount awarded by the tribunal under the conventional heads are too meager and not in consonance with the guildelines laid down by the Apex Court in this regard in ***National Insurance (supra)***. We accordingly awarded Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively under the conventional heads namely, loss of estate, loss of consortium and funeral expenses.

(iv) The last ground at which the learned counsel for the appellants has challenged the impugned judgment and award is that tribunal ought to have awarded interest at the rate of 9% per annum on the awarded amount of compensation, we do not find any merit therein in view of Rule 220A of the Uttar Pradesh Motor Vehicle Rules 1998.

11. We accordingly proceed to recalculate the compensation in the light of the aforesaid findings. As noted above, the deceased was earning Rs. 1,20,000/- p.a. less tax. By adding 25% towards future prospects as the deceased was between the age of 40 to 50 years, the deemed annual income of the deceased would be Rs. 1,50,000/- p.a. (1,20,000/- + 25% of Rs. 1,20,000/-). After deducting 1/3rd amount from his annual income i.e. 1,50,000/- towards the living and personal expenses of the deceased, his contribution to the family is determined as Rs. 1,00,000/- p.a. By applying the multiplier of 14, the total loss of dependency is assessed at Rs. 14,00,000/-. We further award a sum of Rs. 15,000/- towards funeral expenses, Rs. 40,000/- under the head of loss of consortium and Rs. 15,000/- towards loss of estate. We accordingly increase the compensation awarded to the claimants-appellants by the Tribunal from Rs. 6,82,000/- to Rs. 14,70,000/-. The claimants-appellants shall further be entitled to interest @ 7% p.a. on the

enhanced amount of compensation from the date of filing of the claim petition till the actual payment is made.

12. The appeal is allowed in part.

13. The impugned judgement and award stand modified to the extent indicated hereinabove.

14. The parties shall bear their respective costs.

(2020)1ILR 919

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE VIVEK KUMAR SINGH, J.

Habeas Corpus Writ Petition No. 917 of 2019

Aarav (Minor) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satyendra Narayan Singh, Sri Ashutosh Pandey

Counsel for the Respondents:
A.G.A., Sri Ishwar Chandra Tyagi, Sri Anmol Kumar Dubey, Sri Nirvikar Gupta

A. Constitution of India - Article 226 – Writ of Habeas Corpus – Alternative Remedy - Habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention - It is an extraordinary remedy and is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. (Para 10)

B. Constitution of India - Article 226 - Writ of Habeas Corpus - Grant -Detention of minor - Writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it - In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody - The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. (Para 9)

C. Writ of Habeas Corpus - Guardians and Wards Act – Jurisdiction – Difference - There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature - What is important is the welfare of the child - In the writ court, rights are determined only on the basis of affidavits - Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court - It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus. (Para 11)

Habeas Corpus Writ Petition dismissed. (E-1)

List of cases cited :-

1. Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad Tewari and others; (2019) 7 Supreme Court Cases 42

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

1. Heard Sri Satyendra Narayn Singh and Sri Ashutosh Pandey, learned counsel for the petitioners and Sri Ishwar Chandra

Tyagi, learned counsel for the opposite party no.2 and Sri Azad Singh and Sri Abhinav Prasad, learned A.G.A. for the State-respondent.

2. This Habeas corpus writ petition has been filed on behalf of corpus namely Arnav by petitioner no.2/father, with the following prayer:-

"(i). Issue a writ, order or direction in the nature of habeas corpus directing the respondent nos.2 to 4 to produce the corpus/petitioner no.1 before this Hon'ble Court and handover him to the petitioner no.2.

(ii). Issue a writ, order or direction in the nature of habeas corpus directing the respondent nos.2 to 4 to produce the petitioner no.1 i.e. corpus before this Hon'ble Court and release the petitioner no.1/corpus from the illegal detention of respondent nos.2 to 4 and hand over the petitioner no.1 to the petitioner no.2 i.e. father Dr. Abhijat Kumar.

(iii). Issue a writ, order or direction in the nature of mandamus protecting the interest of the petitioner, which this Hon'ble Court deem fit and proper under the facts and circumstances of the case."

3. The facts of the case in capsulated form are that the petitioner no.2 who is the father of petitioner no.1 having qualification of M.B.B.S. (M.S.) Surgery working as consultant surgeon at Navyug Medical Centre Pvt. Ltd., which is his own hospital and is also working as Senior Resident at Basti Medical College, Basti. The marriage of the petitioner no.2 namely Dr. Abhijat Kumar was solemnized with the respondent no.2 namely Dr. Sweta on 31.1.2009, which was registered before the Registrar, Hindu Marriage District Basti on 19.10.2016 and out of the said wedlock a male child i.e. corpus was born on 7.7.2012. The respondent no.2 was working as Doctor in Navyug Medical Centre and she was also one of the Director in the aforesaid medical centre alongwith petitioner no.2 and his parents Dr. Naveen Kumar and Dr. Shashi Srivastava. The petitioner no.1 is getting his education in Class-II, Section A at St. Basil's School.

4. The respondent no.2 had moved an application to C.M.S., V.R.T.K. mentioning therein that due to some personal reasons she cannot attend the hospital therefore, the leave may be granted w.e.f. 19.8.2019 to 31.8.2019. The respondent no.2 also sent a letter of resignation from service at C.M.S., V.R.T.K., District Women Hospital, Basti, mentioning therein that she is unable to work at Basti, reference is made to annexure-5 and 6 to the affidavit accompanying this habeas corpus writ petition.

5. Pursuant to orders dated 14.10.2019 and 14.11.2019 the corpus namely Arnav (Minor) has been produced by her mother i.e. respondent no.2, both have been identified by their counsel Sri Ishwar Chandra Tyagi, representing respondent no.2.

6. **On being asked the corpus informed that his name is Aarav.**

On being asked, with whom he is living right now, the corpus informed that he is living with his mother.

On being asked, with whom he wants to live, the corpus informed that he wants to live with his mother.

7. The counsel for the respondent contend that the writ of habeas corpus cannot be issued when efficacious alternative remedy is available to the petitioner No.2 under Hindu Minority and Guardianship Act, 1956. It is also contended that the question of custody of the minor child is to be decided not on consideration of the legal rights of the parties; but on the sole and predominant criterion of what would best serve the interest and welfare of the minor and, as such, the respondents who are taking care of the child since more than a year, they alone would be entitled to have the custody of the child in preference to petitioner No.1-father of the child.

8. I have carefully considered the rival contentions and statement of the corpus recorded herein above.

9. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child.

10. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

11. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

12. In the matter of ***Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad***

Tewari and others reported in ***(2019) 7 Supreme Court Cases 42*** My Lord's of The Apex Court have observed as follows:-

"25. Welfare of the minor child is the paramount consideration:- The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

26. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, 8 ***Lahari Sakhamuri v. Sobhan Kodali 2019 (5) SCALE 97*** *education, intellectual development and favourable surroundings, in Nil Ratan Kundu9, it was held as under:-*

"49. In ***Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148*** *the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.*

50. Again, in ***M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315*** *the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.*

51. In ***Kamla Devi v. State of H.P. AIR 1987 HP 34*** *the Court observed:*

"13. ? the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other." ***9 Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413***

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is

required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

27. Reliance was placed upon Gaurav Nagpal10, where the Supreme Court held as under:-

"32. In ***McGrath, (1893) 1 Ch 143, Lindley, L.J.*** *observed: (Ch p. 148) The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded." (emphasis supplied) ???*

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis 10 ***Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42*** *on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in* ***Mausami Moitra Ganguli case (2008) 7 SCC 673****, the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.*

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

28. Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in ***Rosy Jacob****11, this Court has observed that:-*

"7. .? the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors." ??..

"15. .... The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the

considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to 11 ***Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840*** *have erred in reversing him on grounds which we are unable to appreciate."*

13. In this view of the matter as well as considering the statement of the corpus made before this Court, which is noted above, this habeas corpus writ petition fails and is **dismissed**, accordingly.

14. However, till the child is settled down in the atmosphere of the second respondent-mother's house, the petitioner No.2 i.e. father alongwith grand parents of the corpus shall visit the child at the second respondent's house on Saturdays or Sundays between 11:00 A.M. to 2:00 P.M. till the corpus attains the age of 10 years. The second respondent shall ensure the comfort of petitioner No.2 as well as the grand parents of the corpus during such time of their stay in her house.

15. The petitioner No.2 is also restrained from indulging into any act of violence with the second respondent or with the corpus and in case he is found in violation of the order of this Court that is being passed today, he will be personally answerable to this Court.

16. It is made clear that dismissal of writ petition shall not preclude the petitioner from seeking remedy available to him in law. Any observation made by this Court, while deciding this writ petition, shall not come in the way of either party.

17. The amount of Rs.15,000/- deposited by the father of the corpus/petitioner no.1 shall be paid to the mother of corpus namely Dr. Sweta by the registry of this Court after due verification through her counsel.

(2020)1ILR 924

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Single No. 26883 of 2019
&
Misc. Single No. 22127 of 2019

Neelam Nigam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devendra Pratap Singh

Counsel for the Respondents:
C.S.C.

A. Constitution of India-Art- 243 F-U.P Panchayat Raj Act,1947-Sec 5A & 95(1)(g)-challenging show cause notice-u/s. 5A-also an order of D.M-removing petitioner from the office of Gram Pradhan-on ground of-holding the office of profit i.e. Auxiliary Nursing Midwifery-is a disqualification.

B. Order of D.M based on circular dt. 28.06.2010-issued by State Election Commission-no sanctity of law-unless an office-validly specified as office of profit-

no power of removal from such office-impugned order-illegal. Petition Allowed.

C. Held, In the present case, the Court is not straightaway called upon to answer as to whether the office of ANM is an office of profit or not which in any view of the matter lies within the domain of the State Government to lay down but what is surprising is that the District Magistrate has placed reliance upon a circular issued by the State Election Commission for such a purpose. The very premise upon which the District Magistrate has rested his decision i.e. a circular issued by State Election Commission on 28.6.2010, does not have any sanctity of law. The Court is of the considered opinion that unless an office is validly specified by the State to be an office of profit, it shall not confer power on the District Magistrate to remove an elected Gram Pradhan from his/her office on that ground alone. The District Magistrate has clearly erred in the present case by placing reliance upon the circular issued by the State Election Commission on 28.6.2010 and the impugned order passed by him, therefore, is liable to be set aside.

Writ Petition No. 26883 of 2019 allowed and Writ Petition No. 22127 of 2019 dismissed. (E-8)

List of cases cited: -

1. Lily Thomas v. Union of India and others reported in (2013) 7 SCC 653

2. Ashok Kumar Bhattacharya v. Ajoy Biwan, (1985) 1 SCC 151

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard learned counsel for the petitioner and Sri Anuj Garg, learned Standing Counsel for the State.

2. These two writ petitions were heard together and the same are being decided by this common judgement. Writ Petition No. 22127 (MS) of 2019 has arisen against the show cause notice dated 11.7.2019 whereas the second writ petition i.e. Writ Petition No. 26883 (MS) of 2019 is directed against the order dated 19.9.2019 whereby the petitioner has been removed from the office of Gram Pradhan on the alleged ground of holding the office of profit i.e. Auxiliary Nursing Midwifery (hereinafter referred to as the "ANM')

3. It is not in dispute that the petitioner is an elected Gram Pradhan and during currency of her term as Gram Pradhan, she came to be selected as ANM and has been engaged on a monthly payment of honorarium to the tune of Rs. 12128/-. It is gathered from the record that a complaint was made by one Maya Ram Verma to the District Panchayat Raj Officer on 23.4.2019 which triggered an action against the petitioner. The alleged disqualification gave rise to a notice dated 11.7.2019 under Section 5-A(c) of the U.P. Panchayat Raj Act, 1947 which was assailed by the petitioner in Writ Petition No. 22127 (MS) of 2019.

4. During pendency of the above writ petition, an order was passed by the District Magistrate on 19.9.2019 removing the petitioner from the office of Gram Pradhan. Resultantly, another Writ Petition No. 26883 (MS) of 2019 was filed assailing the order passed by the District Magistrate under Section 95(1)(g) of the Act.

5. The sum and substance of the controversy involved in the two petitions is as to what procedure is open to be adopted by the competent authority before passing an order of removal from office of Gram Pradhan on the alleged

disqualification of holding an office of profit; secondly, as to whether the State Election Commission has authority to identify and categorise the offices of profit and; thirdly, as to whether the petitioner's engagement as ANM by the District Society of National Health Mission program in district Ayodhya on the payment of monthly honorarium of Rs. 12128/- funded by the Central Government and utilised through the societies registered under the Societies Registration Act, 1860 would be an office of profit or not. Holding of office of profit by an elected pradhan is undisputedly a disqualification which one incurs by virtue of Section 5-A(c) of the U.P. Panchayat Raj Act, 1947 and the same is extracted for ready reference as under:

"5-A. Disqualification for membership- A person shall be disqualified for being chosen as, and for being [the Pradhan or] a member of a Gram Panchayat, if he-

(a) .....

(b) .....

(c) holds any office of profit under a State Government or the Central Government or a [local authority, other than a Gram Panchayat or Nyaya Panchayat; or a Board, Body or Corporation owned or controlled by a State Government or the Central Government];

....."

6. The appointment of the petitioner as ANM became a subject matter of complaint at the instance of one Sri Maya Ram Verma who filed a representation before the District Panchayat Raj Officer on 30.4.2019. It is not clear from the record as to whether Sri Maya Ram Verma, the complainant, pursued the matter further or not but the complaint so made did yield a response at various levels. Ultimately a notice under Section 5-A(c) was issued to the petitioner on 11.7.2019 to show cause as to why she may not be removed, which precedes by several letters issued by District Panchayat Raj Offficer to take action against the petitioner on the basis of complaint.

7. On a plain reading of Section 5-A(c), it is evident that the provision simply prescribes a ground of disqualification but it does not lay down any procedure for setting up an enquiry by District Magistrate who is vested with the powers of removal of a Gram Pradhan on the grounds mentioned under Section 95(1)(g), which includes a disqualification under Section 5-A of the Act. For ready reference Section 95(1)(g) is also extracted below:

"95. Inspection *- (1) The State Government may -*

(g) remove a Pradhan, Up-Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he -

(i) absents himself without sufficient cause for more than three consecutive meetings or sittings.

(ii) Refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charges for an offence involving moral turpitude,

(iii) has abused his position as such or has persistently failed to perform the duties imposed by this Act or Rules made thereunder or his continuance as such is not desirable in public interest, or

iii-a) has taken the benefit of reservation under sub-section(2) of Section 11-A or sub- section (5) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of Scheduled Castes, the Scheduled Tribes or the backward classes, as the case may be,

(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

(v) suffers from any of the disqualifications mentioned in Clauses (a) to (m) of Section 5-A:

Provided that where, in an enquiry held by such person and ***in such manner as may be prescribed,*** *a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.*

Provided that no action shall be taken under Clause (f), Clause (g) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed.

(2) A person under sub-clause (iii) and (iv) of clause (g) of sub-section (1) of this section shall not be entitled to be re-elected or re-appointed to any office under this Act for a period of five years or such lesser period as the State Government may order in any case.

(3) No order made by the State Government under this section shall be called in question in any Court.

(4) Where any Gram Panchayat, Joint Committee or Bhumi Prabandhak Samiti is dissolved the State Government may appoint such person or persons to exercise and perform the powers and duties thereof as it may deem fit."

8. The constitutional mandate after 73rd amendment in the Constitution of India by virtue of Article 243(F) clearly prescribes that an elected person at the local self government cannot be removed except in accordance with the procedure prescribed. Article 243(F) for that purpose being relevant is also reproduced as under:

"243F. Disqualifications for membership.

(1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat-

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide."

9. In the light of provisions extracted above, it is urged by the learned counsel for the petitioner that even if an information or complaint regarding

holding of office of profit had reached to the office of District Magistrate, the same ought to have been referred to the prescribed authority as required under Section 6-A of the Act.

10. For establishing a disqualification specified under Section 5-A, the Statute requires the question to be referred to the prescribed authority under Section 6-A of the Act which reads as under:

*"**6-A. Decision on question as to disqualifications** - If any question arises as to whether a person has become subject to any disqualification mentioned in Section 5-A or in sub-section (1) of Section 6, the question shall be referred to the prescribed authority for his decision and his decision shall, subject to the result of any appeal as may be prescribed, be final."*

11. Section 2(q) of the Act defines the prescribed authority. It is this definition alone that aids the implementation of Section 5-A through the procedure provided under Section 6-A of the Act. Section 2(q) of the Act for ready reference is reproduced hereunder:

"(q) "Prescribed authority' means -

i) for the purposes of the provisions of this Act mentioned in Schedule III of the [Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961], the Zila Parishad or the Kshettra Samiti, as may be specified in column 3 of that Schedule; and

ii) in respect of any other provisions of this Act, the authority notified as such by the State Government whether generally or for any particular purpose;"

12. The State Government in order to make Section 6-A workable has defined the prescribed authority either by reference to Schedule-III of U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 as specified in Column-3 and in respect of other provisions of the Act, the authority notified as such by the State Government whether generally or for any particular purpose. This Court may note that Schedule-III, Column-3 appended to U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 does not specify any authority with reference to Section 6-A of the Panchayat Raj Act. The only Rules framed to serve the purpose of Section 6-A of the Act are U.P. Panchayat Raj (Computation of Period of Five years for Removal of Disqualification, Fixation of period of dues etc. and Settlement of Disputes of Disqualification) Rules, 1994.

13. The above mentioned rules pose a peculiar difficulty when the matter is viewed within the scope of Rule 4 and 5. The proceeding under Rule-4 is not inclusive of the disqualification of office of profit i.e. 5-A(c) of the Act whereas, Rule-5 prescribes the authority for those cases which arise otherwise than a claim or objection. Rule 5 for ready reference is extracted hereunder:

***5. Reference under Section 6-A pertaining to disqualification:-**(1) Where any question as is referred to in Section 6-A of the Act is raised otherwise than in a claim or objection, it shall be referred to the Tehsildar by the officer or authority before whom such question arises for consideration.*

(2) On the receipt of a reference under sub-rule (1) the Tehsildar shall fix the date, time and place for it's hearing and shall give notice to the parties concerned.

(3) The Tehsildar shall after hearing the parties and after such other enquiries as he deems fit, give his decision on the question referred to him.

(4) Any person aggrieved by the order of the Tehsildar may, within fifteen days of the date of such order, prefer an appeal to the Sub-Divisional Officer.

(5) The Sub-Divisional Officer, shall after notice to the parties and after hearing such of them as desire to be heard, dispose of the appeal.

(6) A copy of the final order passed on the question referred to the Tehsildar as modified in appeal, if any, shall be forwarded to the Secretary of the Gram Panchayat and to the Assistant Development Officer (Panchayat) of the concerned Kshettra Panchayat."

14. The case at hand is a case of complaint by one Maya Ram Verma and there is no reason as to why such a complaint may not be understood as an objection by a person who is a resident of the same village. The difficulty arises when such an objection raising the question of disqualification does not fall within the scope of Rule-4 which applies to disqualifications other than those provided under Section 5-A(a) to (c). At the same time there is no specification of the prescribed authority under Rule-5 for cases arising out of a claim or objection. Thus, the present case essentially an objection (complaint) under Section 5-A(c) raised by Maya Ram Verma a resident of the village is a case for which the prescribed authority is not specified under the Rules, 1994. Therefore, the question of reference under Section 6-A unless the authority is specified, does not arise. The wisdom of the State Government leaving the Prescribed Authority undefined for adjudication of disqualifications under Section 5-A(a) to (c) and restricting the scope of Rule-4 to other disqualifications alone is not under question, therefore, the authority to issue show cause notice on 11.7.2019 by the District Magistrate is traceable to Section 95(1)(g) of the Act as a delegate of the State Government.

15. The authority to remove a Gram Pradhan who incurs a disqualification under Section 5-A of the Act is undoubtedly possessed by the State under Section 95(1)(g) of the Act. This power has been delegated by the State Government to the District Magistrate by virtue of G.O. dated 28.3.2001. This government order specifies various authorities for the exercise of powers which the Act contemplates under various provisions and the power under Section 95(1)(g) is prescribed to be exercised by the District Magistrate.

16. This government order when looked at in the light of Article 243-F of the Constitution of India is bound to be understood meaningfully.

17. Separation of powers and independence of each organ of the State are essential features of the Constitution of India and the Courts of law while interpreting the provisions of the Constitution or statute must bear in mind this significant aspect. Panchayati Raj which in common parlance is known as Local Self Government operates at the grass root level of democracy and must find its means and ways of self sustenance

leaving least scope for the State to topple whimsically.

18. For a democratically elected representative, the removal on the grounds of disqualification prescribed under law is to achieve the purpose of good governance. This is an external control maintained by the State for a definite purpose. The disqualifications prescribed under Section 5-A of the Act are the grounds in addition to financial and administrative lapses which entail the consequence of removal. For any disqualification provided under Section 5-A(a) to (c) of the Act, the District Magistrate in absence of the prescribed authority being specified for reference under Section 6-A is thus fully empowered to proceed against a Gram Pradhan on any ground mentioned under Section 95(1)(g)(v). It is for this reason as well that two provisos are appended to Section 95(1)(g).

19. The first proviso appended to Section 95(1)(g) envisages an enquiry by such person and in such manner as may be prescribed. For the purposes of removal of a Gram Pradhan on the ground of any disqualification mentioned under Section 5-A(a) to (c), there is no such prescription of any person for enquiry. The District Magistrate himself being a delegatee of the State cannot sub-delegate, hence the first proviso has no application in the matter of disqualification provided under Section 5-A(a) to (c).

20. The only procedure which logically emerges is that of the second proviso appended to Section 95(1)(g) of the Act according to which observance of rule of opportunity is a condition precedent. There is no other provision within which the authority to issue the impugned notice dated 11.7.2019 on the alleged disqualification under Section 5-A(c) can be traced. The power to supervise the conduct of election is vested in the District Magistrate under Section 12-BC of the U.P. Panchayat Raj Act, 1947 which is for a different purpose and its applicability cannot be stretched beyond the conduct of elections.

21. The second proviso appended to Section 95(1)(g) is reiterated below:

"Provided that no action shall be taken under clause (f), clause (g) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed.

22. It is in the spirit of above provision that the District Magistrate issued the show cause notice on 11.7.2019 competence whereof, in my humble opinion, is doubtless. The argument that the notice issued on 11.7.2019 suffers from lack of jurisdiction must fail. Therefore, Writ Petition No. 22127 of 2019 filed by the petitioner against the show cause notice dated 11.7.2019 fails and is accordingly dismissed.

23. The real issue raised in the subsequent writ petition is as to whether the petitioner holds an office of profit or not. For establishing such a disqualification, the notice dated 11.7.2019 makes a reference to the so called government order issued by the Joint Commissioner, State Election Commission on 28.6.2010 according to which certain appointments on honorarium though not a disqualification under U.P. State Legislature (Prevention of

Disqualification) Act, 1971 or the corresponding Central Act are nevertheless identified by State Election Commission to be a disqualification for being an elected member of Panchayats. These offices are Aanganbadi Karyakattri/Sahayika, Ashabahu, Kisan Mitra, Shiksha Mitra, Rozgar Sewak etc. The petitioner, however, is appointed as ANM which is not specifically included in the circular dated 28.6.2010, yet there is resemblance in the matter of payment of honorarium.

24. The petitioner in response to the show cause notice has stated that all the appointments mentioned in the circular of State Election Commission dated 28.6.2010 are made in the Gram Panchayats, whereas, the petitioner having duties related to maternity and vaccination was serving in the other adjoining district for which the honorarium paid is not salary but a kind of compensatory allowance. The honorarium is not linked to any permanent post having independent existence except that there is a contract of service which is entered into between the petitioner and the society at the district level. The chief executive of the district level society is the Chief Medical Officer who under the bye-laws of the society is empowered to terminate the contract on the ground of dissatisfactory service. The renewal of contract is also dependent upon the satisfactory service.

25. Before coming to the aspect as to whether the time bound contractual services on honorarium basis can be termed to be an office of profit in terms of the circular dated 28.6.2010, the Court would go into the second issue relating to the source of power under which the State Election Commission has issued the said circular. The opposite parties in the counter affidavit have not clarified as to under what authority and in what manner the said circular was binding on the State Government or the District Magistrate.

26. For laying down the conditions of disqualification, Article 243(F) lays down twin conditions. Firstly, the disqualifications for being a member of State legislature under law shall equally apply to a member of Panchayats. Secondly if a person is so disqualified by or under any law made by the legislature of the State, a person may be removed by following the procedure as prescribed.

27. By virtue of Article 243(K) of the Constitution of India the State Election Commission is empowered with superintendence, direction and control of the preparation of electoral rolls as well as the conduct of elections. This power vested in the State Election Commission cannot be understood to have conferred upon the Commission an authority to lay down as to holding of what offices would be a disqualification which essentially lies within legislative domain of the State. Article 243(K) read together with Section 12-BB of the U.P. Panchayat Raj Act does not in any manner authorise the State Election Commission to identify the offices of profit.

28. This Court would hasten to add that under Article 298 of the Constitution of India, Parliament is vested with the powers to legislate on the matters not included in the concurrent and State list. The apex court decision rendered in the case of ***Lily Thomas v. Union of India and others*** reported in ***(2013) 7 SCC 653*** also gives a clear indication that it is the legislature of the State or Parliament alone which may prescribe the conditions of

disqualification. To say that the State Election Commission has a power to specify offices of profit that too without there being any constitutional or statutory authority, in my humble view, is clearly in excess of the jurisdiction and for that reason, the very premise upon which the District Magistrate has placed reliance i.e. the circular dated 28.6.2010, is clearly unfounded and without authority of law.

29. It is not the case at hand that the State Government has prescribed certain appointments on honorarium basis to be a disqualification. Once it is clear that the District Magistrate has placed reliance upon the circular issued by the State Election Commission, this Court has no hesitation to observe that the District Magistrate stepped into an error which is apparent on the face of record.

30. To lay down as to which offices are to be treated in the category of offices of profit and which others may be understood not to have the trappings of the same, it is for the State Government to lay down. The Court is, however, conscious of the fact that the working hours may also be a factor for such consideration but a foolproof answer to this question is for the State legislature to provide. This Court on principle may only observe that the State Government while identifying an office to be an office of profit must bear in mind that the independence of each organ of the State is protected. It is the rule of independence of each organ of the State which consequently strengthens a democratic system based on the freedom of expression and speech.

31. Having answered the second question favourable to the petitioner, the Court would next consider as to whether a contractual time bound appointment on payment of honorarium by a society constituted at the district level would at all be an office of profit. The appointment of ANMs on contractual basis is to aid the existing staff appointed at Primary, Community and District level health centres. The strength of contractual staff appointed by the District Level Society are to aid the regular staff appointed against regular posts who are paid much higher salary. The services of contractual employees to carry out National Health Mission on honorarium basis is administratively controlled by the society registered under the Societies Registration Act, 1860. The Chief Medical Officer works as Chief executive of the society as per its bye-laws. Secondly, there is no concept of permanent posts in the Health Mission and the schemes keep on floating from one district to another. Thirdly, there is no payment of salary like against the regularly sanctioned posts having an independent existence. The societies and NGOs constituted at the district level who deal in health services are also open to be merged with the District Level Society. The Chairman, Zila Panchayat and District Magistrate are also ex-officio office bearers of the Management.

32. Insofar as the working hours are concerned, it is not the case before this Court that the petitioner has failed to perform her functions effectively as Gram Pradhan. The ground of inefficiency is independent of the alleged disqualification. An office of profit has two essential ingredients. Firstly, it must yield a true pecuniary benefit based on a master and servant relationship between the government or any statutory or local body of the State and the person concerned, secondly, the executive

authority of the person for which the pecuniary benefit against a position is derived must owe its existence to the office held by him. An employment of which the position goes with the termination of contract and for which there is no protection of tenure against any disciplinary measure is a pure contract of service, therefore, any incentive to meet out of pocket expenses like payment of honorarium cannot be classified to be an office of profit. Thus, the critical test of independent existence of the position irrespective of the occupant is not satisfied.

33. It is equally noteworthy that contractual appointment does not place a bar upon the incumbent to be a public representative at the panchayat level or otherwise. The question of conflict of public duty also does not arise with the service contract for reasons more than one. A contract of service finds its scope within the larger horizon of public duties which a citizen on being elected a public representative may owe to the State or its public institutions. The spirit of public duty is distinct from a service contract and every service contract for this reason alone may not debar a person from being a public representative. For coming to this reasoning, the Court would fruitfully place reliance on the judgment rendered by the apex court reported in (2018)8 SCC 1(State Election Commissioner, Bihar, Patna and others versus Janakdhari Prasad and other) wherein the Court had drawn a distinction between service and the office of profit being it a situation in the case decided by the Apex Court.

34. Looking at the issue from a different angle attracts the Court to say that some honorarium to the tune of Rs. 5000/- p.m. is paid to the Gram Pradhan on his election to the office and the duties attached to the said office are no less onerous, yet holding the office of Gram Pradhan is not a disqualification to contest the election of an MLA. For the purposes of eligibility, Section 3(O) of the U.P. State Legislature (Prevention of Disqualification) Act, 1971, exempts holding the office of Gram Pradhan for being elected as an MLA. It is a different thing that two offices cannot be simultaneously held as per the mandate of statute. The payment of honorarium alone is not a decisive factor but it is the master and servant relationship of which the authority and control vests in the government coupled with the fact that the office has an independent existence irrespective of the occupant.

35. This Court is conscious of the fact that Hon'ble the apex court in the case ***Ashok Kumar Bhattacharya v. Ajoy Biwan, (1985) 1 SCC 151,*** has guided the courts to interpret the concept office of profit in a manner that the approach adopted by a court must reduce the risk of conflict between the public duty and private interest which in the present case does not seem to be the situation. The petitioner's services as ANM are rendered in the adjoining district and the remuneration of honorarium is nothing but a compensatory allowance to meet out of pocket expenditure. This, however, does not suggest that this Court has certified the efficiency of the petitioner in the matter of performance of her duties as Gram Pradhan which is always open to be examined as per law. For this purpose, every District Magistrate must ensure that a CCTV camera and video conferencing facility connected to the district headquarter is installed in the district so

that the participation of panchayat members in the meetings at Gram Panchayat is duly ascertained and monitored by the State.

36. In the present case, the Court is not straightaway called upon to answer as to whether the office of ANM is an office of profit or not which in any view of the matter lies within the domain of the State Government to lay down but what is surprising is that the District Magistrate has placed reliance upon a circular issued by the State Election Commission for such a purpose. The very premise upon which the District Magistrate has rested his decision i.e. a circular issued by State Election Commission on 28.6.2010, does not have any sanctity of law. The Court is of the considered opinion that unless an office is validly specified by the State to be an office of profit, it shall not confer power on the District Magistrate to remove an elected Gram Pradhan from his/her office on that ground alone. The District Magistrate has clearly erred in the present case by placing reliance upon the circular issued by the State Election Commission on 28.6.2010 and the impugned order passed by him, therefore, is liable to be set aside.

37. The District Magistrate ought to have taken up the matter with the State Government instead of calling for a report from his sub-ordinate officials for which he lacked the authority under law. The State Government is bound to consider the matter and come up with a clear stand on the circular issued by the Commission on 28.6.2010 so that the disputes of this nature do not arise in future. Suffice it to say that the State Government while identifying an office to be an office of profit must bear in mind the true import and purpose of such a disqualification.

38. For the reasons aforesaid, the Court is of the considered opinion that the impugned order dated 19.9.2019 being illegal and arbitrary is liable to be set aside. It is accordingly quashed and petitioner is directed to be restored as Gram Pradhan.

39. Writ petition No. 26883 of 2019 is allowed. The cost of litigation is quantified at a sum of Rs. 25000/- payable by the State to the petitioner within a period of three months from today.

(2020)1ILR 934

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2020

BEFORE
THE HON'BLE JASPREET SINGH, J.

Second Appeal No. 83 of 2014

Smt. Dropadi Devi & Ors. ...Appellants
Versus
Shiv Chandra Dixit ...Respondent

Counsel for the Appellants:
Mohd. Aslam Khan, Sri Ashish Srivastava

Counsel for the Respondent:
Sri Amit Jaiswal, Sri Brijesh Kr. Saxena, Sri Brijesh Kumar

A. Code of Civil Procedure, 1908 - Section 100 - challenge to –concurrent judgement-no error in the concurrent finding returned by two courts as far as possession is concerned-concurrent finding of fact is usually binding on the High court while hearing the second appeal-when any concurrent finding of facts is assailed in second appeal, the appellant is entitled to point out any one or more ground on the basis of pleadings and evidence, such ground will constitute substantial question of law. (Para 68 to 73)

B. Defendant claimed damage for wrongful possession-he failed to lead any evidence or establish quantum regarding damage-defendant shall not be entitled to the decree of the damage in his counter claim-decree of possession is affirmed. (Para 74 to 77)

Second Appeal allowed. (E-6)

List of cases cited: -

1. Budhram & Ors. Vs. Banshi & Ors. 2010 (11) SCC 476

2. Laxmi & Ors. Vs. Parmeshwari Hegde & Ors. AIR 1969 Karnataka 175

3. Om Prakash Vs. Kintu & Anr. 2005 (13) SCC 289

4. Ashok Leyland Vs. St. of Tamilnadu 2004(3) SCC 1

5. D.S. Lakshmaiah & Anr. Vs. L. Balasubramanyam 2003 (10) SCC 310

6. Gurnam Singh Vs. Gurbachan Kaur 2017 (13) SCC 414

7. Mithai Lal Dalsinghar Singh Vs. Panna Bai Dev Ram Kinni 2003 (10) SCC 691

8. Kundiba Dagdu Kadam Vs. Savitri Bai Sopan Gurjar 1993 (3) SCC 722

9. Mithai Lal Dalsinghar Singh Vs. Panna Bai Dev Ram Kinni 2003 (10) SCC 691

10. Kunj Bihari Vs. Ganga Sahai Pande 2013 SCC Online Alld. 13489: 2013 (99) ALR 826

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Sri Mohd. Arif Khan, learned Senior Advocate along with Sri Deepankar Kumar and Mohd. Aslam Khan for the appellants and Sri B.K. Saxena, learned Counsel along with Sri Amit Jaiswal, Ms. Shreya Saxena and Sri Utkarsh Srivastava, for the respondents.

2. The instant second appeal has been preferred against the concurrent judgment and decree passed by the two courts below whereby the Additional Civil Judge, Senior Division, Court No. 24, Lucknow by means of its judgment and decree dated 08.10.2010 dismissed the suit of the plaintiffs-appellants and allowed the counter claim of the defendant-respondent. The aforesaid judgment and decree has been affirmed by the First Appellate Court in Regular Civil Appeal No. 155 of 2010 by A.D.J., Court No. 2, Lucknow by means of its judgment and decree dated 05.02.2014, while dismissing the appeal.

3. The aforesaid second appeal was admitted by means of the order dated 01.04.2014 on three substantial questions of law which shall be discussed later, while dealing with them. However, in order to appreciate the controversy involved in the above second appeal, certain brief facts giving rise to the instant appeal are being noticed hereinafter.

4. The plaintiffs-appellants instituted a suit for cancellation of a will deed as well as a sale deed in the Court of Munsif, South, Lucknow which was registered as R.S. No. 615 of 1992. Primarily, the pleadings were that the house bearing No. 57/1984 Mohalla Tilpurwa, Ward-Hussainganj, District Lucknow is a Joint Hindu Family Property of the ancestors namely Balbhadra Dubey which was not partitioned as yet.

5. It was also pleaded that the plaintiffs are in possession of the entire property in question and they had executed a registered power of attorney in favour of one Sri Harish Kumar Trivedi to look after the property as well as for the purpose of instituting and conducting the litigation. It

was specifically stated that on 30.08.1992, the defendant namely Sri Shiv Chandra Dixit had attempted to forcibly occupy the property in question which was resisted by the plaintiff. It is then that the defendant while claiming title to the property indicated that he had purchased the property by means of a registered sale deed dated 17.07.1971 from Smt. Gaga Dei who was the daughter of Late Sri Shiv Shanker Dubey.

6. It was also pleaded that as the property in question was a Joint Hindu Family Property and as such Sri Shiv Shanker Dubey, the father of Smt. Gangadei, did not have a right to execute any will allegedly dated 12.12.1947 and consequently Smt. Gangadei did not have any right to execute sale deed dated 17.07.1971, hence the defendant did not get any right.

7. The plaint was later on amended and by amendment it was specifically incorporated that Sri Shiv Shanker had instituted a Suit bearing No. 718 of 1950 before the Munsif City, Banaras seeking partition of the Joint Hindu Family Property. In the aforesaid suit of 1950 a defence was raised by the plaintiffs herein, that the suit instituted at Banaras was bad for partial partition, inasmuch as, the property bearing No. 57 of 1984, Mohalla Tilpurwa, Hussainganj, Lucknow was also a part of the Joint Hindu Family Property which ought to have been included in the Schedule of property for which the partition was sought by Sri Shiv Shanker Dubey.

8. The Court at Banaras by means of its judgment and decree dated 07.10.1955 specifically provided that the property situate at Lucknow should be included in the Schedule of properties at the time of preparation of final decree and in case if Sri Shiv Shanker Dubey does not include the said property then his suit shall stand dismissed. It was also pleaded that despite the aforesaid direction the plaintiff of the partition suit filed at Banaras, Sri Shiv Shanker Dubey did not include the aforesaid property nor challenged the aforesaid order before any superior court, accordingly, his suit was dismissed by means of the order dated 15.12.1962.

9. It was also pleaded that since it was held that the property in question was a Joint Hindu Family Property in the suit filed before the Court of Munsif, Banaras, accordingly, the said findings were binding and Sri Shiv Shanker Dubey did not have any right to execute any will in respect of the un-partitioned Joint Hindu Family Property, nor his daughter Smt. Gangadei had any right to execute any sale deed in favour of the defendant i.e. Shiv Chandra Dixit, hence, the sale deed dated 17.07.1971 was also bad in law.

10. It was also pleaded that the plaintiff/appellant herein had instituted a SCC Suit against a tenant namely Kalpnath Pandey who was in occupation of part of the property and upon obtaining a decree of eviction against the said tenant, the possession of the part occupied by the tenant was also handed over to the plaintiff and in this fashion he came in possession of the entire property and it is only on 30.08.1992 when the defendant on the basis of the illegal sale deed dated 17.07.1971 attempted to forcibly occupy the property in question that the cause of action accrued thereafter the plaintiff applied for the certified copy of the sale deed in question and the suit came to be filed on 25.11.1992 seeking a decree of

cancellation of the sale deed dated 17.07.1971 and the will deed dated 12.12.1947 and also for an injunction restraining the defendant from interfering in the peaceful possession of the plaintiff in respect of the property in question bearing No. 57/84, Tilpurwa, Hussainganj, Lucknow (Old House No. 9/131).

11. The aforesaid suit came to be hotly contested by the defendant by filing his written statement. While denying the averments contained in the plaint in suit, the defendant in the additional pleas of his written statement, specifically pleaded that the disputed house in question was the self-acquired property of Late Sri Shiv Shanker Dubey who had purchased the same in his own name by means of a registered sale deed dated 25.01.1934 from its erstwhile owner namely Agnu son of Sahabdeen.

12. It was also pleaded that Sri Balbhadra Dubey was the grand-father of the Shiv Shanker Dubey who died much earlier and the uncle of Sri Shiv Shanker Dubey namely Sri Girdhari Dubey had also died in the year 1925. The father of Sri Shiv Shanker Dubey had died in 1931 and none of the aforesaid persons i.e. the father and the uncle or the grand-father of Sri Shiv Shanker Dubey had purchased the property in question nor they had the means to do so.

13. It was also pleaded that Sri Shiv Shanker Dubey had been enlisted in the Army during the First World War on the post of a driver and he had his own independent source of income. Sri Shiv Shanker Dubey was de-enlisted from the Army on 09.01.1920 and thereafter he was employed at Loco Workshop in Lucknow and in the year 1934 his salary was Rs. 71 and 4 Annas. Thus, it is from the salary received by Sri Shiv Shanker Dubey during his service in the Army as well as from his salary in the Loco Work Shop that he had saved, he had initially bought another house situate in Mohalla Hussainganj from its erstwhile owner namely Lalta Prasad by means of a registered sale deed dated 17.02.1931. This particular house was thereafter sold by Shiv Shanker Dubey Dubey in favour of Mahadev Prasad on 23.03.1931 for a sum of Rs. 400/- and thereafter in the year 1934 he had purchased the disputed house in question from his own self-generated income and the said property was not of the Joint Hindu Family.

14. Sri Shiv Shanker Dubey considering that he had only his wife and one daughter, in order to protect his properties, had executed a registered will on 12.12.1947 which was duly registered in the office of the Sub Registrar, Lucknow. As per the will he had bequeathed all his properties in favour of his wife Smt. Rajrani with a stipulation that after her death his only daughter namely Smt. Gangadei would become the absolute owner of all his property. Since Sri Shiv Shanker Dubey had immense faith in his daughter and while he had turned old he had also executed his power of attorney in favour of his daughter which was also registered before the Sub Registrar at Lucknow. Sri Shiv Shanker Dubey expired in the year 1962 and his wife namely Smt. Rajrani became the exclusive owner who also expired in the year 1970 and thereafter Smt. Gangadei being the sole heir of Sri Shiv Shanker Dubey succeeded to his properties and her name was also recorded in the Municipal Records and thereafter Smt. Gangadei executed a registered sale deed in favour of the defendant on 17.07.1971.

15. The defendant also made a specific pleading that the Suit of the plaintiff was hugely time barred, inasmuch as, the plaintiff had resorted to suppression of facts. It was also pleaded that the plaintiff has referred to the SCC suit filed by him against the erstwhile tenant namely Kalpnath Pandey. The defendant stated that in the said SCC Suit filed by the plaintiff against Sri Kalpnath Pandey, where the tenant had taken a defence that he was paying rent to the answering defendant. In the said suit the copy of the sale deed dated 17.07.1971 was also placed on record and the same finds mention in the judgment of the SCC Court and thus the plaintiff was very well aware of the aforesaid sale deed dated 17.07.1971 and despite the same no effort was made by the plaintiff to challenge the said sale deed within the period of limitation and now after a lapse of 11 years the instant suit was instituted that too by creating and indicating an artificial cause of action and as such the suit of the plaintiff challenging the sale deed was not maintainable and was liable to be dismissed as time barred.

16. The defendant also specifically pleaded that the partition suit of 1950, was dismissed on 15.12.1962 without any decision on merit, inasmuch as, the plaintiff herein, had made an application bearing Paper No. C-11 and C-12 stating that Sri Shiv Shanker Dubey had expired on 21.08.1962 and since the substitution had not taken place, accordingly, the suit was dismissed for technical reasons. It was also pleaded that Smt. Gangadei continued to reside in the premises in question after execution of sale deed with the consent of its owner, while Sri Kalpnath Pandey was a tenant of only part of the disputed house. After the death of Smt. Gangadei, the answering defendant was in entire possession of the property in question.

17. It is actually the plaintiff and his power of attorney holder who along with his musclemen attempted to forcibly occupy the premises in question which was resisted by the answering defendant. Again on 02.03.1993 the plaintiffs forcibly broke open the lock and took the possession from the answering defendant. The incident was reported to the police who came on the site and by taking recourse to proceedings under Section 145/146 Cr.P.C. sealed the premises in question. It was only later that the plaintiffs challenged the proceedings before the Hon'ble High Court at Lucknow, who without entering into the merits and considering the fact that a civil suit between the parties in respect of the property in question was already pending, accordingly, directed that the possession be handed over to the plaintiff subject to the outcome of the civil suit and it is in furtherance thereof that the defendant by amending its written statement introduced a counter claim seeking possession of the property in question as well as damages at the rate of Rs. 50 per day from the plaintiffs.

18. It is in the backdrop of the above facts that the Trial Court had framed as many as 15 issues. The voluminous documentary evidence was led by both the parties, however, as far as the oral evidence is concerned, the plaintiff namely Sri Girish Prasad was examined as P.W. 1, Sri Omkar Nath was examined as P.W. 2 while Ram Khelawan and Om Prakash Dwivedi were examined as P.W. 3 and P.W. 4, Sri Dharmendra Vajpayee, Kanhaiya Lal Yadav and Sri Kailash Nath were examined as P.W. 5, P.W. 6 and

P.W. 7 respectively. As far as the defendant is concerned he examined himself as the sole witness.

19. The Trial Court by means of the judgment and decree dated 08.10.2010 dismissed the suit of the plaintiff and decreed the counter claim of the defendant, directing the plaintiff to handover the possession within 3 months from the date of judgment and decree along with a decree of damages @ Rs. 50 per day. While doing so, the Trial Court found that the suit of the plaintiff was clearly time barred. It also recorded a finding that the property in question was purchased by Sri Shiv Shanker Dubey out of his own income and he had a right of executing a will and his daughter namely Smt. Gangadei was legally entitled to execute the sale deed dated 17.07.1971. This judgment and decree dated 08.10.2010 was made the subject matter of the Regular Civil Appeal No. 155 of 2010.

20. The First Appellate Court after hearing the parties and considering the evidence and material available on record by means of its judgment and decree dated 05.02.2014 dismissed the First Appeal and affirmed the judgment and decree passed by the Trial Court.

21. Being aggrieved thereafter the plaintiff has preferred the instant second appeal which, as already noticed above, was admitted by this Court by means of order dated 01.04.2014 on the substantial questions of law which are re-produced hereinafter for ready reference:-

(I) Whether the admission which is the best piece of evidence unless explained or withdrawn coud be ignored and the learned courts below, despite the specific admission of the respondent DW-1 that Smt. Gangadei, who died on 22.02.1975, remained in possession of the house till her death, held that the sale deed dated 17.07.1971 is valid, while decreeing the counter claim filed by the respondent?.

(II) Whether it having been held in previous suits filed by late Shiv Shanker Dubey, father of Smt. Gangadei that the house in dispute is Joint Hindu Undivided family property, the learned courts below were justified in law in dismissing the suit for cancellation of those deeds afte holding that it was self-acquired property of Shiv Shanker Dubey, ignoring the fact that the aforesaid judgments would operate as resjudicata?

(III) Whether the learned courts below were justified in law in decreeing the counter claim set up by the respondent, ignoring the earlier judgments passed by the competent courts of law, holding that the house in dispute is Joint Hindu Undivided Family property and Shiv Shanker Dubey Dubey was not the absolute owner, thereby he could not execute Will dated 12.12.1947 in respect to the entire house in favour of his wife and daughter and the latter could not execute a valid sale deed in favour of the respondent on 17.07.1971 in respect to the entire house and further the vendee having failed to get the possession since the time of the execution of the sale deed dated 04.04.1947 would not derive any right title on that basis?

22. Mohd. Arif Khan, learned Senior Advocate while assailing the judgment and decree passed by the two courts has raised the following submissions:-

23. It has been submitted that the two courts have committed an error in not considering the effect of the finding given

by the court in the suit instituted by Sri Shiv Shanker Dubey for partition before the Court of Munsif, City at Banaras. It was submitted that in the said suit a specific objection has been raised, by the plaintiff herein, that the suit instituted by Sri Shiv Shanker Dubey for partition was bad since it did not include the property situate at Lucknow. It was also urged that the Court at Banaras while deciding the civil suit by means of its judgment dated 07.10.1955 had clearly mentioned in its order that the suit of the plaintiff for partition is decreed with the condition that the plaintiff shall include the house situate at Lucknow also for partition at the stage of preparation of final decree failing which the suit of the plaintiff shall stand dismissed being bad for partial partition.

24. In the said suit it was also held that the plaintiff i.e. Sri Shiv Shanker Dubey only had 1/4th share in the house at Lucknow and he was allowed one month's time to include the said house. Since the aforesaid order was not complied with, accordingly, it is clear that the property situate at Lucknow was a Joint Hindu Family Property which remained un-partitioned and since the finding which had been returned in the proceedings which were held at Banaras would be binding on the defendant and his predecessors, accordingly, Sri Shiv Shanker Dubey could not have executed any will deed in respect of a Joint Hindu Family Property in favour of his wife and daughter nor his daughter could have any right to sell the entire un-partitioned Joint Hindu Family Property by means of the sale deed dated 17.07.1971 in favour of the defendant and, accordingly, the two courts have grossly erred in failing to consider this aspect of the matter. Coupled with the fact that the findings recorded in the Banaras judgment dated 07.10.1955 was the best evidence which was neither disproved nor explained, accordingly, the suit could not have been dismissed, nor the counter claim could be allowed.

25. Sri Arif Khan has also urged that the possession of the premises in question was with the plaintiffs-appellants. The averments made by the defendant that he is in possession is also false, inasmuch as, there was no material on record to indicate as such. It was also submitted that the sale deed of the premises in question even assuming to be valid would indicate that it was of the year 1971 and the plaintiff being in possession was never evicted and by introducing a counter claim in the written statement by way of an amendment in the year 1999, was clearly time barred and in view thereof the counter claim for possession against the plaintiff could not be decreed, in any circumstances.

26. Sri Khan has also submitted that since the property was found to be Joint Hindu Family Property wherein Sri Shiv Shanker Dubey at best had 1/4th share, accordingly, if at all, the counter claim could been decreed it could have only been done for 1/4th share and not for the entire property and to that extent also the decree passed by the two courts is bad, inasmuch as, it does not take care nor address the aforesaid issues.

27. It has further been urged by Sri Khan that despite not a shred of evidence was led by the defendant in support of its counter claim regarding the damages prayed at the rate of Rs. 50/- per day yet the Courts have granted the aforesaid sum without due application of mind which is a perversity apparent on the face of the record and thus, the courts below have

committed gross error in decreeing the counter claim and as such the same cannot be sustained.

28. Sri B.K. Saxena, learned counsel for the respondents has forcefully refuted the submissions of Sri Arif Khan. Sri Saxena submitted that apparently the suit of the plaintiff was barred by limitation, inasmuch as, in the plaint suit, in paragraph 11, it was mentioned that the cause of action for filing the suit occurred only on 30.08.1992 when the defendant allegedly attempted to forcibly occupy the premises in question on the basis of title based on the sale deed dated 17.07.1971.

29. It was pointed out that the plaintiffs had mentioned that they became aware of the sale deed only on 30.08.1992 which was reitreated on oath during evidence before the Trial Court. The said fact was apparently false for the reason that the plaintiff themselves relied upon the judgment passed by the SCC Court in SCC Suit No. 1806 of 1975 which was decided on 22.01.1981. It was submitted that in the aforesaid judgment there is a clear reference to the sale deed executed by Smt. Gangadei in favour of Sri Shiv Shanker Dubey which was brought on record of the SCC Suit as bearing Paper No. C-25.

30. Thus, the plaintiff was fully aware of the said sale deed, however, chose not to assail the same. As per Article 59 of the Limitation Act the sale deed could be assailed only within the period of limitation which began to run from the date of knowledge, which commenced from the date the said document was filed on record of the SCC suit and even otherwise at best it would commennce when the SCC suit was decreed in January, 1981. The instant suit was filed by the plaintiffs only on 25.11.1992 which is beyond a period of 11 years and was ex-facie barred by limitation and as such the suit of the plaintiffs was rightly dismissed by the Trial Court.

31. Sri Saxena has further vehemently urged that the submissions of Sri Arif Khan regarding the proceedings of the earlier partition suit of 1950 is also bad for the reason that the suit of 1950 was not dismissed for non-compliance of the direction as mentioned in the judgment dated 07.10.1955 rather the proceedings of the earlier partition suit of 1950 was dismissed as being abated on account of the fact that Sri Shiv Shanker Dubey had died in August, 1962 and since his legal heirs had not been brought on record within the period of limitation, consequently, upon the application of the plaintiff the suit abated and this fact was also known and admitted to the plaintiff, however, it is now being contended otherwise.

32. Sri Saxena has also drawn the attention of the Court to a written statement to the counter claim which was filed by the plaintiff before the Trial Court bearing Paper No. A-82 wherein in paragraph 7 it was specifically pleaded that the suit of the plaintiff Sri Shiv Shanker Dubey was dismissed as the legal heirs were not brought on record and so the suit was dismissed on 15.12.1962. It has been urged by Sri Saxena that there was no finding given by the Court on merits regarding the property at Lucknow being a Joint Hindu Family Property.

33. Sri Saxena has also submitted that the judgment which has been referred to by Sri Arif Khan dated 07.10.1955 was

assailed before the First Appellate Court which was set aside. He has also submitted that thereafter a F.A.F.O. bearing No. 284 of 1957 was preferred by the defendants of the Suit No. 718 of 1950 which was allowed by this Court by means of judgment dated 21.08.1961 and the matter was remanded to the First Appellate Court to decide the appeal afresh. It is only thereafter that the suit came to be dismissed solely on the ground of abatement as Sri Shiv Shanker Dubey had expired in August, 1962 and the suit came to be dismissed on 15.12.1962 and that too on the application of the plaintiffs, accordingly, in light of the explanation appended to Order 22 Rule 9 C.P.C. it cannot be said that the findings have been returned on merits.

34. It has further been submitted, in case if the plaintiffs in the instant appeal had taken a plea regarding the property in question being Joint Hindu Family Property it was incumbent upon the plaintiffs to have proved the same which they have miserably failed. The submission is merely by relying upon certain judgments which were rendered in the proceedings arising out of Suit No. 718 of 1950 and that too which was neither conclusive nor on merits, the same could not grant any benefit to the plaintiffs whereas the defendant had brought sufficient cogent material on record in the shape of the sale deed executed in favour of Sri Shiv Shanker Dubey in the year 1934 and which indicated that the property was standing in the name of Sri Shiv Shanker Dubey and was purchased by his self-generated income.

35. Thus, the Courts have not committed any error rather on the basis of the material and the evidence available on record have categorically recorded findings of fact in respect of the property being self acquired property of Sri Shiv Shanker Dubey, coupled with the fact that he was survived by his wife and only daughter, Consequently, upon his death in the year 1962 his will executed in the year 1947 became redundant and the property in any case devolved on his wife and daughter and upon the death of his wife his daughter became the sole owner who executed the sale deed dated 17.07.1971 in favour of the defendant who became its actualy owner.

36. It is also submitted that the possession remained with the defendant and Smt. Gangadei till her life time continued to reside therein with the consent of the defendant. Since the defendant had unequivocal title to the property and the plaintiff attempted to forcibly take the same which was duly reported to the police and the premise in question was sealed in proceedings under Section 145/146 Cr.P.C. which was assailed by the plaintiff before the High Court. In light of the commission conducted on the orders of the High Court, considering the fact that the Civil Suit was pending, the High Court by means of its order dated 04.04.1997 directed the police to unlock the house in question and deliver its possession to the plaintiffs subject to the rights which were to be adjudicated in the Civil Court in the instant Suit.

37. Thus, it is thereafter that the cause for possession arose to the defendant who introduced a counter claim against the plaintiff and since the plaintiff being the owner and claiming possession on the basis of his title was entitled to do so by virtue of Article 64 and 65 of the Limitation Act, hence, it cannot be said

that the counter claim of the defendant was barred and, accordingly, the two courts have rightly decreed the counter claim.

38. Lastly, it has been submitted by Sri Saxena that though the defendants claimed Rs. 50/- per day as damages for the counter claim but he fairly conceded that there was no evidence in respect of the quantum of damages but he submitted that since the plaintiff remained in possession of the premise in question, the defendants were entitled to the damages which is in the discretion of the Court. He has further submitted that the quantum of damages will have no effect on the substantive part of the decree of the counter claim regarding possession which in any case is based on material on record and being findings of fact are not to be disturbed in second appeal in exercise of the powers under Section 100 C.P.C.

39. Sri Arif Khan has relied upon the decision of the Apex Court in the case of ***Budhram and Others Vs. Banshi and Others*** reported in ***2010 (11) SCC 476*** and ***Laxmi & Others Vs. Parmeshwari Hegde & Others*** reported in ***AIR 1969 Karnataka 175.***

40. Sri Saxena has relied upon the decision of the Apex Court in the case of ***Om Prakash Vs. Kintu and Another*** reported in ***2005 (13) SCC 289, Ashok Leyland Vs. State of Tamilnadu*** reported in ***2004 (3) SCC 1, D.S. Lakshmaiah and Another Vs. L. Balasubramanyam*** reported in ***2003 (10) SCC 310 , Gurnam Singh Vs. Gurbachan Kaur*** reported in ***2017 (13) SCC 414, Mithai Lal Dalsinghar Singh Vs. Panna Bai Dev Ram Kinni*** reported in ***2003 (10) SCC 691, Kundiba Dagdu Kadam Vs. Savitri Bai Sopan Gurjar 1993 (3) SCC 722 .***

41. The Court has given its anxious consideration to the submissions of the learned counsel for the parties and have also perused the record as well as the case laws cited by the respective parties. In light of the submissions made as well as the factual matrix, the questions of law to be answered in the above second appeal as already noticed and reproduced hereinabove requires this Court to examine whether in the facts and circumstances of the case, the counter claim has been rightly decreed or not. From the perusal of the substantial questions upon which the above second appeal was admitted, upon which the parties have been heard, the core questions that require consideration are the effect of the proceedings arising out of the Suit No. 718 of 1950. In light of the same whether the successors of Sri Shiv Shanker Dubey had any right to execute the sale deed in favour of the defendant and whether the defendant had the right to get the counter claim of possession against the plaintiff.

42. From the perusal of the record, certain facts are not in dispute between the parties. It is not disputed that Sri Shiv Shanker Dubey was survived only by his wife and his daughter. In case if the property in question is held to be the self-acquired property then the same vested with Sri Shiv Shanker Dubey till his death in the year 1962 and upon his death irrespective of the fact whether his Will of 1947 was valid or not, the fact remains that in view of the promulgation of the Hindu Succession Act his wife and daughter alone would be the sole legal heirs and the plaintiff to that extent would have no right in the property. Having said that upon the death of wife of Shiv Shanker Dubey his only daughter Smt. Gangadei was the sole and exclusive

owner and she would have a right to execute a sale deed in favour of the defendant.

43. Now to ascertain whether the property in question was the exclusive property of Sri Shiv Shanker Dubey or he had 1/4th right as stated by the appellant to have been held in the judgment rendered by the Court of Munsif, City Banaras in its judgment dated 07.10.1955, the records have been carefully perused by the Court and it indicate that the aforesaid judgment dated 07.10.1955 does specifically state that the plaintiff i.e. Shiv Shanker Dubey would have 1/4th share in the said house and he was allowed one month's time to include the said house and make it available for partition in the final decree to be drawn failing which his suit shall stands dismissed being bad for partial partition, however it is only on incomplete version.

44. The record also reveals that the aforesaid judgment was set aside in appeal. The parties have filed the copy of the judgment passed by this Court dated 28.01.1961 in F.A.F.O. No. 284 of 1957. From the perusal of the said judgment passed by this Court it indicates that the High Court had taken note of certain facts. From the perusal of the same it indicates that the order dated 07.10.1955 was assailed by Sri Shiv Shanker Dubey in an appeal which was allowed by the learned Civil Judge Sri H.M. Srivastava and the matter was remanded. It is the aforesaid remand order which was assailed before this Court in the aforesaid F.A.F.O. and this Court while allowing the appeal set aside the remand order and remitted the matter to the District Judge, Varanasi to re-admit the appeal to its original number and to decide the same afresh either by the District Judge himself or transfer it to other Civil Judge of competent jurisdiction.

45. Thus, it would indicate that as far as the judgment dated 07.10.1955 is concerned, the same did not survive and the same was set aside by means of the order dated 23.08.1957 passed in Appeal No. 508 of 1955. The said order is bearing Paper No. C-171/2. In pursuance of the order passed by this Court in F.A.F.O. No. 284 of 1957 which was decided on 21.08.1961, the matter was remanded and it was yet to be considered before the Court concerned to give its finding on the issue whether the said property was a Joint Hindu Family Property or not.

46. Both the parties have drawn the attention of the Court to the document bearing No. C-183/1 which is the certified copy of the formal order which was issued by the Court of City Munsif, Varanasi dated 09.01.1963. From the perusal of the aforesaid formal order it indicates that the suit was dismissed as it was not constituted properly and the file was consigned to records.

47. At this stage, it will be relevant to point out and refer to paragraph 6 of the plaint in Suit bearing Paper No. A-3. In the aforesaid paragraph the plaintiff did make a mention of the dismissal of the Suit bearing No. 718 of 1950 by referring to the order dated 15.12.1962. The plaintiff had quoted the order dated 15.12.1962 which reads as under:-

" In view of 11-C and the affidavit 12-C the suit is dismissed being improperly constituted consigned to records."

48. Upon perusal of the record, this Court finds that the plaintiffs had even

filed written submissions before the First Appellate Court which is bearing Paper No. C-35/3 in the record of the A.D.J., Court No. 2, Lucknow. In the aforesaid written submissions in paragraph 5 the plaintiffs himself had again referred to the order dated 15.12.1962 and submitted before the First Appellate Court which reads as under:-

" The defendant moved an application along with Affidavit (Paper No. 11-C and 12-C) that the plaintiff died during the pendency of the suit and no legal heirs of the deceased was substituted in his place, the suit ought to be abated and on that application learned Munsif, Banaras passed the order or application along with affidavit (Paper No. 11-C and 12-C) that " in view of 11-C and the affidavit 12-C, the suit is dismissed for improperly constituted consigned to records"."

49. Thus, from the above it is clear that as far as the parties are concerned, they are not at variance to the fact that the Suit bearing No. 718 of 1950which was instituted before the City Munsif, Banaras came to be dismissed on 15.12.1962. The plaintiff has not brought any evidence on record to indicate that once the matter was remanded in terms of the order passed by this Court the F.A.F.O. No. 284 of 1957 decided on 21.08.1961 what was the outcome of the appeal and under what circumstances the aforesaid suit came back on the Board of the City Munsif, Banaras. The plaintiffs have also failed to bring on record the application C-11 and the affidavit C-12 a reference of which has been made by the plaintiffs themselves in their plaint. But the fact remains that from the pleadings as already referred hereinabove as well as in the reply to the counter claim as filed by the plaintiff it was mentioned that the Suit at Banaras stood abated for non-substituting the heirs of Sri Shiv Shanker Dubey. Obviously, the matter which was sent back to the Court of Munsif, Banaras could only be available once the matter in appeal would have been remanded. It is not the case of the parties that the proceedings which was pending before the Court of Munsif, Banaras in the year 1962 was arising out of final decree proceedings. It is also not disputed between the parties that Sri Shiv Shanker Dubey died on 21.08.1962 and no legal heirs of Sri Shiv Shanker Dubey were brought on record till 15.12.1962.

50. Thus, the consequence is that after expiry of 90 days from 21.08.1962 the proceedings before the Court of Munsif at Banaras stood automatically abated. Once the proceedings abated the findings, if any, could not be treated as being on merits, moreso, in light of the explanation appended to Order 22 Rule 9 which reads as under:-

(9) Effect of abatement or dismissal

(1) Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of

1877), shall apply to applications under sub-rule (2).

[Explanation : Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this order.]

51. The submission of the learned counsel for the appellant that in the judgment passed by the City Munsif at Banaras would be ample evidence to indicate that the property was a Joint Hindu Family Property does not impress this Court. As already noticed above, whatever be the stage of the proceedings which was pending before the City Munsif at Banaras in 1962 upon the death of Sri Shiv Shanker Dubey on 21.08.1962 the proceedings abated after 90 days. The abatement as per law is automatic. The record as noticed above would indicate that the plaintiff himself made an application C-11 along with an affidavit C-12 upon which the City Munsif at Banaras passed an order dismissing the suit as being improperly constituted. The fact remains that after 90 days from 21.08.1962 the proceedings abated and the explanation of Order 22 Rule 9 provides that nothing in the rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in which the suit, which had abated or had been dismissed under this order.

52. Thus, the effect is that any of the findings could not prevent the defendants to raise a valid defence in the instant suit which was brought by the plaintiff. Thus, the defendant having raised a valid defence regarding the property being the self-acquired by Sri Shiv Shanker Dubey, this defence could not have been non-suited merely on the ground that in the earlier proceedings in the City Munsif, at Banaras at some point of time the finding was recorded regarding the Lucknow property being Joint Hindu Family Property whih was set aside in appeal and thereafter the suit had been dismissed as abated.

53. The learned counsel for the plaintiffs-appellants have relied upon the case of Budh Ram (Supra). This Court finds that the ratio of the aforesaid case is quite settled which reads as under:-

10. *Abatement takes place automatically by application of law without any order of the court. Setting aside of abatement can be sought once the suit stands abated. Abatement in fact results in denial to hearing of the case on merits. Order 22 Rule 1 CPC deals with the question of abatement on the death of the plaintiff or of the defendant in a civil suit. Order 22 Rule 2 relates to procedure where one of the several plaintiffs or the defendants die and the right to sue survives. Order 22 Rule 3 CPC deals with procedure in case of death of one of the several plaintiffs or of the sole plaintiff. Order 22 Rule 4 CPC, however, deals with procedure in case of death of one of the several defendants or of the sole defendant. Sub-rule (3) of Rule 4 makes it crystal clear that:*

"4. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

(Emphasis supplied)

17. *Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the respondent-defendants would abate the appeal in toto or only qua the deceased*

respondent-defendants, depends upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not interdependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-à-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.

54. However, the learned Senior Counsel for the appellants failed to express clearly how the appellant gains from the aforesaid ratio. Thus, this Court is of the view that the aforesaid decision does not in any manner help the plaintiffs/appellants.

55. Moreover, the decision cited by the respondent in the case of Ashok Leyland (Supra) in para 118 has considered the issue of res-judicata and has held as under :-

118. *The principle of res judicata is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like, estoppel, waiver or res judicata. This question has since been considered in Sri Ramnik Vallabhdas Madhvani and Ors. v. Taraben Pravinlal Madhvani: (2004)1SCC497 wherein this Court observed in the following terms :*

"So far as the question of rate of interest is concerned, it may be noticed that the High Court itself found that the rate of interest should have been determined at 6%. The principles of res judicata which according to the High Court would operate in the case, in our opinion, is not applicable. Principles of res-judicata is a procedural provision. The same has no application where there is inherent lack of jurisdiction.

In Chief Justice of A.P. and Anr. v. L.V.A. Dikshitulu and Ors. etc. : [1979]1SCR26 , the law is stated in the following terms:

"23. As against the above, Shri Vepa Sarathy appearing for the respective first respondent in C.A. 2826 of 1977, and in C.A. 278 of 1978 submitted that when his client filed a writ petition (No. 58908 of 1976) under Article 226 of the Constitution in the High Court for impugning the order of his compulsory retirement passed by the Chief Justice, he had served, in accordance with Rule 5 of the Andhra Pradesh High Court (Original Side) Rule, notice on the Chief Justice and the Government Pleader, and, in consequence, at the preliminary hearing of the writ petition before the Division Bench, the Government, Pleader appeared on behalf of all the respondents including the Chief Justice, and raised a preliminary objection that the writ petition was not maintainable in view of Clause 6 of the Andhra Pradesh Administrative Tribunal Order made by the President underArticle 371D which had taken away that jurisdiction of the High Court and vested the same in Administrative Tribunal. This objection was accepted by the High Court,

and as a result, the writ petition was dismissed in limine. In these circumstances - proceeds the argument - the appellant is now precluded on principles of res judicata and estoppel from taking up the position, that the Tribunal's order is without jurisdiction. But, when Shri Sarathi's attention was invited to the fact that no notice was actually served on the Chief Justice and that the Government Pleader who had raised this objection, had not been instructed by the Chief Justice or the High Court to put in appearance on their behalf, the counsel did not pursue this contention further. Moreover, this is a pure question of law depending upon the interpretation ofArticle 371D. If the argument. holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in the case."

In Dwarka Prasad Agarwal (D) By LRs. And Anr. v. B.D. Agarwal and Ors. : AIR2003SC2686 , it is stated:

"It is now well-settled that an order passed by a court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case, as the High Court did not have any jurisdiction to record the compromise for the reasons stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to, the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such. "

56. Thus, in light of the above discussion the earlier decision of the Banaras suit would neither operate as Res judicata and moreover the order passed in December, 1962 was passed after the death of Shiv Shanker Dubey who died in August, 1962 while after 90 days of death, the proceeedings automatically abated.

57. This Court is fortified in its view and rely on the decisions of the Apex Court in the case of ***Mithai Lal Dalsinghar Singh Vs. Panna Bai Dev Ram Kinni*** reported in ***2003 (10) SCC 691,*** the relevant portion reads as under:-

8. *In as much as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abateed, yet the legal representatives*

proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

10. *In the present case, the learned trial judge found sufficient cause for consideration of delay in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representatives of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived, In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once, the prayer made by the legal representatives of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the Court passed in that behalf.*

58. Similarly, the Apex Court in the case of ***Gurnam Singh Vs. Gurbachan Kaur*** reported in ***2017 (13) SCC 414*** has held as under:-

17. *The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".*

21. *It is a fundamental principle of law laid down by this Court in Kiran Singh case [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340] that a decree passed by the court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to*

this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a "nullity" (see N. Jayaram Reddy v. LAO [N. Jayaram Reddy v. LAO, (1979) 3 SCC 578] , Ashok Transport Agency v. Awadhesh Kumar [Ashok Transport Agency v. Awadhesh Kumar, (1998) 5 SCC 567] and Amba Bai v. Gopal [Amba Bai v. Gopal, (2001) 5 SCC 570]).

59. Now coming to the question regarding the evidence to indicate that the property was a Joint Hindu Family Property, it was for the plaintiffs to have led the evidence in that regard which they have failed. In absence of any evidence to the aforesaid effect the plaintiff could not have been granted the benefit of getting the property treated as Joint Hindu Family Property whereas on the other hand prima-facie the evidence which was available on record clearly indicated that the property in question was purchased by Sri Shiv Shanker Dubey in the year 1934.

60. It was not disputed by the plaintiff-witness that Sri Shiv Shanker Dubey was not employee/enlisted in the Army during the First World War. It was also not disputed by the plaintiff and his witnesses that Sri Shiv Shanker Dubey was employed in the Loco Work Shop at Lucknow. It was also not disputed that Sri Shiv Shanker Dubey had earlier purchased a property in the year 1931 which he later sold and thereafter he purchased the disputed house in the year 1934.

61. At this stage it will be worthwhile to notice the law regarding the Joint Hindu Family Property is now fairly well settled that in order to successfully stake a claim regarding a Joint Hindu Family Property, the burden is on the party to indicate that there existed a joint family which had the requisite funds and nucleus out of which the property in question has been purchased.

62. There is a difference between a joint family and a joint family property merely because a joint family exists does not give rise to a presumption that the property also belongs to the joint family. In this regard, this Court draws strength from the decision of the Apex Court in the case of ***D.S. Lakshmaiah and Another Vs. L. Balasubramanyam*** reported in ***2003 (10) SCC 310,*** the relevant portion reads as under:-

18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

63. Similary, the Coordinate Bench of this Court in the case of ***Kunj Bihari Vs. Ganga Sahai Pande*** reported in ***2013 SCC Online Alld. 13489: 2013 (99) ALR 826*** wherein tracing the history and considering the earlier decision on the point of Joint Hindu Family and property, the burden of proof etc. This Court has held as under:-

24. *The "patriarchal family" may be defined as a group of natural or adoptive descendants, held together by*

subjection to the eldest living ascendant, father, grand-father, great-grandfather. Whatever be a formal prescription of law, the head of such a group is always in practice, despotic; and he is the object of respect, if not always of affection, which is probably seated deeper than any positive institution. Manu says, "three persons, a wife, a son and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong." Narada says, "he is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old."

25. *The "joint family" is normally a transition form from "patriarchal family". At the death of common ancestors or head of house, if the family chooses to continue united, the eldest son would be the natural head. The former one was head of family by natural authority, the later other can only be so by a delegated authority. He is primus but inter pares. An undivided Hindu family thus is ordinarily joint, not only in estate but in food and worship. The presumption, therefore, is that members of a Hindu family are living in a state of union unless contrary is established. This presumption however varies inasmuch as it is stronger in case of real brother than in case of cousin and farther one go, from the founder of family, the presumption becomes weaker and weaker. However, there is no presumption that a family, because it is joint, possesses joint property. Under Mitakshara Law, possession of property is not necessary requisite for constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as, at least, ordinary household articles which they would enjoy in common.*

32. *The joint undivided family is the normal condition of Hindu society as observed in Raghunadha Vs. Brozo Kishroe (1876) 3 IA 154 and Neelkisto Deb Vs. Beerchunder (1989) 12 MIA 523. An HUF is ordinarily joint not only in estate but in food and worship. Unless contrary is established, the presumption is that the members of a Hindu family are living in a state of union (see: Govind Dass Vs. Kuldip Singh AIR 1971 Delhi 151 and Bhagwan Dayal Vs. Mst. Reoti Devi AIR 1962 SC 287). If, however, one of the coparceners is admittedly living separately from other members of the family, neither it can be said that other members do not constitute a Hindu joint family nor the member living separately, who has stripped his relation with the joint family, can be said to be still a coparcener or member of joint family. Simultaneously, merely if some members are working and living at different places, though own a joint family in common, it cannot be said that they do not form a joint Hindu family. Since it is only a presumption, the strength thereof necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and farther one goes from the founder of the family, the presumption becomes weaker and weaker.*

33. *Brothers may be presumed to be joint but conclusion of jointness with collaterals must be affirmatively proved. The presumption lies strongly in favour of father and son that they are living jointly unless proved otherwise.*

34. *This presumption, however, does not apply in respect of property. There is no presumption that a family, because it is joint, possess joint property. As per Mitakshara law, the possession of*

property is not a necessary requisite for the constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive that they are possessing no property whatever, such as ordinary household articles which they would enjoy in common.

35. *In Sher Singh Vs. Gamdoor Singh 1997 (2) HLR 81 (SC), the Court said that once existence of a joint family is not in dispute, necessarily the property held by family assumed the character of a coparcenary property and every member of family would be entitled, by birth, to a share in coparcenary property, unless any one of the coparcener pleads, by separate pleadings and proves, that some of the properties or all the properties are his self-acquired properties and cannot be blended in coparcenary property. Merely because the family is joint, there is no presumption of joint property. A Hindu, even if he be joint may possess separate property. Such property belongs exclusively to him. Neither member of the coparcenary, nor his male issue, acquires any interest in it by birth. On his death (intestate), it passes by succession to his heirs and not by survivorship to the surviving coparcener. The existence of joint family does not raise presumption that it owns properties jointly. But once joint family nucleus is either proved or admitted so as to draw inference that such property could have been acquired out of joint family funds, the burden shifts to the party alleging self acquisition, to establish affirmatively, that such property was acquired without aid of joint family. Initial burden always lies upon the party asserting that any item of property is joint family property.*

38. *In Appalaswami Vs. Suryanarayanamurti and Ors., AIR 1947 PC 189, it was held that Hindu law is very clear. Proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon one who asserts that an item of property is joint, to establish that fact. But where it is established that the family possessed some joint property which, from its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition, to establish affirmatively that the property was acquired without the aid of joint family property/fund.*

39. *Again in Srinivas Krishnarao Kango Vs. Narayan Devji Kango AIR 1954 SC 379, it was held that proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which form its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of joint family property.*

40. The legal proposition which emerges therefrom is that initial burden is on the person who claims that it is joint family property but after initial burden is discharged, the burden shifts to the party claiming that the property was self acquired and without the aid of joint family property/fund.

41. *In Rukhmabai Vs. Lala Laxminarayan AIR 1960 SC 335, the Court said:*

"There is a presumption in Hindu Law that a family is joint. There

can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need. not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis- a-vis the family property, A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of, a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property. to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property..." (emphasis added)

64. In light of the paras quoted above, the decision of the Karnataka High Court relied upon by the appellant in the case of Laxmi (supra) has no applicability as it related to the suit for partition of properties governed by Aliyasantana Law. The learned Senior Counsel could not explain how the aforesaid case had any relevance and even what was the Aliyasantana Law and how he derived any benefit from the said decision.

65. This Court upon going through the aforesaid citation relied by the appellant finds that it does not apply to the facts of the present case and the appellant cannot get any benefit of the aforesaid ruling.

66. Moreover, the Apex Court and this Court in the cases of D.S. Lakshmaiah (supra) and Kunj Bihari Vs. Ganga Sahai Pandey (supra) respectively has lucidly explained the law regarding Joint Family Property which squarely applies Thus, applying the aforesaid principles, it would indicate that as far as the joint family property is concerned, the plaintiff could not bring any document or evidence on record to indicate and establish that the property in question was the Joint Family Property, hence the submission of Sri Arif Khan does not find favour with this Court.

67. Moreover, the two courts have concurrently held the suit of the plaintiffs to be barred by limitation and this has not been assailed by the appellant nor any substantial question of law emanates from the aforesaid issue. Accordingly, the substantial question (II) stands answered accordingly.

68. Coming to the substantial question of law at Serial Nos. (I) and (II) as noticed above, this Court finds that the title of the defendant stood established for the reason that once the property was held to be the self-acquired property of Sri Shiv Shanker Dubey then upon his death, his wife and daughter would inherit and subsequently upon the death of his wife,

his daughter Smt. Gangadei became its exclusive owner and she had the right to sell the property which she did by means of sell deed dated 17.07.1971.

69. Once the defendant acquired exclusive title of the aforesaid property and in terms of the Article 65 the defendant had the right to seek possession against the plaintiff by instituting the counter claim. Significantly, the plaintiff did not setup any plea of adverse possession rather he only claimed that he had some share in the property in question and moreover that share also could not be established by him and that it has been held that the defendant is the exclusive owner of the entire property. Having said that it has come on record that the possession was handed over to the plaintiff in tems of the order passed by this Court dated 04.04.1997 in Criminal Misc. Case No. 235 of 1993 in proceedings under Section 482 Cr.P.C. assailing the proceedings initiated under Section 145 Cr.P.C. Thus, the possession which was handed over was subject to the adjudication of rights of the respective parties in the civil suit. Once in the aforesaid civil suit, the two courts have concurrently come to a conclusion that the title remained with the defendant and thus there is no error committed by the two courts regarding the decree of the counter claim in respect of relief of possession which could not be said to be time barred.

70. The alleged admission of the D.W. 1 that Gangadei remained in possession of her house till her death i.e. 22.05.1975 would not have any effect, inasmuch as, it has been clearly explained in the pleadings as well as in the evidence that Smt. Gangadei was residing in the premises in question with the consent of the defendant and upon her death it was the defendant who have performed her last rites and he had been in possession. There is no evidence that Smt. Gangadei even after executing of the sale deed remained in possession as its owner. Rather the evidence is to the contrary that she was residing with the consent of the defendant till her lifetime only.

71. In light of the discussions above, as far as the title is concerned, the same is found to be valid and subsisting with the defendant and the two courts have not committed any error in arriving at the aforesaid conclusions.

72. The findings of possession as far as the plaintiff is concerned is only limited to the extent that it was given to the plaintiff in terms of order passed by this Court subject to final adjudication of rights in the civil suit.

73. In order for the appellant to challenge the aforesaid it was essential for the appellant to have pointed out any perversity in the judgment of the two courts. The Apex Court while considering the circumstances where the High Court can interfere in concurrent findings of the two couts has held in the case of ***State of Rajasthan and Others Vs. Shiv Dayal and Another*** reported in ***2019 (8) SCC 637*** in following words:-

14. *True it is as has been laid down by this Court in several decisions that "concurrent finding of fact" is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908(hereinafter referred to as "the Code"). However, this rule of law is subject to certain well known exceptions mentioned infra.*

15. *It is a trite law that in order to record any finding on the facts, the Trial Court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly, it is also a trite law that the Appellate Court also has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the Trial Court or reverse it. If the Appellate Court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called "reversing finding". These expressions are well known in the legal parlance.*

16. *When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded de hors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (see observation made by learned Judge Vivian Bose,J. as His Lordship then was a Judge of the Nagpur High Court in Rajeshwar Vishwanath Mamidwar & Ors. vs. Dashrath Narayan Chilwelkar & Ors., AIR 1943 Nagpur 117 Para 43).*

17. *In our opinion, if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law within the meaning of Section 100 of the Code.*

74. Thus, applying the aforesaid proceedings, this Court does not find any error in the concurrent findings returned by the two courts as far as the possession is concerned. However, this Court upon perusal of the evidence finds that the defendants has claimed damages @ 50/- per day, however, he failed to lead any evidence and failed to establish the quantum regarding damages. In absence of any evidence, this Court finds that the two courts ought not to have granted the decree for damages @ Rs. 50 per day for wrongful possession as the defendant had failed to establish his own case.

75. Thus, in light of the discussions made above, this Court is of the considered view that as far as the finding regarding the dismissal of the suit as well as the decree of counter claim to the extent grant of decree of possession is concerned, there is no error and the said findings culminating in the decree of possession is affirmed.

76. However, since the defendant could not establish the quantum of damages by leading evidence accordingly the grant of decree of damages @ Rs. 50/- per day while decreeing the counter claim cannot be sustained and is accordingly set aside.

77. Thus, for the reasons aforesaid, the appeal is partly allowed and the judgment and decree passed by the two courts are confirmed except that the defendant shall not be entitled to the decree of the damages in his counter claim, accordingly, the judgment and decree of the Trial Court dated 08.10.2010 passed by Additional Civil Judge,(Senior Division), Court No. 24, Lucknow in R.S. No. 615 of 1992 shall stand modified to the above extent.

78. In the facts and circumstances, there shall be no order as to costs.

79. The record of the court below shall be returned to the court concerned within a period of two weeks from today.

(2020)1ILR 956

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ A No. 14490 of 2018
With
Writ A No. 36446 of 2017

Dr. Digvijay Nath Tiwari ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha, Sri Ratnakar Upadhyay

Counsel for the Respondents:
C.S.C., Sri Anil Kumar Singh, Sri Ashok Kumar Yadav, Sri Rahul Jain, Sri Santosh Kumar Dwivedi, Sri Anil Kumar Singh

A. Challenging-impugned order-rejecting-selection of petitioner-for the post of headmaster-approving selection of respondent-on the ground-not qualified for the said post-U/R-12(5) of Rules, 1998-U/R-7AA of Act, 1921-not a full time teacher-committed fraud & misrepresentation-C/M entitled-to promote/appoint teachers-to the vacancy-in L.T Grade-no embargo-on C/M on making appointment-of asst. teachers-in other streams.

B. Held, I have no hesitation in holding that the finding returned by the Board that petitioner does not have the requisite experience mandated under the ''Note' to sub-Rule (5) of Rule 12 is justified and valid, therefore, calls for no interference. It is thus clear that the Committee of Management is entitled to promote/appoint such teacher to the vacancy caused in L.T. grade who is required to teach the subject which the Committee of Management thinks necessary in the interest of the institution. Learned counsel for the petitioner failed to show any provision of Act, 1921 or the Regulations and Rules framed thereunder that there is any embargo upon the Committee of the Institution for not making appointment for assistant teachers in other streams.

Writ Petition No. 14490 of 2018 dismissed and Writ Petition No. 36446 of 2017 allowed. (E-8)

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

1. Heard Sri R.K. Ojha, learned Senior Counsel, assisted by Sri Ratnakar Upadhyay, learned counsels for the petitioner, learned Standing Counsel for the State-respondent, Sri S.K. Dwivedi for the third respondent, Sri Rahul Jain for the sixth respondent and Sri V.K. Singh, learned Senior Counsel, assisted by Sri H.P. Singh learned counsel for the petitioner in the connected writ petition (Writ-A No. 36446 of 2017), i.e. sixth respondent in the lead petition (Writ-A No. 14490 of 2018).

2. On the consent of the parties, the pleadings and facts of Writ-A No. 14490 of 2018 is being taken for the sake of convenience for deciding the writ petitions.

3. The writ petition is directed against the order dated 24 May 2018, passed by the third respondent, Secretary, U.P. Secondary Education Service Selection Board, Prayagraj, rejecting the selection of the petitioner for the post of Headmaster in high school and approving the selection/appointment of the sixth respondent.

4. The facts, briefly stated, is that the Board invited applications, inter alia, for

the post of Headmaster vide Advertisement No. 1 of 2008, notified on 7 September 2008. The petitioner and the sixth respondent came to be selected and their names were included in the select panel issued by the Board on 12 March 2010. Pursuant thereof, petitioner joined as Headmaster in Gramin Uchchatar Madhyamik Pandir Ke Rampur Bariarpur, District Deoria, whereas, the sixth respondent joined as Headmaster in Sri Shanker Narvadeshwar Uchchtar Madhyamik Vidyalaya Beejrapur, Jhangtaun, Deoria, on 1 July 2010. Thereafter several petitions came to be filed either by the petitioner or the third parties with regard to the appointment/selection, but finally on the directions of the Division Bench of this Court, the Board decided the eligibility of the contesting parties by the impugned order.

5. Earlier, vide order dated 24/1 March 2017 passed by the Board, the sixth respondent (petitioner in writ petition No. 36467 of 2017) was held unqualified not having the requisite qualification for L.T. Grade assistant teacher (Science). The order dated 24 November 2017 and the consequential orders are under challenge in the connected writ petition. However, by the impugned order dated 28 May 2018, the candidature of the petitioner of the lead petition has been set aside not being qualified, but the Board has found the sixth respondent qualified for the post of Head Master. In other words, the Board has for all practical purpose annulled its earlier order insofar it pertains to the sixth respondent.

6. The Board rejected the claim of the petitioner, primarily, on three counts: (i) petitioner lacks teaching experience on the post of L.T. grade assistant teacher mandated in sub-rule (5) of Rule 12 of U.P. Secondary Education Services Selection Board Rules 1998; (ii) petitioner having experience of part time lecturer (Sanskrit) under Section 7-AA of Intermediate Education Act, 1921, not being a full time or regular teacher is not qualified; (iii) petitioner committed fraud and misrepresentation as he worked in three different institutions i.e. Junior High School/Intermediate College/Degree College in the same period.

7. Insofar the sixth respondent is concerned, it is urged that he has the experience of assistant teacher (Agriculture), whereas, no post of assistant teacher (Agriculture) was sanctioned in the institution where the petitioner claims to have been teaching. In other words, it is urged that assistant teacher (Science) was approved for the institution, against which the sixth respondent claims to have been appointed, whereas, he lacks the qualification of assistant teacher (Science).

8. Learned counsel for the petitioner has made submissions on all the three points noted in the impugned order rejecting the claim of the petitioner. It is urged that under Section 7-AA, teacher/lecturer is appointed on regular basis on full time, though they are referred to as part time lecturer under Section 7-AA, but that would not mean that the teacher is a part time teacher as understood in common parlance. Petitioner came to be appointed in a regular pay-scale, therefore, the finding that petitioner was a part time lecturer is perse perverse. Part time teacher is not granted regular pay scale. Petitioner came to be appointed in 1993 as lecturer (Sanskrit) and since then he has continued until his selection on the post.

9. It is further urged that petitioner did not commit any fraud/misrepresentation, of working in three different institutions simultaneously. Petitioner was appointed lecturer (Sanskrit) in 1993 and in 2008 petitioner came to be appointed lecturer in a degree college. With regard to the allegation that petitioner was earlier working in a junior high school is incorrect and false. Petitioner had never worked as an assistant teacher in a junior high school for the reason that petitioner since inception i.e. 1993 was appointed lecturer (Sanskrit) in an Intermediate college. The allegation of the sixth respondent that the petitioner had instituted a petition being writ petition No. 17342 of 2008, claiming salary on the post of assistant teacher of a junior high school is incorrect. It is urged that the petitioner had not instituted the said writ petition, rather, it was mischievously filed by some imposter in 2008. There was no occasion to claim salary for the post of assistant teacher for the reason that petitioner came to be selected in a degree college on a much higher post.

10. Be that as it may, this Court is not inclined to enter into disputed questions of fact, whether petitioner was employed in three different institutions at the same time, or whether petitioner was a part time/full time lecturer.

11. The issue that primarily arises for consideration is as to whether petitioner possesses the requisite qualification/experience mandated under Rule 12 of Rules, 1998.

12. Prior to the enactment of Uttar Pradesh Secondary Education Services Selection Board Act, 1982, the selection appointment and qualification of headmaster/principal of High School and Intermediate institutions was laid down in Appendix A of Regulation 1 of Chapter II of U.P. Intermediate Education Act, 1921, which, inter alia, provides that apart from the minimum educational qualification, four years teaching experience of class 9 to 12 was mandatory for the head of the institution i.e. headmaster/principal. In other words, lecturer appointed to teach class 11 to 12 was eligible for appointment as Head Master of High School. However, with the coming into force of Act, 1982 w.e.f. 14 July 1981, the posts were entrusted to a Commission, in order to ensure that good and competent persons were selected and appointed on the said post and relevant rules were framed by the State Government from time to time. However, vide notification dated 13 July 1988, Rules, 1998, enforced w.e.f. 8 August 1998, were notified. The selections of the contesting parties were held under the Rules, 1998. Act, 1982 came to be amended w.e.f. 20 July 1998, entrusting entire selection process to the Board in place of the Commission. Rule 5 of Rules, 1998 prescribes the academic qualification for appointment to the post of teacher which reads thus

" 5. Essential Qualifications- A candidate for appointment to a post of teacher must possess qualifications specified in Regulation 1 of Chapter II of the Regulations made under the Intermediate Education Act, 1921."

13. The Chapter II of the Regulations framed under Act, 1921 deals with appointment of heads of institutions and teachers. Regulation 1 of the said Chapter stipulates the minimum qualification for appointment as head of institution and teacher in any recognized institution

whether by direct recruitment or otherwise, shall be as given in Appendix A. As per the said Appendix, the essential qualification for the post of head of the institution reads thus:

"1. Head of the institution:

(1) Trained M.A. or M.Sc. or M.Com or M.Sc (Agri) or any years equivalent post graduate or any other degree which is awarded by corporate body specified in above mentioned para one and should have at least teaching experience of four years in classes 9 to 12 in any training institute or in any institution or University specified in above-mentioned para one or in any degree college affiliated to such University or institution, recognized by Board or any institution affiliated from Boards of other States or such other institutions whose examinations are recognized by the Board, or should the condition is also that he/she should not be below 30 years of age.

2. xx xx xx

3. xx xx xx"

14. Part III of Rules, 1998, lays down the procedure for recruitment to various categories of teachers. Rule 10(a) thereof provides, the mode of recruitment of Principal of an Intermediate College or Headmaster of High School. Rule 12 lays down the procedure for direct recruitment. The "Note' appended to Rule 12 stipulates the teaching experience that shall be counted for the post of Principal/Head Master. Note reads thus:

"Note.- ***For the purpose of calculating experience the service rendered as Headmaster of Junior High School or as assistant teacher in a High School/Intermediate College shall be counted in the case of selection of Headmaster;*** *and for selection of Principal, the service rendered as Headmaster of a High School or as a Lecturer shall only be counted. The provision of sub-rule (4) of Rule 12 regarding the certificate of experience shall mutatis mutandis apply."*

15. The "Note' further provides for calculating experience the service rendered as Headmaster of junior high school or as assistant teacher in a High School/Intermediate College shall be counted in the case of selection of Headmaster.

16. As noted supra, Rule 5 of the Rules, 1998 deals with academic qualifications for appointment to the post of teacher and contemplates that a candidate must possess qualification as specified in Regulation 1 of Chapter II of the Regulations. Appendix A of the Regulations mandates that a candidate should have four years experience of teaching classes 9 to 12. However, the `Note' appended to sub rule (5) of Rule 12 excludes the teaching experience of assistant teacher for classes 11 and 12 for the post of Headmaster. The "Note' clearly stipulates that for selection to the post of the Headmaster, with which the Court is concerned, for the purpose of calculating experience, services rendered as assistant teacher teaching upto class 10 are qualified for the post of Headmaster. The "Note' excludes lecturers (class 11 and 12) for being considered for the post of Headmaster. Act, 1982 being a subsequent Act, the "Note' appended to sub-rule (5) of Rule 12 of Rules, 1998 has the effect of modifying the conditions of qualifying experience mentioned in Appendix A of the Regulations under the Intermediate Act. Section 32 of the Act, 1982, provides

that the provision of the Intermediate Act and Regulations made thereunder will continue to be in force in case they are not inconsistent with the Principal Act and the Rules made thereunder.

17. The Supreme Court in **Balbir Kaur and another Versus Uttar Pradesh Secondary Education Service Selection Board, Allahabad**, was called upon to consider sub-Rule (5) of Rule 12 of Rules, 1998 with regard to the qualifications for the post of principal of Intermediate college. It was held that experience mandated in the 'Note' to sub-Rule (5) of Rule 12 of Rules, 1998, prescribes the requirement of experience for the post, which is different from what is prescribed in the Appendix of the Regulations, there being a conflict between the two provisions, the `Note' shall have an overriding effect to Appendix in view of Section 32 of Act, 1982. Para 23 is extracted:

"23.Having come to the said conclusion, the issue which still survives for consideration is whether for appointment to the post of Principal, the qualifying experience as stipulated in the said `Note' would apply or the one prescribed in the Appendix-A to Regulation I of Chapter II of the Regulations made under the Intermediate Act. In our view, answer to the question can be found in Section 32 of the Principal Act, which provides that the provision of the Intermediate Act and Regulations made thereunder will continue to be in force in case they are not inconsistent with the Principal Act and the Rules made thereunder. As noted hereinbefore `Note' to sub rule (5) of Rule 12 of 1998 Rules prescribes the requirement of experience for the post, which is different from what is prescribed in the said Appendix A and, therefore, there being a conflict between the two provisions, in the teeth of Section 32, the said `Note' shall have an overriding effect over Appendix A insofar as the question of experience is concerned. In this view of the matter, we are in agreement with the learned Single Judge that the impugned advertisements were in conformity with the said `Note' and, therefore, the selection procedure could not be faulted on that score."

18. It is admitted by the learned counsel for the petitioner that the experience certificate placed before the Board calculating the experience of the petitioner since 1993 is on the post of lecturer (Sanskrit). The subsequent document relied upon granting pay scale to the petitioner is also on the post of lecturer. The documents i.e. experience certificate relied upon by the petitioner before the Board has been placed on record which clearly shows that the petitioner at any point of time was not appointed assistant teacher rather he had teaching experience of lecturer, i.e. teaching students of classes 11 and 12.

19. In view thereof, admittedly petitioner was not having the requisite experience mandated in the "Note' to sub-Rule (5) of Rule 12. The finding to that effect returned by the Board while passing the impugned order cannot be faulted.

20. Reliance has been placed by the learned Senior Counsel on various notifications issued in the past by the Board to contend that a candidate appointed as assistant teacher in various universities/colleges affiliated to the University and working in L.T. Grade pay scale or higher pay scale and having four

years teaching experience are also eligible. It is sought to be urged that the advertisement clearly prescribes that a candidate working on higher pay scale would have the requisite experience. The lecturer of a degree college/university can also seek appointment on the post of Headmaster.

21. In rebuttal, learned counsel appearing for the Board submits that the advertisement is strictly as per the provisions of Rule 5/12 of Rules, 1998. The four year experience mandated thereunder is that of an assistant teacher and not of a lecturer of an intermediate Institution and/or University/degree college. In the State there are colleges affiliated to Sanskrit University imparting education from Class 8 to graduation or higher level. But since 31 October 2008 colleges affiliated to Sanskrit University are imparting education for graduate classes. The teachers working in these universities/colleges as assistant teacher teaching class 8 to 10 would alone be eligible for the post of Headmaster, whereas, teachers appointed as lecturer to teach class 11 and 12 or higher classes would not qualify under Rule 12. The rule mandates experience of assistant teacher and not of higher post. An assistant teacher working on higher pay scale would certainly not mean that such a teacher would include the lecturer of intermediate/degree college.

22. On specific query, learned Senior Counsel does not deny that in the State of Uttar Pradesh the Sanskrit University/Colleges affiliated to the University are taking classes from class 8 to degree level.

23. In view thereof, I have no hesitation in holding that the finding returned by the Board that petitioner does not have the requisite experience mandated under the "Note' to sub-Rule (5) of Rule 12 is justified and valid, therefore, calls for no interference.

24. Insofar as the eligibility of the sixth respondent/petitioner of Writ - A No.36446 of 2017 is concerned, the allegation against him is that he is B.Sc./M.Sc. (Agriculture). It is, therefore, urged that the sixth respondent was not qualified to have been appointed assistant teacher (Science). It is not in dispute that sixth respondent has been working as assistant teacher in High School and has the requisite experience mandated by the "Note' to Rule 12 of Rules, 1998. The plea, that since vacancy in Science subject arose in the institution, therefore, only a Science teacher could have been appointed is not tenable. Under the Act, 1921, lecturers are appointed for a specific subject, but the number of assistant teacher is determined depending upon the strength of the students enrolled in the institution. It is left open to the Committee of Management of the Institution to appoint teachers as is required. In other words, where assistant teacher teaching Science or English retires, it is not incumbent upon the Committee of Management of the Institution to appoint teachers for Science or English subjects. The discretion is available with the Committee depending whether teachers to teach the subject are available. In case, the teachers are available the Committee of Management can appoint any other person eligible for teaching the subject for which teacher is required.

25. Division Bench of this Court in **B.P. Tripathi Vs. State of U.P. and others**, held that the expression: -

"..... for teaching the subject in which the teacher ..... in the L.T. grade is required" cannot be read as "for teaching

the subject which was being taught by the teacher whose vacancy is to be fulfilled".

26. It is thus clear that the Committee of Management is entitled to promote/appoint such teacher to the vacancy caused in L.T. grade who is required to teach the subject which the Committee of Management thinks necessary in the interest of the institution. The decision was followed by the subsequent Division Bench in **Pati Ram Pal Vs. District Inspector of Schools and others**.

27. On specific query, learned counsel appearing for the petitioner and the Board do not dispute that the sixth respondent has the requisite experience for the post of assistant teacher, the only plea being raised that since he was B.Sc. (Agriculture), therefore, he could not have been appointed against the vacancy of assistant teacher (Science), lacks merit.

28. Learned counsel for the petitioner failed to show any provision of Act, 1921 or the Regulations and Rules framed thereunder that there is any embargo upon the Committee of the Institution for not making appointment for assistant teachers in other streams.

29. Accordingly:

(i) Writ Petition No.14490 of 2018 (Dr. Digvijay Nath Tiwari Vs. State of U.P. and others), is dismissed.

(ii) Writ Petition No.36446 of 2017 (Ajay Kumar Sahi Vs. State of U.P. and others), is allowed. Impugned order dated 24 March 2017 passed by the Board and consequential orders are set aside and quashed.

30. No order as to cost.

(2020)1ILR 962

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No. 18163 of 2019

Reena Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Shanker Tripathi, Sri Vijay Shanker Tripathi

Counsel for the Respondents:
C.S.C., Sri Sanjay Kumar Singh

A.Challenging-impugned order-cancelling-appointment-from the post of Asst. Teacher-on the ground-appointment obtained-on the basis of-forged & fabricated T.E.T marksheet/certificate-if inducted on this basis-becomes beneficiary of illegal & fraudulent appointment-hence void ab initio-cancellation lawful.

B. Held, that the forgery committed by the petitioner, for obtaining public employment on the basis of forged TET Examination marksheet/certificate; is in the basic eligibility conditions for appointment on the post of Assistant Teacher. Therefore, it vitiates the process of her appointment. Thus, the appointment of the petitioner is void ab initio and she cannot be said to be a government servant. Therefore, her appointment has been lawfully cancelled by the impugned order.

Writ Petition dismissed. (E-8)

List of cases cited: -

1. Union of India & Anr. v. Raghuwar Pal Singh, (2018) 15 SCC 463

2. Nidhi Kaim & Anr. v. State of Madhya Pradesh & Ors., (2017) 4 SCC 1

3. Chairman and Managing Director, Food Corporation of India & Ors. v. Jagdish Balaram Bahira & Ors.(2017) 8 SCC 670

4. R.Vishwanatha Pillai v. State of Kerala, (2004) 2 SCC 105 : 2004 SCC (L&S) 350]

5. Union of India v. Dattatray, (2008) 4 SCC 612 :(2008) 2 SCC (L&S)

6. Rita Mishra & Ors. v. Director, Primary Education, Bihar & Ors. AIR 1988 Patna 26

(Delivered by Hon'ble Surya Prakash Keasrwani, J.)

1. Heard Sri Vinod Shankar Tripathi, learned counsel for the petitioner and Sri Sanjay Kumar Singh, learned counsel for the respondent nos. 3 and 4.

2. **Cancellation of appointment of the Petitioner Assistant Teacher for appointment obtained by her on the basis of forged and fabricated T.E.T. marksheet/certificate, is the controversy involved in the present writ petition.**

3. On 02.12.2019, this Court passed the following order:-

"Case called out.

Sri Anil Kumar Pandey, learned standing counsel has filed a counter affidavit dated 2.12.2019 on behalf of the respondent no. 5 which is taken on record.

In paragraph 4 of the counter affidavit, the respondent no. 5 has stated as under:-

"That the petitioner has appeared in TET Examination 2014 with Roll No. 0510201832 and the same was produced before the counseling members and got an appointment as Assistant Teacher in the aforesaid college thereafter after examining by the District Basic Education Officer, Kannauj to the aforesaid certificate of the petitioner on the uploaded website of result of ***U.P.T.E.T. Examination 2014.*** *The aforesaid* ***certificate submitted by the petitioner was found forged*** *as such vide letter dated 23.10.2019 the services of the petitioner - Smt. Reena Devi as Assistant Teacher has been terminated under the Government order issued by the Government. It is further stated that* ***after scrutinizing the Roll No. 0510201832 in the available records, on the aforesaid Roll number the name was shown as Km. Anita daughter of Sri Krishna is mentioned and Km. Anita has not found qualifying marks which is shown in OBC category*** *and she has also obtained only 82 marks out of 150 as such the marks is very low and which is shown in the list which was uploaded on the website of T.E.T. Examination 2014, as unsuccess. The photo copy of the uploaded the select list of U.P.T.E.T. Examination 2014 is being filed as Annexure No. C.A.-1 to this affidavit. As such on the basis of the aforesaid facts no certificate has been issued under under the provisions of Government Order issued by the Government in this regard. Hence the present writ petition filed by the petitioner is not maintainable."*

Two days time is granted to the learned counsel for the petitioner to file a rejoinder affidavit.

Since none has appeared on behalf of the petitioner even in the revised call, therefore, learned standing counsel is directed to communicate this order in writing to the learned counsel for the petitioner within 24 hours.

Put up this matter on 5.12.2019 in the additional cause list."

4. Today, learned counsel for the petitioner states that he tried to contact the

petitioner but the petitioner is not responding and it appears that she does not wish to file a rejoinder affidavit.

5. In view of the aforesaid, the contents of paragraph 4 of the counter affidavit as reproduced in the aforequoted order dated 02.12.2019, is deemed to be correct.

6. Undisputedly, in terms of the provisions of the Uttar Pradesh Basic Education (Teachers) Service Rules 1981, N.C.T.E. Act, N.C.T.E. Regulations, 2001, the Right of Children to Free and Compulsory Education Act 2009 and the Rules framed thereunder and the Notification issued under Section 23(1) of the N.C.T.E. Act, one of the essential qualifications for appointment of Assistant Teacher is that the candidate must have passed Teacher Eligibility Test (TET). Thus, TET is the eligibility for appointment on the post of Assistant Teacher. The petitioner secured appointment on the post of Assistant Teacher vide appointment order dated 03.09.2016 issued by the District Basic Education Officer, Firozabad. She joined in Junior Basic School Ahirua Rajarampur, Vikas Khand Chibramau, District - Kannauj on 24.09.2016. On verification her TET marksheet/certificate was found to be forged by the District Basic Education Officer who consequently passed the impugned order dated 23.10.2019 cancelling the appointment order of the petitioner.

7. In view of the aforesaid, the **appointment obtained by the petitioner on the basis of a forged and fabricated TET marksheet/certificate has been rightly cancelled by the respondent no.4.** It is settled law that fraud and justice never dwell together. Cancellation of appointment of the petitioner on account of forged and fabricated TET marksheet/certificate is wholly justified under the facts and circumstances of the case and requires no interference by this Court.

8. Hon'ble Supreme Court in **Union of India & Anr. v. Raghuwar Pal Singh, (2018) 15 SCC 463** had examined a case, where the appointment letter was issued without approval of the competent authority. The question arose whether such appointment letter would be a case of **nullity or a mere irregularity? In case of nullity, affording opportunity to the incumbent would be a mere formality and non-grant of opportunity may not vitiate the final decision of termination of his services.** Hon'ble Supreme Court held that in absence of prior approval of the competent authority, the Director Incharge could not have hastened issuance of the appointment letter. The act of commission and omission of the Director Incharge would, therefore, suffer from the vice of lack of authority and nullity in law.

9. In **Nidhi Kaim & Anr. v. State of Madhya Pradesh & Ors., (2017) 4 SCC 1,** a three Judge Bench was dealing with admission of students to MBBS Course on the basis of illegal and unfair admission process. The Court held as under:

"92. ...Having given our thoughtful consideration to the above submission, we are of the considered view that conferring rights or benefits on the appellants, who had consciously participated in a well thought out, and meticulously orchestrated plan, to circumvent well laid down norms, for gaining admission to the MBBS course,

would amount to espousing the cause of "the unfair". It would seem like allowing a thief to retain the stolen property. It would seem as if the Court was not supportive of the cause of those who had adopted and followed rightful means. Such a course would cause people to question the credibility of the justice-delivery system itself. The exercise of jurisdiction in the manner suggested on behalf of the appellants would surely depict the Court's support in favour of the sacrilegious. It would also compromise the integrity of the academic community. We are of the view that in the name of doing complete justice it is not possible for this Court to support the vitiated actions of the appellants through which they gained admission to the MBBS course.

xx xx xx

94. ...Even in situations where a juvenile indulges in crime, he has to face trial, and is subjected to the postulated statutory consequences. Law, has consequences. And the consequences of law brook no exception. The appellants in this case, irrespective of their age, were conscious of the regular process of admission. They breached the same by devious means. They must therefore, suffer the consequences of their actions. It is not the first time that admissions obtained by deceitful means would be cancelled. This Court has consistently annulled academic gains arising out of wrongful admissions. Acceptance of the prayer made by the appellants on the parameter suggested by them would result in overlooking the large number of judgments on the point. Adoption of a different course, for the appellants, would trivialise the declared legal position. Reference in this behalf may be made to the judgments relied upon by the learned counsel representing Vyapam.

xx xx xx xx xx

108. ...In the facts and circumstances of the case in hand, it would not be proper to legitimise the admission of the appellants to the MBBS course in exercise of the jurisdiction vested in this Court under Article 142 of the Constitution. We, therefore, hereby decline the above prayer made on behalf of the appellants."

43) In another three Judge Bench judgment in Chairman and Managing Director, Food Corporation of India & Ors. v. Jagdish Balaram Bahira & Ors.(2017) 8 SCC 670, the Court was examining the consequences of false caste certificate produced to seek appointment. The Court held as under:

"69. For these reasons, we hold and declare that:

xx xx xx

69.3. The decisions of this Court in R.Vishwanatha Pillai v. State of Kerala, (2004) 2 SCC 105 : 2004 SCC (L&S) 350] and in Union of India v. Dattatray, (2008) 4 SCC 612 :(2008) 2 SCC (L&S) 6, which were rendered by Benches of three Judges laid down the principle of law that ***where a benefit is secured by an individual-such as an appointment to a post or admission to an educational institution--on the basis that the candidate belongs to a reserved category for which the benefit is reserved, the invalidation of the caste or tribe claim upon verification would result in the appointment or, as the case may be, the admission being rendered void or non est.***

xx xx xx

69.7. Withdrawal of benefits secured on the basis of a caste claim which has been found to be false and is invalidated is a necessary consequence which flows from the invalidation of the

caste claim and no issue of retrospectivity would arise;"

(Emphasis supplied by me)

10. A Full Bench of the Hon'ble Patna High Court in the case of **Rita Mishra & Ors. v. Director, Primary Education, Bihar & Ors. AIR 1988 Patna 26** has dealt with **appointment in the education department claiming salary although the letter of appointment was forged, fraudulent or illegal.** The Full Bench declined to grant such claim and held that *"**the right to salary stricto sensu springs from a legal right to validly hold the post for which salary is claimed. It is a right consequential to a valid appointment to such post. Therefore, where the very root is non-existent, there cannot subsist a branch thereof in the shape of a claim to salary. The rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise."***

11. The aforesaid judgment of Full Bench of the Hon'ble Patna High Court in the case of **Rita Mishra (supra)** was approved by a three Judges Bench of Hon'ble Supreme Court in **R. Vishwanatha Pillai Vs. State of Kerala & Ors. (2004) 2 SCC 105.**

12. Hon'ble Supreme Court by three Judge Bench in **the State Of Bihar Vs. Kirti Narayan Prasad, decided on 30 November 2018, 2019 (1) ESC 3** considered the matter of appointments made on the basis of forged appointment letter and held as under:

*"17. In the instant cases the writ petitioners have filed the petitions before the High Court with a specific prayer to regularize their service and to set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ **petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously** by concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order. The writ petitioners **are the beneficiaries of illegal orders** made by the Civil Surgeon-cum-Chief Medical Officer. They were given notice to establish the genuineness of their appointment and to show cause. None of them **could establish the genuineness or legality of their appointment before the State Committee.** The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio.We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularisation of their services by invoking para 53 of the judgment in Umadevi (supra) does not arise. **Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged byArticle 311of the Constitution or under any other disciplinary rules shall not arise."***

13. The aforesaid judgment in the case of **the State Of Bihar Vs. Kirti Narayan Prasad** has been followed by Hon'ble Supreme Court in **the State Of**

Bihar Vs. Devendra Sharma, 2019 AIR 1158 (S.C.). In the case of **Devendra Sharma (supra),** Hon'ble Supreme Court also considered fraudulently obtained appointments and held as under:-

*"19) The cases in the **second category** i.e. **appointment on the basis of forged nursing registration** stands on the same footing as category one though it is argued by the appellants in three appeals that nursing registration certificate is not forged but the matriculation certificate on the basis of which the candidates have undergone Auxiliary Nurse Mid-Wife, (for short 'ANM') course was found to be forged. The State Committee has found that ANM certificate is a forged certificate. Even if, the certificate of ANM is not forged as argued before this Court but the Matriculation Certificate is said to be forged, the fact is that the educational qualification, a pre-condition for undergoing nursing course, was found to be forged. **Therefore, the forgery is in the basic eligibility condition to undertake ANM course, which will vitiate the process of appointment.** For the reasons recorded in Kirti Narayan Prasad, Civil Appeal Nos. 7906 of 2019, 7919 of 2019 and 7920 of 2019 are dismissed.*

*20) Coming to **third category** of cases, Mr. Mukherjee, learned counsel for the State referred to the separate Government Circulars dated December 3, 1980 in respect of Class III and Class IV category posts. It is contended t**hat appointments on such circulars have been found to be illegal** by this Court in Ashwani Kumar, which view was in fact, approved later by Constitution Bench judgment in Uma Devi, wherein this Court held as under:*

"33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non- available posts should not be taken note of for regularisation. The cases directing regularisation have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

xx xx xx

*53. One aspect needs to be clarified. There may be cases where **irregular appointments** (not illegal appointments) as explained in **S.V. Narayanappa [(1967) 1 SCR 128 :** AIR 1967 SC 1071], **R.N. Nanjundappa [(1972) 1 SCC 409 :** (1972) 2 SCR 799] and **B.N. Nagarajan [(1979) 4 SCC 507 :** 1980 SCC (L&S) 4 : (1979) 3 SCR 937] and referred to in para 15 above, of **duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals.** The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above-referred to and in the light of this judgment....."*
(Emphasis Supplied)

*21) **In Uma Devi,** the argument that the employees have **legitimate expectations was negated** when this Court held as under:*

*"46. ..... **The doctrine can be invoked if** the decisions of the*

administrative authority affect the person by depriving him of some benefit or advantage which either ***(i)*** *he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or* ***(ii)*** *he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn... There is no case that any assurance was given by the Government or the department concerned while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the Commissioner of the Commercial Taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after Dharwad decision [(1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902 : (1990) 1 SCR 544] . Though, there is a case that the State had made regularisations in the past of similarly situated employees, the fact remains that such regularisations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some cases by this Court....*

47. ***When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature.*** *Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees...."*

14. **Thus, where a person secures appointment on the basis of a forged marksheet or certificate or appointment letter and on that basis he or she has been inducted in Government service then he becomes beneficiary of illegal and fraudulent appointment. Such an appointment is illegal and *void ab initio*. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution of India or under any disciplinary rules including the Uttar Pradesh Basic Education Staff Rules, 1973 or the Uttar Pradesh Government Servant (Disciplin and Appeal) Rules 1999, shall not arise.**

15. **The forgery committed by the petitioner, for obtaining public employment on the basis of forged TET Examination marksheet/certificate; is in the basic eligibility conditions for appointment on the post of Assistant Teacher. Therefore, it vitiates the process of her appointment. Thus, the appointment of the petitioner is *void ab initio* and she can not be said to be a government servant. Therefore, her appointment has been lawfully cancelled by the impugned order.**

16. For all the reasons aforestated, I do not find any error of law in the impugned order dated 23.10.2019, which has been passed by the respondent no.4 after affording opportunity of hearing to the petitioner. Therefore, the writ petition is **dismissed.**

(2020)1ILR 969

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No. 18346 of 2019

Manish Sharma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashish Tripathi

Counsel for the Respondents:
C.S.C., Sri Shashi Kant Verma

A. Challenging-impugned order-transferring/adjusting petitioners-treating them to be surplus-policy decision-contained in G.O-adjustment of teachers-made on the basis if actual number of students-against total number of students enrolled-impugned order-in conformity with G.O dt. 17.06.2019.

B. Held, in making transfer/adjustment in terms of the policy decision dt 17.06.2019, the authorities have adopted uniform method. No specific perversity could be pointed out by the petitioners in the list of students and teachers prepared by the District basic Education Officer, filed as Annexure No. 5 to the Writ Petition which is not even under challenge in the present writ petition. The impugned transfer/adjustment orders are merely consequential to the above. Therefore, it cannot be interfered with.

Writ Petition dismissed. (E-8)

(Delivered by Hon'ble Surya Prakash Keasrwani, J.)

1. Heard Sri Ashish Tripathi, learned counsel for the petitioners, Sri Shyam Sundar, learned standing counsel for the State respondents and Sri Shashi Kant Verma, learned counsel for the respondent nos. 3 & 4.

Facts:

2. This writ petition has been filed praying for the following reliefs:-

"(a) To issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 15.7.2019 (Vide Annexure No. 6 of the writ petition) passed by Basic Shiksha Adhikari, Sonbhadra i.e. respondent no. 4 adjusting / transferring the petitioners treating them to be surplus.

(b) To issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 6.11.2019 (Vide Annexure No. 8 of the writ petition) by which the representation has been rejected by the District Level Committee, adjusting / transferring the petitioners treating them to be surplus.

(c) To issue a writ, order or direction in the nature of mandamus directing the respondents not to interfere with the peaceful functioning of the petitioners working as Assistant Teacher / Head Teacher."

3. By the impugned order dated 6.11.2019 passed by the respondent no. 3, the representation of the petitioners against

their adjustment / transferred to some other schools, has been rejected.

Submissions:

4. Learned counsel for the petitioners submits that several writ petitions are pending before this Court involving similar controversy and a copy of order dated 25.7.2019 passed in one such writ petition being Writ-A No. 11283 of 2019 (Smt. Kamla Sipal & 40 others Vs. State of U.P. & 3 others) has been filed as Annexure No. 10 to the writ petition, and therefore, the petitioners are entitled for the same interim relief. The aforesaid interim order dated 25.7.2019 in Writ-A No. 11283 of 2019 (Smt. Kamla Sipal & 40 others Vs. State of U.P. & 3 others) is reproduced as under:-

"Heard Sri Amit Saxena, learned senior counsel assisted Sri Shatrughan Yadav, learned counsel for the petitioners, learned standing counsel for respondent nos. 1 and 2 and Sri Amit Shukla, learned counsel for respondent nos. 3 and 4.

Learned counsel for the petitioners submits that State Government has issued a Government Order dated 17.6.2019 for adjustment of teachers in different educational institution run by U.P. Basic Shiksha Parishad for session 2019-20 and for that detailed procedure has been provided for "adjustment" of teachers. In paragraph 2 of the Government Order dated 17.6.2019, ***it is specifically mentioned that for "adjustment", maximum enrolment of previous year shall be taken for determining the student teacher ratio.*** *He further submits that very same criteria was also adopted by Basic Education Officer of Badaun, Kushinagar, Meerut etc.,* ***but in the case of petitioners, entirely different criteria was adopted for calculating the student teacher ratio. Total number of students intake in Mid Day Meal in a year was divided by total number of days distribution of Mid Day Meal****. He further submits that for fixing the teacher student ratio for "****adjustment", a self generated formula was adopted and for distribution of schools dress, shocks, books sweater, the cut off date is taken as total number of students enrolled on 30th September of that year. He further submits that formula so adopted is beyond the commonsense of any prudent person and for distribution of materials, different criteria has been adopted.*** *He further submits that formula so adopted for teacher student ratio for the purpose of* ***"adjustment" is absolutely contravention of Government Order dated 17.6.2019*** *and number of student has to be calculated as it is done by Basic Education Officer, Badaun, Kushinagar, Meerut District.*

Sri Amit Shukla, learned counsel for respondent nos. 3 and 4 prays for and is granted two weeks time to seek instruction about the matter.

Put up this case as fresh on 9.8.2019.

Till the next date of listing, no coercive action shall be taken against the petitioners."

5. Learned standing counsel as well as learned counsel for the respondent nos. 3 & 4 submits that the impugned order has been passed in accordance with law.

Discussion & Findings:

6. I have carefully considered the submissions of the learned counsel for the parties.

7. Undisputably, the State Government has taken a policy decision dated 17.6.2019 to transfer Assistant Teachers of such institutions where they are surplus, to such institutions where there is single Assistant Teacher or no Assistant Teachers, so as to achieve the object of the Right of Children to Free and Compulsory Education Act, 2009 (herein after referred to as the Act, 2009), and Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 (herein after referred to as the Rules, 2011). For this purpose, the District Level Transfer Committee has been constituted which consist of District Magistrate as Chairman and four other Officers as members. The District Basic Education is member Secretary of the Committee. The policy intends to ensure that students may not suffer due to lack of teachers and every school may have sufficient teachers as far as possible, as per available work force i.e. Assistant Teachers.

8. The aforesaid Government dated 17.6.2019 is reproduced below:-

प्रेषक,

रेणुका कुमार,
अपर मुख्य सचिव,
उत्तर प्रदेश शासन।

सेवा में,

1– शिक्षा निदेशक (बेसिक),
2–सचिव, बेसिक शिक्षा परिषद,
उ0प्र0 लखनऊ।
उ0प्र0 प्रयागराज।

बेसिक शिक्षा अनुभाग–5
लखनऊ, दिनांक 17 जून 2019

विषय– उ0प्र0 बेसिक शिक्षा परिषद के नियंत्रणाधीन संचालित प्राथमिक/उच्च प्राथमिक विद्यालयों में शैक्षिक सत्र 2019–20 हेतु जनपद के अन्दर समायोजन के संबंध में।

महोदय,

उपर्युक्त विषयक अपने पत्रांक–शि0नि0(बे0) /16208/2019–20, दिनांक 27.05.2019 का कृपया संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा उत्तर प्रदेश बेसिक शिक्षा परिषद के नियंत्रणाधीन संचालित प्राथमिक/उच्च प्राथमिक विद्यालयों में शैक्षिक सत्र 2019–20 हेतु जनपद के अन्दर समायोजन के सम्बन्ध में प्रस्ताव उपलब्ध कराया गया है।

2– इस संबंध में मुझे यह कहने का निदेश हुआ है कि सम्यक विचारोपरान्त **शैक्षिक सत्र 2019–20 हेतु जनपद के अन्दर समायोजन के लिए निम्नवत नीति निर्धारित की जाती है–**

(1) जनपदीय स्थानान्तरण हेतु समिति–

1–जिलाधिकारी– अध्यक्ष
2–अपर जिलाधिकारी– सदस्य
3–जिला बेसिक शिक्षा अधिकारी– सदस्य सचिव
4–प्राचार्य जिला शिक्षा एवं प्रशिक्षण संस्थान द्वारा नामित एक सदस्य (सम्बन्धित जनपद)– सदस्य
5–जनपद मुख्यालय पर कार्यरत खण्ड शिक्षा अधिकारी– सदस्य

(2) परिषदीय प्राथमिक/उच्च प्राथमिक विद्यालयों में समायोजन हेतु पदों का निर्धारण–

निःशुल्क एवं अनिवार्य बाल शिक्षा अधिकार नियमावली–2011 के नियम–21 में दी गयी व्यवस्थानुसार जनपद के अन्दर समायोजन हेतु निम्नवत व्यवस्था प्रख्यापित है–

21–(1) जिला मजिस्ट्रेट अपने–अपने जनपद के प्रत्येक विद्यालय की स्वीकृत अध्यापक संख्या अधिसूचना करेगा/ऐसी अधिसूचना जनपद की बेबसाइट पर प्रदर्शित की जायेगी तथा विद्यालय की स्वीकृत अध्यापक संख्या सम्बन्धित विद्यालय को एवं स्थानीय प्राधिकारी/जिला बेसिक शिक्षा अधिकारी को भी सूचित की जायेगी,

परन्तु **ऐसी अधिसूचना के दो माह के अन्दर जिला मजिस्ट्रेट उन विद्यालयों के अध्यापकों को पुनर्योजित करेगा, जहॉ उपनियम–(1) में निर्दिष्ट अधिसूचना जारी होने के पूर्व अध्यापकों की संख्या स्वीकृत संख्या से अधिक हो।**

(2) जिला मजिस्ट्रेट प्रत्येक वर्ष के जुलाई माह के पूर्व स्वीकृत विनिर्दिष्ट शिष्य–अध्यापक अनुपात को बनाये रखने हेतु विद्यालय की अध्यापक संख्या का पुनरीक्षण करेगा तथा आवश्यकतानुसार अध्यापको को पुनयोजित करेगा।

(3) क– **समायोजन की कार्यवाही–**

समायोजन हेतु निम्न प्रारूप पर सूचना संरक्षित की जायेगी–

1–विद्यालय का नाम, यू–डायरा कोड सहित।
2–**विगत वर्ष का अधिकतम नामांकन।**

3–शिक्षक की आवश्यकता (आर0टी0ई0 मानक के अनुसार)

4–कार्यरत अध्यापक की संख्या

5–अध्यापको की कमी/अधिकता।

6–भविष्य में स्कूल चलो अभियान के अन्तर्गत जनपद में विद्यालयो में बच्चो की संख्या में बढ़ोत्तरी होती है तो समायोजन के माध्यम से यथावश्यकता नवीन समायोजन का अधिकार जिलाधिकारी की अध्यक्षता में गठित समिति में निहित रहेगा।

ख–प्रत्येक विद्यालय में अध्यापक–छात्र अनुपात के आधार पर पदों का निर्धारण होने के उपरान्त सर्वप्रथम अध्यापको के समायोजन की कार्यवाही की जायेगी।

ग–**जिन विद्यालयों में अध्यापक–छात्र मानक से अधिक अध्यापक कार्यरत है वहॉ से उनको हटाकर आवश्यकता वाले विद्यालयों में तैनात किया जायेगा।**

घ–इसके उपरान्त ही यदि कोई शिक्षक जनपद के भीतर एक ब्लाक से दूसरे ब्लाक (ग्रामीण से ग्रामीण क्षेत्र में एवं नगरीय से नगरीय क्षेत्र में) पारस्परिक समायोजन चाहता है तो उस पर समिति द्वारा विचार किया जायेगा। ग्रामीण से नगर क्षेत्र में एवं नगर क्षेत्र से ग्रामीण क्षेत्र में पारस्परिक समायोजन नहीं किया जाएगा। समायोजन में यह ध्यान रखा जायेगा कि प्रत्येक उच्च प्राथमिक विद्यालयों में विज्ञान/गणित के अध्यापकों की उपलब्धता रहे।

ड– अध्यापक–छात्र संख्या के आकलन के क्रम में मानक से अधिक अध्यापक/अध्यापिकाओं को अन्यत्र समायोजित किये जाने के पश्चात संबंधित विद्यालय में किसी अन्य अध्यापक का समायोजन नहीं किया जायेगा।

च–जिलाधिकारी द्वारा यह सुनिश्चित किया जायेगा कि समायोजन के उपरान्त कोई विद्यालय बन्द एवं एकल न रह जाये।

छ– ऐसे विद्यालय जहॉ पर छात्राओं का नामांकन अधिक है, उन विद्यालयों में कम से कम एक महिला अध्यापिका की तैनाती अनिवार्य रूप से की जाय। जिलाधिकारी इसमें विवेकानुसार आवश्यकता निर्धारित करेंगे। जनपद स्तरीय समिति द्वारा समायोजन में दिव्यांग एवं सेना में कार्यरत जवान के पति/पत्नी को वरीयता दी जायेगी।

ज– **जनपद में समायोजन प्रकिया में किसी प्रकार की कठिनाई के निराकरण हेतु जनपद स्तर पर गठित समिति सक्षम होगी ।**

झ– जनपद में समायोजन की कार्यवाही 15 जुलाई, 2019 तक पूर्ण कर ली जाये तथा उसके उपरान्त कोई भी जनपदीय समायोजन नही किया जायेगा।

उ0प्र0 बेसिक शिक्षा परिषद के नियंत्रणाधीन संचालित <u>प्राथमिक/उच्च</u> प्राथमिक विद्यालयों में शैक्षिक सत्र 2019–20 हेतु जनपद के अन्दर समायोजन की कार्यवाही उक्त निर्धारित प्रकियानुसार, पारदर्शितापूर्ण ढंग से सुनिश्चित की जाये। **उक्त समायोजन हेतु विद्यालयवार अध्यापकों का आंकलन, नामांकन एव नामांकन के सापेक्ष वास्तविक रूप से उपस्थित छात्रों की संख्या के आधार पर किया जायेगा । जनपदीय समिति को उपस्थित छात्रों की वास्तविक संख्या से अवगत करान` का कार्य जिला बेसिक शिक्षा अधिकारी का होगा ।** इसमें त्रृटि के लिए जिला बेसिक शिक्षा अधिकारी सीधे तौर पर उत्तरदायी होंगे। किसी भी स्तर पर अनियमितता की शिकायत प्राप्त होने पर प्रत्येक स्मतर पर उत्तरदायित्व का निर्धारण का नियमानुसार कठोर कार्यवाही की जायेगी।

भवदीया
रेणुका कुमार
अपर मुख्य सचिव।

9. The policy decision of the State Government being Government Order dated 17.6.2019 is not under challenge. Merely the order of transfer / adjustment has been challenged by the petitioners.

10. In making transfer / adjustment in terms of the policy decision dated 17.6.2019, the authorities have adopted uniform method. No specific perversity could be pointed out by the petitioners in the list of students and teachers prepared by the District Basic Education Officer, filed as Annexure No. 5 to the writ petition which is not even under challenge in the present writ petition. The impugned transfer / adjustment orders are merely consequential to the above. Therefore, it cannot interfered with.

11. Petitioners have completely failed to show any prejudice caused to them by the impugned transfer orders.

12. The State is under constitutional obligation under Article 21A of the

Constitution of India and also under statutory obligation under the Act, 2009 and the Rules framed thereunder, to provide free and quality education to all children of the age of 6 to 14 years which intends a systematic change to empower deprived Sections of the Society. The present petition is clearly intended to frustrate the very object of the Act, 2009 and fundamental rights of children under Article 21A of the Constitution of India by opposing their transfer / adjustment orders without any fundamental or statutory right to remain on the place of present posting. Paragraph No.3(d) of the G.O. dated 17.06.2019 requires to secure certain information. The last paragraph of the G.O. contains policy decision that adjustment of teachers shall be made on the basis of actual number of students in the school as against the total number of students enrolled. This exercise has been undertaken by the respondents and on that basis the impugned adjustment order has been passed. Thus, impugned adjustment order is in conformity with the policy decision of the State Government dated 17.06.2019. Therefore, the impugned adjustment order cannot be interfered with.

13. For all the reasons aforestated, I do not find any good reason to interfere with the impugned transfer / adjustment orders. Consequently, the writ petition is dismissed.

(2020)1ILR 973

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 19124 of 2019

Vivek Kumar Verma ...Petitioner
Versus
U.P. Rajya Vidyut Utpadan Nigam Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Chitranshi

Counsel for the Respondents:
C.S.C., Sri Ankit Saran

A. Indian Evidence Act, 1872 - Section 108 - Challenging-impugned order-rejecting Petitioner's claim-for compassionate appointment-on the ground-declaration of civil death-of petitioner's father-by civil court-on 07.07.2018-by then-Petitioner's father-retired-compassionate appoint-not available-only upon expiry of 7 years-from the date he went missing-then declaration by civil court-permissible-no presumption-if specific date of death proved-present case-no proof or disclosure of date of death.

B. Held, that it is only upon expiry of 07 years from the time such person went missing that declaration of civil death would be permissible in terms of Section 108 of the Evidence Act. This presumption, however, would not arise when a specific date of death is proved by evidence. In the facts of the present case, the date of death is neither disclosed nor is proved. The Division Bench judgment, therefore, also would not be of any help to petitioner's cause.

Writ Petition dismissed. (E-8)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Challenge is laid in this petition to an order dated 1.5.2019, passed by U.P. Rajya Vidyut Utpadan Nigam Ltd., Lucknow, whereby petitioner's application for grant of compassionate appointment is rejected. Order impugned records that declaration of civil death of petitioner's father has been granted by civil court on

7.7.2018, by when petitioner's father had already retired, and therefore the provision for grant of compassionate appointment would not be available. Petitioner's application has accordingly been rejected.

2. Undisputed facts that emerge on record are that petitioner's father was employed in the respondent Corporation and he was due to superannuate on 30.5.2010. It transpires that petitioner's father attended his duties last on 10.3.2010, in the afternoon shift that lasted from 2.00 p.m. to 10.00 p.m. but he did not return thereafter. A written report was thus lodged with the concern police station on 12.3.2010. Newspaper publications were also made in local Hindi daily "Dainik Jagran' etc. but despite all attempts petitioner's father could not be traced. Ultimately, petitioner alongwith other heirs instituted Original Suit No.72 of 2017 before the Civil Judge (Sr. Division), Sonbhadra, seeking declaration of civil death of petitioner's father. The employer i.e. respondent Corporation was impleaded as defendant in the suit. On the basis of pleadings exchanged the trial court formulated 07 issues for determination in the suit. Issue no.1 was as to whether petitioner's father Chandreshwar Prasad has gone missing since 10.3.2010. The second issue was regarding lodging of missing report in the concern police station regarding petitioner's father. The last issue related to grant of relief in the facts of the case. Other issues framed are not relevant for present purposes. The trial court after appreciating the evidence on record returned a categorical finding on issue no.1 that petitioner's father was seen last on 10.3.2010, and has not been seen thereafter. The second issue has also been answered acknowledging that a missing report was lodged with the concern police station. The trial court for the purpose of grant of relief to the plaintiff relied upon Section 108 of the Indian Evidence Act, 1872 to hold that as petitioner's father has not been seen for a period of 07 years w.e.f. 12.3.2010, therefore, he is liable to be declared dead. The presumption contained under Section 108 has, accordingly, been granted to hold the father of petitioner dead under Section 108 of the Evidence Act, 1872. This declaration by the civil court is granted on 7.7.2018. It is thereafter that an application for grant of compassionate appointment has been moved, which has been declined by the order impugned.

3. The order of the Corporation is assailed by counsel for the petitioner, who submits that relevant date of death in the facts of the present case ought to be taken as 10.3.2010, particularly as an intimation was given to the concern police station on 12.3.2010 itself, and that the declaration of civil court granted on 7.7.2018 would relate back to the date when petitioner's father went missing. For such contention, learned counsel for the petitioner places reliance upon a judgment of Nagpur Bench of the Bombay High Court in Second Appeal No. 18 of 2016 (Sou. Swati w/o Abhay Deshmukh Vs. Shri Abhay), decided on 26.2.2016. Reliance is also placed upon a Division Bench judgment of the Andhra Pradesh High Court in Writ Petition No. 34859 of 2016 (Union of India, represented by its Secretary and others Vs. Polimetla Mary Sarojini and another), decided on 31.1.2017.

4. Petition is opposed by Sri Ankit Saran, appearing for the Corporation, who submits that the presumption under Section 108 of the Evidence Act would

come into being only upon expiry of 07 years term from the date the person was last seen, and therefore, petitioner's application has rightly been rejected since petitioner's father had attained the age of superannuation by then.

5. In order to appreciate the rival submissions advanced on behalf of the parties, it would be necessary first to refer to Sections 107 and 108 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Act of 1872'), as it would govern the controversy involved. The sections are quoted hereinafter:-

"107. Burden of proving death of person known to have been alive within thirty years.--When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years.--Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

6. Section 107 provides that the burden of proving whether a man dead, if it is shown that he was alive within thirty years, is on the person who affirms it. Section 108 is an exception to Section 107, and provides that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him, if he had been alive, the burden of proving that he is alive is shifted upon the person who affirms it. Statutory scheme is absolutely clear. The presumption of death under Section 108 would be available if a person has not been seen for a period of 07 years by those who would have naturally heard of him, if he had been alive. For presumption of death to arise under Section 108 of the Act of 1872 two facts must be entertained. Firstly, it has to be ascertained as to what is the last date when such a person is seen last. Secondly, it must be established that a period of 07 years has expired since such person is seen last by those who would have naturally heard of him. The facts of a given case would have to be examined in the context of the aforesaid statutory scheme before a presumption of civil death arises. In the facts of the present case it is admitted that father of petitioner was seen last on 10.3.2010, as he completed his work in the shift that lasted from 2.00 p.m. to 10.00 p.m. It is thereafter that he has not been heard of. 10th March, 2010, therefore, would be treated to be the date when petitioner's father was last seen. There is no specific date of death disclosed by the plaintiffs nor any evidence is lead in that regard, and the suit appears to have been instituted by relying upon Section 108 of the Evidence Act. The suit has also been decreed by the civil court accepting such contention. In order to decree the suit based upon Section 108 of the Evidence Act, a period of 07 years must pass since the date when petitioner's father was last seen. The period of 07 years accordingly would expire on 10.3.2017. The declaration under Section 108 of the Indian Evidence Act cannot be stretched to a date prior to 10.3.2017. It is admitted that petitioner's father had retired by then.

7. The interpretation of Sections 107 and 108 of the Evidence Act is no longer res-judicata, inasmuch as the purport of

the provision has been examined by the Apex Court in LIC of India Vs. Anuradha, (2004) 10 SCC 131. Para 12 to 15 of the judgment would be relevant for the present purposes and is reproduced hereinafter:-

"12. Neither Section 108 of Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time. The presumption stands un-rebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

13. A presumption assists a party in discharging the burden of proof by taking advantage or presumption arising in his favour dispensing with the need of adducing evidence which may or may not be available. Phipson and Elliott have observed in 'Manual of the Law of Evidence' (Eleventh Edition at p.77) that although there is almost invariably a logical connection between basic fact and presumed fact, in the case of most presumptions it is by no means intellectually compelling. In our opinion, a presumption of fact or law which has gained recognition in statute or by successive judicial pronouncements spread over the years cannot be stretched beyond the limits permitted by the statute or beyond the contemplation spelled out from the logic, reason and sense prevailing with the Judges, having written opinions valued as precedents, so as to draw such other inferences as are not contemplated.

14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back

on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person who's life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise.

15. If an issue may arise as to the date or time of death the same shall have to be determined on evidence-direct or circumstantial and not by assumption or presumption. The burden of proof would lay on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim. Rarely it may be permissible to proceed on premise that the death had occurred on any given date before which the period of seven years' absence was shown to have elapsed."

8. Perusal of the judgment in LIC of India (supra) would clearly indicate that grant of declaration under Section 108 would not lead to a presumption with regard to date or time of death. The presumption, moreover, would arise only on lapse of 07 years, and by applying no logic or reasoning can be stretched to a period prior to expiry of 07 years. Apex Court has observed that rarely would it be permissible to proceed on the premise that death had occurred on any given date before expiry of 07 years' absence. Such rarity is not shown to exist in the facts of the present case. The petitioner, therefore, would not be entitled to declaration of death prior to 10.3.2017.

9. Learned counsel for the petitioner has placed heavy reliance upon the judgment of Nagpur Bench of the Bombay High Court in Sou. Swati (supra). The judgment of the Bombay High Court was in the context of facts, as had been noticed in para 2 of the judgment. It was noticed that the person concerned went missing on 16.7.2006 and was not heard of since then. A report at the Police Station Ranapratapnagar, Nagpur was lodged on 16.3.2008. It was in that context that applicability of Sections 107 and 108 was examined by the Court. On the facts of the case, the Court came to a conclusion that 16.3.2008 would be the relevant date for issuing a death certificate. This judgment although refers to the judgment of the Apex Court in the case of LIC of India (supra) and also notices Sections 107 and 108 of the Evidence Act, but on facts it was found by the Court that the death had occurred prior to 16.3.2008. No principle of law can be culled out from this judgment to support petitioner's contention, inasmuch as the declaration in that case is based more upon the appreciation of facts of that particular case.

10. Learned counsel for the petitioner has also placed reliance upon the death certificate issued by the competent

authority, in which the date of death is mentioned 10.3.2010. This document would not be of much relevance, inasmuch as the registration of date of death appears to be based upon the decree passed by the civil court itself. This Court had already taken note of the decree to hold that presumption of death in terms of Section 108 of the Indian Evidence Act would arise only on 10.3.2017. In that view of the matter, mere registration of date of death in the death certificate would not be material and the declaration of civil court would be binding.

11. Coming to the Division Bench judgment of the Andhra Pradesh High Court in the case of Union of India (supra), learned counsel for the petitioner has referred to para 36 and 37 of the judgment, which are reproduced hereinafter:-

"36. Thus it is clear that both in England and elsewhere, the date of expiry of 7 years from the time a person went missing, is taken to be the date of death also, unless any other date is proved by the party asserting, to be the date of death. But the moment a party is able to prove a particular date as the date of death, then the question of presumption itself would not arise. The decisions of various Courts holding that in certain circumstances a person must be presumed to be dead from the date he went missing or within a few days thereafter, are based upon a flawed logic. The Evidence Act allows of only one presumption. But by holding that a person must be presumed to be dead from the time he went missing, some Courts have raised a second presumption, which is not traceable to the Evidence Act. A distinction exists between a presumed fact and an inferred one. Many times the confusion occurs due to the use of the presumption as a synonym for inference.

37. As we have pointed out earlier, there is a distinction between a presumption of fact and an inference. Section 108 of the Evidence Act admits of only one presumption namely the presumption of death of a person not heard of for 7 years by those who would normally have heard of him. Since it is a rebuttable presumption and the rebuttal can take place at any time, the law does not stipulate any date as the date on which a person may be presumed to be dead. There is huge difference between the presumption as to death and presumption as to date of death. Since the law does not prescribe any presumption as to date of death, the same may have to be proved. An inference cannot take the place on proof or presumption."

12. The above observation of the Division Bench clearly endorses the proposition that it is only upon expiry of 07 years from the time such person went missing that declaration of civil death would be permissible in terms of Section 108 of the Evidence Act. This presumption, however, would not arise when a specific date of death is proved by evidence. In the facts of the present case, the date of death is neither disclosed nor is proved. The Division Bench judgment, therefore, also would not be of any help to petitioner's cause.

13. In light of the discussions and deliberations aforesaid, this Court finds that there is no error in the decision taken by the Corporation to deny compassionate appointment to the petitioner.

14. Writ petition lacks merit and is accordingly dismissed. No order is passed as to costs.

(2020)1ILR 979

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2019

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

Writ C No. 1059 of 2019

Rajendra Prasad Kanaujiya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ravi Shanker Tiwari

Counsel for the Respondents:
C.S.C., Sri Ram Bahadur Singh

A. The falling standard of legal profession - instituted a one Judge enquiry - approved by the Hon'ble Administrative Committee-a resolution was taken to authorize the Hon'ble Chief Justice to take appropriate remedial action. (Para 3, 4, 5, 9 & 10)

In absence of any training or good educational background law graduates cannot be expected to integrate to the high standard tradition, and professed proficiency which is required for practicing in the High Court - The Supreme Court in the case of R.K. Anand (supra) has considered this issue and has issued directions to the High Courts to frame the Rules for holding examinations like the Advocate-on-Record for High Courts and courts subordinate thereto - The Madras High Court also considered the same issue in WP (MD) No.7257 of 2019, A.Kannan v. High Court of Madras and others - issued certain directions for the improvement of the standard of the Bar. (Para 6 & 7)

Held: - This Court should also consider to frame the Rule in the line of the other High Courts to arrest the deterioration of standard of legal profession which also affect the entire justice delivery system. The Hon'ble Chief Justice has been requested to consider the remedial measure suggested in the enquiry report in the light of the facts recorded in this order and the directions of the Hon'ble Supreme Court in A.Kannan (supra)**.** (Para 9 & 11)

Writ Petition dismissed. (E-7)

List of cases cited: -

1.Sandeep Patel and others v. State of U.P. and others, Writ-C No. 17720 of 2014

2.Committee of Management, Sri Shankar Shiksha Prasar Samiti and another v. State of U.P. and others, 2009 (2) AWC 1871 All

3. A.Kannan v. High Court of Madras and others, WP (MD) No.7257 of 2019

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

1. The petitioner has preferred this writ petition under Article 226 of the Constitution for the following relief:

"PRAYER

It is, therefore, Most respectfully prayed that this Hon'ble Court may graciously be pleased to-:

(i) issue a writ order or direction in the nature of Mandamus by direct to the Respondents not to delete the fruit Juice Shop of the petitioner which is located at Town Hall Road Shahjahanpur on the land of Arya Samaz Mandir on Rent.

(ii) issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iii) To award the cost petition in favour of the petitioner."

2. We have carefully perused the pleadings and relief of the writ petition.

3. We experience that a large number of writ petitions are filed in this Court with some what similar pleadings and relief. With a view to hilight the falling standard of some of the members of the bar, the entire writ petition with its grounds and prayer is extracted below in verbatim:

"1. That this is first writ petition on behalf of petitioner before this Hon'ble Court by seeking present relief. Petitioner never preferred any other earlier writ petition on his behalf before this Hon'ble Court by seeking present relief.

2. That the petitioner in land of Arya Samaz Mandir located at Town Hall Road Shahjahanpur have one fruit Juice Shop from the Year 2004 on Rent of Rs.300 and regularly paid the same and no dispute between the them till date and petitioner take electricity connection on 13.04.05. A Photo Copy of some rent receipts as well as electricity connection Receipt are collectively been filed herewith and marked as Marked as ***Annexure No. 1*** *to this writ Petition.*

3. That it is most important to mentioned here that petitioner shop distance from the Road 15 Fit and entire road Track numbers of building are constructed and no any building has been disturbed by the Respondents. A Current Photo Graph of the petitioner Shop as well as located area are being filed herewith and Marked as ***Annexure No. 2*** *to this writ Petition.*

4. That the petitioner's family livelihood depends up on this shop but Respondents illegally want to delete the shop of petitioner i.e. against the natural justice and eye of law.

5. That the Respondents till date no any Notice has been given to the petitioner regarding the delete his Fruit Juice Shop but illegally want to delete the shop.

6. That the petitioner has no speedy remedy except approach this Hon'ble Court.

7. That the petitioner is very poor and law abiding person of the society.

8. That in view of aforesaid facts and circumstances of the case, it is expedient in the interest of justice that this Hon'ble Court may graciously be pleased to allow this writ petition and direct to the Respondents not to delete the fruit Juice Shop of the petitioner which is located at Town Hall Road Shahjahanpur on the land of Arya Samaz Mandir on Rent, in the interest of justice may be done and/or pass such other and further order as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case, otherwise petitioner shall suffer irreparable loss and injury.

9. That there is no other alternative remedy except to approach this Hon'ble Court under Article 226 of the Constitution of India, inter alia amongst other following grounds:-

GROUNDS

A. Because, the petitioner in land of Arya Samaz Mandir located at Town Hall Road Shahjahanpur have one fruit Juice Shop from the Year 2004 on Rent of Rs.300 and regularly paid the same and no dispute between the them till date and petitioner take electricity connection on 13.04.05.

B. Because, it is most important to mentioned here that petitioner shop distance from the Road 15 Fit and entire road Track numbers of building are

constructed and no any building has been disturbed by the Respondents.

C. Because, the petitioner's family livelihood depends up on this shop but Respondents illegally want to delete the shop of petitioner i.e. against the natural justice and eye of law.

D. Because, the Respondents till date no any Notice has been given to the petitioner regarding the delete his Fruit Juice Shop but illegally want to delete the shop.

E. Because, the petitioner has no speedy remedy except approach this Hon'ble Court.

F. Because, the action of Respondents is against the eye of law."

4. The then Hon'ble Chief Justice Dr.D.Y.Chandrachud (as His Lordship was then) had instituted a one Judge enquiry vide his order dated 12.03.2015. Amongst others one of the reference of the enquiry was as under:

"It has become necessary for the High Court to make a comprehensive assessment of the situation, on the administrative side and to take appropriate remedial measures. Hence, it has been considered necessary to entrust the matter on the administrative side to a judge of the High Court, Hon'ble Mr. Justice P.K.S. Baghel who has been nominated in the matter will submit a report on all aspects including those having a bearing on the need to ensure safe and orderly conditions of work in and the proper discharge of judicial functions by the district courts of the State of Uttar Pradesh. The report would indicate appropriate remedial measures."

5. The said enquiry was conducted by one of us (Justice P.K.S.Baghel). The Enquiry Judge has submitted its report to the Hon'ble Chief Justice and was approved by the Administrative Committee on 04.09.2015.

6. The Enquiry Judge has made a study on depth on the falling standard of the Bar across the State. The Chapter IV of the report deals with the said aspect. The material part of the report is extracted in extentio:

".....The Law Commission in its Fourteenth Report had expressed its deep concern about falling standard of the Bar. The Commission had considered the situations prevailing in the 1950s. Its report was submitted in 1958. The report of the Law Commission could not get due attention by various stakeholders. It would be inappropriate for the Committee to make any comment on a statutory body, Bar Council of India, but now BCI itself has admitted that "situation is slipping out of hand" and "Sadly, this profession has fallen under a cloud."

3. Observation of Bar Council of India:

In the year 2014, the Bar Council of India itself has painted a very gloomy picture of legal profession in the statement of objects and reasons of recently framed statutory rule: "Bar Council of India Certificate of Practice and Renewal Rules, 2014". The statement of objects and reasons for enacting the said rule was that it was felt by the Bar Council that a definite trend was visible that the situation is slipping out of the hands of the advocates who practice law. The Bar Council has also expressed its concern over the falling standard of legal profession and it felt urgent need for laying down some conditions for practicing law in different courts.

*** *** ***

Under these circumstances it appears that a definite trend is visible that the control of Bar Associations and of other elected bodies under the Advocates Act is slipping out of the hands of the advocates who practice law. It is also being experienced that after certificate of enrolment is issued to an advocate, practically no communicative and continuing contact survives between him and the Council.

*** *** ***

The Bar Council of India has also come to know that a number of fake (farzi) persons (without any Law Degree or enrolment certificate) are indulged in Legal practice and are cheating the Litigants, courts and other stake-holders; and neither the Bar Associations nor the concerned State Bar Councils have any control over such fake persons. Shockingly, it has come to the notice of the Council that at some places, the office-bearers of Bar Associations or some vote-seekers knowingly make such people members and voters of their Associations with a motive to get their votes in the elections of Bar Associations or Bar Councils. Similarly, many persons, after getting enrolled as Advocates in any State Bar Council, get involve in Property-Dealings, contract or switch over to some other business, profession or job and have no more concern with the Legal profession. Such "non-practicing Advocates" are sometimes being used by some of the office-bearers/ candidates for elections of Bar Associations or Bar Councils (only for their votes). But in fact, the Council has realized that such practice is degrading the standard of Legal profession, and this mal-practice has to be stopped.

*** *** ***

4. Suggestions of the First Law Commission:

The Law Commission in its Fourteenth Report, while dealing with falling standard of the Bar, made several suggestions. It aptly observed as under:

"1. A well-organized system of judicial administration postulates a properly equipped and efficient Bar. ....

2. The evidence given before us reveals a general consensus that there is a fall in efficiency and standards at the Bar. The recent recruit to the profession is said to be inferior in his legal equipment, less pains-taking and in a hurry to find work.

*** *** ***

55. ...The overcrowding in the profession is undoubtedly one of the causes which has contributed to the growth of the evil. Persons entering the profession, whose economic conditions make it impossible for them to wait before they can start earning a living or who have waited without success, are driven to these practices in their struggle for existence. It not infrequently, happens, however, that lawyers who have been driven to these practices in the earlier stages of their career in their need to earn a living continue these practices even after they have gathered considerable practice at the Bar and some of them even after they have attained seniority in the profession.....

*** *** ***

6. Declining standard of Bar - An example:

While dealing with the falling standard of the Bar, I wish to venture about the standard of High Court's Bar. I am not oblivious of the fact that I am transgressing the terms of reference. But in the larger interest of the Institution, I wish to draw the attention to the present standard of young lawyers. This Court in the case of ***Sandeep Patel and others v.***

State of U.P. and others, Writ-C No. 17720 of 2014, decided on 03 April 2014, *has extracted the pleadings of a writ petition and quoted the same extensively in the judgment, as under:*

"2. Some of the paragraphs of the writ petition need to be quoted, which are as under;

"3. That the matter is very urgent because the respondents taking the counseling on 15-03-2014 which petitioners are very loss if not stay the B.T.C. Counseling.

3A- That the all petitioners O.B.C. categories. The petitioners in the merit list in B.T.C. Counseling 2013, so that petitioner No. 1 namely Sandeep Patel counseling in Allahabad district and others counseling district Faizabad/ Ambedkar.

5. That the petitioner No. 1 selected the district Allahabad and 9 others district choice of alternative chances if district Allahabad paid the free seat and then other district select by the petitioner. And petitioners No. 2 to 5 select the district the Ambedkar and 9 others district alternative free paid of the aforesaid district. For kind perusal of this Hon'ble Court a photo copies of the choice of district is being filed herewith and marked as ***ANNEXURE NO. 2*** *to this writ petition.*

6. That the petitioners after counseling informal final selected list and others districts option of the available aforesaid mentioned. For kind perusal of this Hon'ble Court a photo copies of the selection list is being filed herewith and marked as ***ANNEXURE NO. 3*** *to this writ petition.*

7. That the petitioners are available chances of the free seat in others districts which 9 alternative districts aforesaid mentioned.

8. That the Respondents publicity in Daily News Paper (Dainik Jagran) 7 March, 2014 declare of the B.T.C. Counseling dated 15-03-2014 and other alternative option full free paid of the B.T.C. Seat then will be fill up paid seat in aforesaid district. For kind perusal of this Hon'ble Court a photo copies of the Daily News Paper (Dainik Jagran) is being filed herewith and marked as ***ANNEXURE NO. 4*** *to this writ petition.*

9. That the petitioners are belong poor family. The petitioners selected the in merit list of B.T.C. 2013.

11. That the petitioner No. 6 is SC. candidate belong to poor family. The petitioner No. 6 is select candidate in B.T.C. Session 2013 which multiple marks 207.51 and select option of 10 district. For kind perusal of this Hon'ble Court A photo copy of the allotted district is being filed herewith and marked as ***ANNEXURE NO. 6*** *to this writ petition.*

13. That the respondents not available to aforesaid district choice of the petitioner No. 6, so that respondents are act illegal."

3. When the matter was taken up, some Senior Advocates, namely, Sri P. N. Saxena, Sri Ashok Khare, Sri R.K. Ojha and Sri G.K. Singh were present in the Court. They also expressed their concern on the falling standard of the Bar. One of the learned Senior Advocates gave a suggestion that like Supreme Court this Court may also consider to hold some examination for Junior Advocates."

Most of the Judges of the High Court have also expressed their deep concern about such type of pleadings which has become a commonplace even in the civil side. Similar is the situation in the District Courts also.

7. ***Need to frame rules likewise Advocate-on-Record of the Supreme Court:***

*The Supreme Court in the case of **R.K. Anand (supra)** has considered this issue and has issued directions to the High Courts to frame the Rules for holding examinations like the Advocate-on-Record for High Courts and courts subordinate thereto. Paragraph-243 of the judgment reads thus:*

"243. In order to avoid any such controversies in future all the High Courts that have so far not framed rules under Section 34 of the Advocates Act are directed to frame the rules without any further delay. It is earnestly hoped that all the High Courts shall frame the rules within four months from today. The High Courts may also consider framing rules for having Advocates-on-Record on the pattern of the Supreme Court of India."

(Emphasis supplied)

*It is significant to mention that there is a direction of this Court also in the case of **Committee of Management, Sri Shankar Shiksha Prasar Samiti and another v. State of U.P. and others, 2009 (2) AWC 1871 All,** wherein this Court has issued a direction on the judicial side to conduct an examination. The direction of the Court as contained in paragraph-29(3) of the judgment, which is relevant for the purposes, is quoted below:*

"3. Rules relating to Advocate on Record, as framed by the Supreme Court of India should also be framed by the High Court, by which, one advocate is made answerable and responsible for receiving affidavit, counter-affidavit, rejoinder-affidavit, notices, etc. and would also be made answerable to the Court and adjournment could only be sought by that counsel in the Court."

It is noteworthy that in compliance of the direction of the Supreme Court, the High Court of Judicature at Patna has framed the rules, called as "Registration of Advocates as Advocates-on-Record of the Patna High Court Rules" and added the said Rules as Sub-Part "D" in Chapter XXIV, Part V of the Patna High Court Rules, 1916.

8. Conclusion:

Rules relating to Advocate-on-Record are, therefore, a crying need of our times but have remained a far cry. If we continue to blink over this issue further, an irreversible situation will arise. In future the operation of the rule can be extended phase-wise to cover District Courts also."

7. In the State of U.P. the law colleges were run by Universities and in some of the affiliated/associated colleges. After the legal education has been made part of the Bar Council's function, in Uttar Pradesh in last decade more than 50 (fifty) colleges have been recognized by the Bar Council. These colleges are self financed and the standard of education imparted in these colleges are disappointing. The law graduates from these self financed colleges are getting enrolled in the High Court as an advocate and without any experience of work in any court these untrained law graduates from self financed private institutions are the main cause for the concern regarding the standard of the Bar. These fresh graduates did not get training from the chamber of the senior lawyers and the district courts. Hence, in absence of any training or good educational background they cannot be expected to integrate to the high standard tradition, and professed proficiency which is required for practising in the High Court. Recently, the Madras High Court has also considered the same issue in **WP (MD) No.7257 of 2019, A.Kannan v. High Court of Madras and others.** In which the Court has issued certain directions for the improvement of the standard of the Bar. Some of the

observations made therein are extracted hereunder:

"....Now, a new trend has crept in the legal profession, namely, the Law Graduates after coming out the Law Colleges without any experience in the legal profession, start appearing before the court without even given the material details in the affidavit and arguing the matters. As a result, the Court is unable to effectively adjudicate the matters. There is no assistance from those Lawyers. It requires at least 3 to 5 years experience in Senior's office, so that, they will be able to know from the Seniors as to what are all the particulars to be collected from the parties, how a petition/plaint should be drafted and what are all the things to be omitted and how the case should be presented before the Court and how the queries raised by the Court could be answered by the Advocate. Though they have the fundamental knowledge, without the basic procedures followed by the Trial Courts, they venture into the legal profession, which makes very difficult for the Courts to render justice effectively.

3.....This Court faced a lot of problems because of inexperienced Advocates appearing before the Court, without knowing the basic procedures. The effort of Mr. Kannan, Petitioner in person, has to be appreciated and his efforts are only to enhance the quality of advocacy and only persons who have got knowledge in law and procedure which could be tested by an examination, could be allowed to appear before the Court.

5. .....This court has got power under Article 225 and 226 of the Constitution of India, apart from Section 34 of the Advocates Act to frame such Rules, like, the Supreme Court Rules, 2013. Only those who are qualified in the examination to be conducted by the Court as per the proposed new Rules, the Supreme Court Rules, 2013, the Advocate with sound knowledge in law would be made as Advocate on Record. This exercise will enable the Court to get good assistance from the Advocates on Record and it is necessary to use the judicial time qualitatively. Prescribing such Rules is not to get away any individual Advocate or section of Advocates from the High Court. It is only to test the knowledge of the Advocates who would be in a better position to adjudicate the matters effectively. Any advocate who has got sound knowledge in law and in current position of law and the latest judgments could easily crack the said test."

8. Some other High Courts have also framed the Rules in compliance of the judgment of the Supreme Court in **R.K.Anand (supra)** case.

9. It is high time that this Court should also consider to frame the Rule in the line of the other High Courts to arrest the deterioration of standard of legal profession which also affect the entire justice delivery system.

10. As discussed above, the enquiry report of the Enquiry Judge was approved by the Hon'ble Administrative Committee on 04.09.2015 and a resolution was taken to authorize the Hon'ble Chief Justice to take appropriate remedial action.

11. In view of the above, we request the Hon'ble Chief Justice to consider the remedial measure suggested in the enquiry report in the light of the facts recorded in this order and the directions of the Hon'ble Supreme Court in **R.K.Anand (supra).**

12. In the present case, having regard to the facts mentioned above, we do not find any ground to interfere in the matter. The writ petition is, accordingly, dismissed.

(2020)1ILR 986

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2019

BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 5712 of 2017
And
Writ C No. 58295 of 2016

Upper Ganges Sugar & Industries Ltd. Bijnor ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kishore Sharma, Sri Shrey Sharma, Sri Anil Sharma

Counsel for the Respondents:
C.S.C.

A. The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 - Section 10 - Notice to tenure-holders failing to submit a statement or submitting an incomplete or incorrect statement - Section 11 - Determination of surplus land where no objection is filed - Section 12 - Determination of the surplus land by the Prescribed Authority where an objection is filed - Section 13 - Appeal to Commissioner - Limitation Act, 1963 - Section 5- delay condonation application - allowed - Appeal maintainable - No illegality in the impugned order.

Section 13 provides a right of appeal to a party aggrieved by an order under Sub-section (2) of Section 11 or Section 12 and no other - Prescribed authority has passed an order under section 12(1) - The proceedings of section 12 begin on the notice of section 10 (2) and objection to the said notice is decided under section 12 (1). (Para-7)

Held :- The objection to the notice given under section 10 (2) of the 'Act 1960' will be disposed of by the prescribed authority through the procedure described under section 12 (1) of the 'Act 1960' and the order passed will be appealable before Commissioner under Section 13 of 'Act 1960 '. Therefore, in the present case appeal made under Section 13 of Act 1960 is maintainable. (Para-10)

B. The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 - Section 38 - the appellate Court shall have all the powers and the privileges of a Civil Court and follow the procedure for the hearing and disposal of appeals laid down in the Code of Civil Procedure, 1908 - Code of Civil Procedure, 1908 - Order 41 Rule 3A – Application for condonation of delay.

If the court considers that there is no reason for rejecting the application without issuing notice to the respondent , the notice thereof shall be issued to the respondent - In this case, without giving any notice to the respondent/petitioner, the application for delay condonation was allowed - this process defect has been corrected by hearing both the parties to the above order on recall (withdrawal) application and placing the same in view of the order passed earlier. (Para 10)

Held: - While disposing of the application for condonation of delay, the court should keep a liberal and practical view and not a technical or conservative view. Therefore, in the present case, the Commissioner has not committed any legal error by adopting a liberal and practical approach but has followed the judicial principles laid down by the Supreme Court. When considering an application for 'delay condonation', the court should keep a liberal, practical, justice-oriented, non-orthodox view, because the court is obliged to remove injustice, not to legalize injustice. (Para 8 & 10)

Writ Petition dismissed. (E-7)

List of cases cited: -

1. Vinit Kumar And Anr. Vs. state of U.P. and 3 ors., Writ no. 28715 of 2015

2. Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors, JT 2000 (5) 389

3. Perumon Bhagvathy Devaswam Vs. Bhargavi Amma, (2008) SCC 321

4.Super Cassettes Industries Ltd. Vs. State of Uttar Pradesh and anr**.**, 2009 (10) SCC 531

5. Shambhu Sharan Chaubey And Others vs State of U.P. And Another , 2012 (10) ADJ 742

6. G. Ramegowda, Major and ors Vs. Special Land Acquisition Officer, Bangalore, 1988 (2) SCC 142

7. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy, 2013 (12) SCC 649

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

1. प्रस्तुत प्रकरण के तथ्य संक्षेप में निम्न है।

(i). अपर गंगेज शुगर एंड इंडस्ट्रीज लिमिटेड, स्योहारा (याची) को 1976 में तत्कालीन विहित प्राधिकारी, द्वारा 'उत्तर प्रदेश अधिकतम जोत सीमा आरोपण अधिनियम, 1960' (संक्षेप में 'अधिनियम 1960') की धारा 10 के अंतर्गत नोटिस प्रेषित किया गया था (वाद सं 170/1976)। ऐसा प्रतीत होता है, इस प्रक्रिया में अन्य सहकारी समितियों की जोत भी सम्मिलित हो गई थी, इस कारणवश उन समितियो ने उक्त कार्यवाही में पक्षकार बनने हेतु एक प्रार्थना पत्र दिया, परन्तु तत्कालीन विहित प्राधिकारी द्वारा उक्त प्रार्थना पत्र को आदेश दिनांक 8.9.1980 द्वारा निरस्त कर दिया था। जिसके विरुद्ध इस उच्च न्यायालय में रिट याचिका 8239/1980 (कुरी सहकारी सहकारी समिति आदि बनाम उ.प्र0. सरकार) योजित की गयी थी, जो 9.12.1996 को निर्णित हुई; जिसके द्वारा आदेश दिनांक 8.9.1980 निरस्त किया गया तथा याची व अन्य सहकारी समितियों को वाद में आपत्ति पेश करने का निर्देश दिया गया व वाद सं० 170/1979 को तत्कालीन विहित प्राधिकारी को गुण दोष पर आधारित निर्णय पारित करने हेतु प्रतिप्रेषित किया गया था।

(ii). ऐसा प्रतीत होता है कि उक्त आदेश दिनांक9.12.1996 के उपरान्त तत्कालीन विहित प्राधिकारी ने, वर्तमान प्रकरण की कार्यवाही में कोई प्रगति नहीं की। काफी वर्षों के उपरान्त, कलेक्टर के आदेशानुसार उपजिलाधिकारी, धामपुर द्वारा दी गई जाँच आख्या दिनांक 5.12.2008 के उपरान्त इस प्रकरण की कार्यवाही पुनः आरम्भ हुई एवं उच्च न्यायालय के आदेश 9.12.1996 के अनुक्रम में याची को नोटिस प्रेषित किया गया। पूर्व योजित वाद संख्या 170/1976 की पत्रावली न मिलने के कारण उस पत्रावली का पुनः निर्माण (रिकन्सट्रक्ट) कराने व आख्या दिनांक 5.12.2008 के आधार पर वाद (वाद सं 7/2009) योजित किया गया।

(iii). याची ने प्रार्थना पत्र दिनांक 2.12.2010 के माध्यम से उक्त नोटिस पर आपत्ति प्रस्तुत करी, जिसमें मुख्य रुप से कहा गया कि विहित प्राधिकारी को नवीन नोटिस प्रेषित करने का अधिकार नहीं है। पूर्व योजित वाद सं. 170/1976 के क्रम में ही कार्यवाही अग्रसर की जा सकती है। अतः उक्त वाद संख्या 170/1976 की पत्रावली को तलब किया जाये तथा उच्च न्यायालय के आदेश दिनांक 9.12.1996 का कठोरता पूर्वक अनुपालन किया जाये।

(iv). याची के उपरोक्त वर्णित आपत्ति का प्रतिउत्तर, उ.प्र. सरकार द्वारा दिया गया, जिसमें मुख्य कथन किया कि-

"1- यह कि प्रतिवादी का प्रार्थना पत्र सरासर गलत तथ्यों पर आधारित होने के कारण खण्डित होने योग्य है।

2- यह कि प्रस्तुत वाद की कार्यवाही में पत्रावली रिकन्सट्रक्ट (Reconstruct) करने की कार्यवाही जिलाधिकारी महोदय के पत्र दिनांक 18.11.2008 पर इस कारण करनी पड़ी क्यों कि मूल पत्रावली का उपलब्ध होना नहीं पाया गया।

3- यह कि प्रश्नगत नोटिस का हरगिज यह तात्पर्य नहीं है कि खातेदार अथवा आपत्ति कर्तागण के पक्ष में या विरोध में पूर्व पारित आदेशों का संज्ञान न लिया जाये।

4- यह कि मूल पत्रावली उपलब्ध न होने की दशा में नई पत्रावली बनाकर कार्यवाही किया जाना न्यायहित में आवश्यक है। ताकि किसी भी पक्ष के हितों पर विपरीत प्रभाव न पड़े।

5- यह कि मूल पत्रावली के उपलब्ध न होने की दशा में पत्रावली रिकन्सट्रक्ट प्रार्थन करने में सहयोग करना खातेदार का भी दायित्व है, इसलिए प्रार्थना-पत्र में प्रस्तुत कार्यवाही समाप्त किया जाने के लिये लिखना औचित्यपूर्ण नहीं है।"

याची ने उक्त प्रतिउत्तर का जवाब पेश किया जिसके द्वारा पुनः कथन किया कि विहित प्राधिकारी द्वारा की जा रही कार्यवाही न्यायहित में नहीं है। इस प्रकरण में आदेश पारित करने कलेक्टर को कोई अधिकार नहीं है।

(v). विहित प्राधिकारी ने उभय पक्ष के विद्वान अधिवक्ताओं को सुनकर अपने निर्णय व आदेश दिनांक 1.4.2015 द्वारा 'अधिनियम 1960' के अन्तर्गत निर्गत नवीन नोटिस को निरस्त कर दिया। निर्णय का निष्कर्ष व आदेश निम्न है:-

"वाद पत्रावली पर उपलब्ध अभिलेखों का गहनता से अवलोकन किया गया। वाद पत्रावली पूर्ण रुप से रिकन्सट्रैक्ट नहीं की गयी हैं। जब तक वाद पत्रावली पूर्ण रुप से रिकन्सट्रैक्ट नहीं हो जाती तब तक खातेदार को दिये गये नोटिस पर कार्यवाही किया जाना न्याय संगत प्रतीत नहीं होता।

अतः तहसीलदार धामपुर वाद से सम्बन्धित पुरानी मूलवाद पत्रावलियाँ तलाश करके इस न्यायालय के समक्ष प्रस्तुत करें।"

एवं आदेश पारित कियाः-

"तहसीलदार धामपुर के निर्देशित किया जाता है कि खातेदार से सम्बन्धित पुरानी वाद पत्रावलियां शीघ्र तलाश कर इस न्यायालय के समक्ष प्रस्तुत करे, जिससे रिट याचिका संख्या 8239/1980 में मा0 उच्च न्यायालय का आदेश दिनांक 9.12.96 के अनुपालन में कार्यवाही की जा सके। वाद पत्रावली उपलब्ध होने तक वर्ष 2009 में खातेदार को सीलिंग अधिनियम की धारा 10(2) के अन्तर्गत दिया गया नोटिस निरस्त किया जाता है।"

(vi). विहित प्राधिकारी के आदेश दिनांक 1.4.2005 के विरुद्ध, उत्तर प्रदेश सरकार ने सीलिंग अपील संख्या 20151300001305, न्यायालय आयुक्त, मुरादाबाद मण्डल, मुरादाबाद के समक्ष 'अधिनियम 1961' को धारा 13 के अंतर्गत पेश की। अपील के संग धारा 5 के अंतर्गत प्रार्थना पत्र भी दायर किया, जिसके द्वारा अपील दायर करने में हुए करीब 4 माह के विलम्ब को क्षमा करने की प्रार्थना की गयी। उक्त प्रार्थना पत्र के मुख्य अंश आगे वर्णित किये गये है।

"प्रार्थी द्वारा अवर न्यायालय द्वारा पारित आदेश दिनांक 01/04/15 के विरुद्ध अपील इस न्यायालय में 30 दिवस के भीतर योजित करनी थी, किंतु सम्बंधित प्रकरण में उ0 प्र0 सरकार की ओर से अपीलीय न्यायालय में अपील योजित किये जाने के सम्बंध में जिला शासकीय अधिवक्ता राजस्व द्वारा अपनी

विधिक राय प्रभारी अधिकारी सीलिंग को दिनांक 13/07/15 को प्रस्तुत की गयी जिसके पश्चात् दिनांक 17/07/15 को जिलाधिकारी बिजनौर द्वारा उक्त आदेश के विरुद्ध अपील योजित किये जाने के लिये मण्डलीय शासकीय अधिवक्ता राजस्व को पत्र प्रेषित किया गया, जिसके अनुसरण में यह अपील माननीय न्यायालय में प्रस्तुत की जा रही है, क्यों कि दिनांक 01/04/15 के आदेश के विरुद्ध अपील नहीं हो सकी, इस कारण इस अपील को योजित करने में लगभग 4 माह का विलम्ब हो गया है, जो न्याय की दृष्टि से क्षमा किये जाने योग्य है।

अतः श्रीमानजी से प्रार्थना है कि अपील योजित करने में हुआ विलम्ब क्षमा करते हुए अपील सुनवाई हेतु गृहण किये जाने के आदेश पारित किये जावे।"

(vii). आयुक्त, मुरादाबाद मण्डल, मुरादाबाद ने निम्न उद्धृत आदेश दिनांक 3.9.2015 के द्वारा याची को नोटिस दिए बिना, केवल उ.प्र. सरकार के अधिवक्ता को सुनकर, अपील पेश करने में हुए करीब 4 माह के विलम्ब को क्षमा कर दिया और अपील को गुण दोष पर सुनने लिए अंगीकृत कर लिया।

"पत्रावली प्रस्तुत हुई। अपीलार्थी/उ0प्र0 सरकार की ओर से उपस्थित विद्वान शासकीय अधिवक्ता को सुना गया। अपील योजित करने में हुए विलम्ब को क्षमा किया जाता है। अपील सुनवाई हेतु ग्रहण की जाती है। दर्ज की जाये। नोटिस निर्गत किये जाये। अवर न्यायालय का अभिलेख मंगाया जाये। पत्रावली वास्ते सुनवाई दिनांक 08-10-2015 को पेश हो।"

(viii). आयुक्त मुरादाबाद मण्डल द्वारा पारित आदेश दिनांक 3.9.2015 के विरुद्ध याची ने उक्त आदेश को प्रत्याहार (रिकाल) व अपास्त करने का आवेदन दिनांक 3.11.2006, को आयुक्त के समक्ष पेश किया। आयुक्त ने उभय पक्षों के तर्कों पर विचार करके अपने आदेश 1.12.2016 के माध्यम से, उक्त प्रार्थना पत्र को निरस्त कर दिया। उक्त आदेश के मुख्य अंश निम्न हैः-

"मेरे द्वारा उभयपक्षों की ओर से प्रस्तुत तर्कों पर विचार किया गया तथा पत्रावली का अवलोकन किया गया। प्रश्नगत अपील लगभग 04 माह विलम्ब से योजित की गयी थी, जिसका कारण धारा-5 के प्रार्थना पत्र में दर्शाया गया है। अतः धारा-5 का प्रार्थना पत्र स्वीकार करके कोई विधिक त्रुटि नहीं की गयी है प्रतिपक्षीगण को अपील में आपत्ति प्रस्तुत करने का पर्याप्त अवसर प्राप्त है। मा0 उच्च न्यायालय द्वारा Writ no. 28715 of 2015 Vinit Kumar And Anr. Vs. state of U.P. and 3 ors. Order dated 19.5.2015 एव मा0 उच्चतम न्यायालय द्वारा Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors JT 2000 (5) 389, Perumon Bhagvathy Devaswam Vs. Bhargavi Amma (2008) SCC 321 में समय पर दी गयी विभिन्न विधिक व्यवस्थाओं में धारा -5 के प्रार्थना पत्र पर उदारता का दृष्टिकोण अपनाये जाने के निर्देश दिये गये हैं। वाद के शीघ्र निस्तारण में सहयोग करना सभी पक्षकारों का दायित्व होता है। ऐसी स्थिति में प्रश्नगत आदेश दिनांक 03.09.2015 को रिकॉल किये जाने का कोई औचित्यपूर्ण कारण न पाते हुये प्रतिपक्षी संख्या-1 एवं प्रतिपक्षी संख्या -5 की ओर प्रस्तुत रिकॉल प्रार्थना पत्र निरस्त किये जाते हैं। पत्रावली अन्तिम बहस हेतु दिनांक 08.12.2016 को पेश हो।"

(ix). उक्त वर्णित आदेश दिनांक 3.9.2015 व 1.12.2016 से क्षुब्द होने के कारण याची, ने याचिका (आज्ञापत्र याचिका संख्या 58295/2016), उच्च न्यायालय के समक्ष दिनांक 7.12.2016 को योजित की। इस याचिका पर दिनांक 9.12.2016 को आदेश पारित हुआ कि याचिका की अग्रिम तिथि

21.12.2016 होगी, साथ ही प्रतिशपथ पत्र दाखिल करने का आदेश भी पारित किया गया।

(x). याचिका संख्या 58295/2016 उच्च न्यायालय में विचाराधीन थी, कि आयुक्त मुरादाबाद, ने अपील सं0 2015 1300001305 में उभय पक्ष के विद्वान अधिवक्ताओं को सुनकर अंतिम निर्णय दिनांक 29.12.2016 को पारित कर दिया, जिसके द्वारा आक्षेपित आदेश दिनांक 1.4.2005 को निरस्त कर दिया गया। आदेश के मुख्य अंश निम्न है-

"सम्पूर्ण तथ्यों के परिशीलन से यह स्पष्टतः विदित होता है कि प्रश्नगत प्रकरण में वर्ष 1976 में दिये गये नोटिस से सम्बिन्धित पत्रावलियां तलाश करने के उपरान्त भी नहीं मिली। मा0 उच्च न्यायालय में योजित रिट याचिका संख्या 8239/1980 कुरी सहकारी समिति लि0 आदि बनाम उत्तर प्रदेश में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 09.12.96 के अनुपालन में तहसीलदार धामपुर द्वारा प्रतिवादीगण के जोत में सम्मिलित समस्त भूमि के आधार पर सीलिंग प्रपत्र तैयार करके उप जिलाधिकारी द्वारा अपने पत्र दिनांक 05.12.08 के साथ संलग्न कर प्रपत्र विहित प्राधिकारी (सीलिंग) के न्यायालय में अग्रेतर कार्यवाही हेतु प्रस्तुत किये। विहित प्राधिकारी (सीलिंग) द्वारा दिनांक 05.12.09 को पत्रावली पर अंकित फर्देहकॉम आदेश में पक्षकारों को नोटिस जारी करने का आदेश दिया गया है तथा मूल वाद पत्रावली पर उपलब्ध अभिलेख भी रिकन्सट्रक्ट (Reconstruct) करने से सम्बन्धित है। जहाँ तक रिट याचिका संख्या 36916/2008 अपर गंगेज शुगर मिल स्योहारा बनाम उ.प्र. सरकार में तत्कालीन तहसीलदार कालीशंकर वर्मा द्वारा दिनांक 25.11.08 को प्रतिशपथपत्र दाखिल करते हुए प्रतिशपथपत्र के पैरा सं0 3 ता 52 तक सत्यापित किये जाने का प्रश्न है। उक्त प्रतिशपथपत्र अन्य राजस्व अभिलेखों उद्धरण खतौनी आदि के आधार पर भी सत्यापित किया जा सकता है। ऐसी स्थिति में विहित प्राधिकारी को आदेश दिनांक 01.04.15 के अन्तर्गत धारा 10 (2) के अन्तर्गत दिया गया नोटिस वापिस करने के स्थान पर पत्रावलियों के रिकन्सट्रक्ट (Reconstruct) करने की कार्यवाही को पूर्ण करना चाहिए था, जैसा कि स्वयं विहित प्राधिकारी (सीलिंग) द्वारा अपने आदेश में अंकित भी किया गया है। प्रतिपक्षीगण के विद्वान अधिवक्ता की ओर से (2009.(9) ADJ811(SC)) में दी गयी व्यवस्था की ओर भी ध्यान आकृष्ट किया गया है, परन्तु विहित प्राधिकारी (सीलिंग) बिजनौर द्वारा पारित आदेश दिनांक 01.04.2015 के अन्तर्गत धारा 10(2) का नोटिस वापिस लिया गया है। ऐसी स्थिति में प्रतिपक्षीगण का यह कथन कि "उत्तर प्रदेश सरकार को अधिकतम जोत सीमा आरोपण अधिनयम की धारा -13 के अन्तर्गत अपील योजित करने का अधिकार नहीं था,"- प्रतिपक्षीगण की ओर से प्रस्तुत मा0 उच्चतम न्यायालय द्वारा दी गयी विधिक व्यवस्था (2009(9) ADJ811(SC)) के आलोक में विधि मान्य नहीं है। अतः वर्णित परिस्थितियों में अपीलार्थी उत्तर प्रदेश सरकार की ओर से उपस्थित विद्वान शासकीय अधिवक्ता के तर्कों में बल प्रतीत होता है तथा उ0प्र0 सरकार की ओर से योजित अपील स्वीकार किये जाने योग्य पायी जाती है।

आदेश

उपरोक्त विवेचना के आधार पर उत्तर प्रदेश सरकार द्वारा योजित अपील स्वीकार की जाती है। विहित प्राधिकारी (सीलिंग)/अपर कलेक्टर बिजनौर द्वारा पारित आदेश दिनांक 01.04.2015 निरस्त किया जाता है। पत्रावली की जाती है कि मा0 उच्च न्यायालय द्वारा रिट याचिका संख्या 8239/1980 कुरी सहकारी समिति लि0 आदि बनाम उत्तर प्रदेश में पारित आदेश दिनांक 09.12.96 के समादर में पक्षकारों के आपत्ति एवं साक्ष्य का पर्याप्त अवसर देते हुए गुण-दोष के आधार पर निर्णयादेश पारित करें। उक्त

आदेश की प्रमाणित प्रतिलिपि सहित अवर न्यायालय का अभिलेख वापिस किया जाये। अपील पत्रावली संचयार्थ अभिलेखागार प्रेषित की जाये।"

(xi). उपरोक्त वर्णित आदेश दिनांक 29.12.2016 से क्षुब्ध होने के कारण याची ने एक और याचिका (व्यवहार प्रकीर्ण आज्ञापत्र याचिका संख्या 5712 वर्ष 2017) इस उच्च न्यायालय में योजित की। इस याचिका पर निम्न उद्धृत आदेश दिनांक 7.2.2017 को पारित हुआ।

"Learned Standing Counsel has accepted notice on behalf of all the respondents. He prays for and is according two weeks time to seek instruction or file counter affidavit. Rejoinder affidavit may be filed within three days thereafter.

List this matter on 27.02.2017 in the additional cause list.

Any action, in between, would be subject to final decision to be passed in this writ petition."

(xii). दोनों याचिकाये (58295/2016 व 5712/2017) वर्तमान आदेश से एक साथ निर्णत की जा रही है।

2. याचिका सं0 58295 वर्ष 2016 में प्रतिपक्ष सं0 1 व 2 की तरफ से प्रतिशपथ पत्र दाखिल किया गया है, जिसमे कथन किया गया है की आयुक्त महोदय ने 'पर्याप्त कारण' होने के कारण 4 माह के विलम्ब को क्षमा किया। ए आई आर 1987 उच्चतम न्यायालय, 1353 में प्रतिवेदित निर्णय को भी आधार बनाया। प्रतिशपथ पत्र का उत्तर देते हुए याची ने कथन किया कि आयुक्त ने बिना नोटिस दिये, विलम्ब को क्षमा करने का अवैधानिक आदेश पारित किया है।

3. याचिका संख्या 5712 वर्ष 2017 में भी प्रतिपक्ष 2 व 3 की तरफ से प्रतिशपथपत्र दायर किया गया है, जिसमें मुख्य रुप से कहा कि:-

5. "यह की अपील प्रश्नगत आदेश दिनांकित 29.12.2016 द्वारा बिल्कुल सही प्रकार, नियमानुसार, विधिपूर्वक, समस्त तथ्यों एवं साक्ष्यों के आधार पर निर्णित की है और स्पष्ट किया गया है कि प्रश्नगत प्रकरण में वर्ष 1976 में दिये गये नोटिस से संबंधित पत्रावली जो तालाश करने के उपरान्त भी नहीं मिली, उनको रिकन्सटक्ट कराने के आदेश दिये गये हैं और उनको रिकन्सटक्ट कराना आवश्यक है तदानुसार अपील स्वीकार की जाकर प्रश्नगत आदेश द्वारा आदेशित किया गया कि विहित प्राधिकारी/ अपर जिलाधिकारी , बिजनौर को इस निर्देश के साथ प्रति प्रेषित किया जाता है कि वह माननीय उच्च न्यायालय द्वारा रिट याचिका संख्या-8239/1980 कुड़ी सहकारी समिति आदि बनाम उ0 प्र0 सरकार में पारित आदेश दिनांक 09.12.1996 के समादर में पक्षकारों को आपत्ति एवं साक्ष्य का पर्याप्त अवसर देते हुए गुण-दोष के आधार पर निर्णय पारित करें। उक्त आदेश के विरुद्ध रिट याचिका पोषणीय नहीं है। याची को यह वैकल्पिक सुविधा प्राप्त है कि अवर न्यायालय / विहित प्राधिकारी सीलिंग, बिजनौर के समक्ष उपस्थित होकर प्रस्तुत कर सकते थे जो याची द्वारा नहीं किया गया इस आधार पर याचिका पोषणीय नहीं है और सव्यय निरस्तकरणीय है।"

याची के प्रतिशपथ का उत्तर भी दिया है, जिसमें याचिका में वर्णित कथनों का समर्थन किया गया है।

4. याची के विद्वान अधिवक्ता श्रेय शर्मा, ने कथन किया कि आक्षेपित आदेश निम्न कारणों से न्याय विरुद्ध है।

(क) विहित प्राधिकारी के द्वारा पारित आदेश दिनांक 1.4.2015 के विरुद्ध 'अधिनियम 1960' की धारा 13 के अन्तर्गत अपील पोषणीय नहीं है, क्योकि आदेश दिनांक 1.4.2015 'अधिनियम 1960' की धारा 11(2) या धारा (12) के अधीन पारित नहीं किया गया है। याची के विद्वान अधिवक्ता ने अपने कथन के समर्थन में उच्चतम न्यायालय द्वारा पारित निर्णय ***सुपर कैसेट इंडस्ट्रीज लि. बनाम उ.प्र. सरकार 2009 (10) एस सी सी 531*** का उल्लेख किया।

(ख) विद्वान अधिवक्ता ने कथन किया कि आयुक्त के द्वारा विलम्ब क्षमा का आदेश याची को नोटिस दिये बिना ही पारित किया गया है, अतः यह आदेश न्याय विरुद्ध है। अपने कथन के समर्थन में इस उच्च न्यायालय द्वारा पारित आदेश ***शम्भू सरन चौबे व अन्य बनाम उ.प्र. सरकार व अन्यः 2012 (10) ए डी जे, 742*** का उल्लेख किया।

(ग) विद्वान अधिवक्ता का यह भी कथन है, कि विलम्ब क्षमा के आदेश को चुनौती देने वाली याचिका (याचिका संख्या 58295/2016) इस उच्च न्यायालय में लम्बित थी की इस दौरान ही आयुक्त ने अपील पर गुण दोष पर निर्णय ले लिया गया था, परन्तु केवल इस कारण से उक्त याचिका स्वयं ही निष्फल नहीं हो जाती है। अगर यह न्यायालय इस निष्कर्ष पर पहुँचता है कि विलम्ब क्षमा का आदेश न्याय विरुद्ध था, तो अपील पर गुण दोष पर दिया गया आदेश स्वतः ही निष्फल हो जायेगा, क्योंकि वो आदेश एक 'आश्रित आदेश' (dependent order) है। इस तर्क को पुख्ता करने के लिए विद्वान अधिवक्ता ने उच्चतम न्यायालय के द्वारा पारित ***रामा गोउडा, मेजर बनाम स्पेशल लैंड एक्यूजीशन ऑफिसर, बैंगलोर 1988 (2) एस सी सी 142*** के निर्णय का उल्लेख किया।

(घ) विद्वान अधिवक्ता ने आगे कथन किया कि आक्षेपित आदेश दिनांक 29.12.2016 गुण दोष पर भी विधि विरुद्ध है,क्योंकि वर्तमान प्रकरण में याची के विरुद्ध 'अधिनियम 1960' के अंतर्गत नवीन नोटिस प्रेषित नहीं किया जा सकता था तथा जिलाधिकारी के आदेश से प्रकरण के दस्तावेजों का पुनर्निर्माण (Reconstruct) नहीं किया जा सकता। यह आदेश उच्च न्यायालय के आदेश दिनांक 9.12.1996 में पारित दिशा निर्देशों के विपरीत भी है।

(ङ) याची द्वारा लिखित बहस भी पेश की गयी है, जिसमें ऊपर वर्णित बहस को दोहराया गया है।

5. विद्वान मुख्य स्थाई अधिवक्ता, उ0 प्र0 सरकार ने प्रति-उत्तर में कथन किया कि;

(क) 'अधिनियम 1960' की धारा 13 में स्पष्ट रुप से वर्णित है कि 'धारा 11' की उपधारा (2) या धारा 12 के अधीन दिये गये किसी आदेश से क्षुब्ध कोई पक्ष उक्त आदेश की तारीख से 30 दिन के अन्दर उस आयुक्त के समक्ष अपील पेश कर सकता है, जिसके अधिक्षेत्र में वह भूमि या उसका कोई भाग स्थित हो। धारा 10 (2) में यह स्पष्ट रुप से उल्लेखित है कि, खातेदार को धारा 10(1) में प्रेषित नोटिस की आपत्ति धारा 10 (2) में की जा सकती है तथा ऐसी आपत्ति का निर्णय धारा 12 (1) के अनुसार किया जायेगा। प्रस्तुत प्रकरण में वर्ष 2010 में एक नोटिस धारा 10 (2) के अंतर्गत पूर्व में योजित कार्यवाही की निरंतरता में प्रेषित किया गया था, जिससे विरुद्ध याची ने आपत्ति पेश की थी। आपत्ति पेश होने पर विहित प्राधिकारी ने उभय पक्ष को सुनकर, कारणों को अभिलिखित करके आपत्तियों को अस्वीकार करने का निर्णय दिनांक 1.4.2015 को पारित किया। अतः उक्त आदेश, धारा 12 (1) के अंतर्गत पारित आदेश माना जायेगा।

अतः उक्त आदेश के विरुद्ध अपील धारा-13, 'अधिनियम 1960'के अन्तर्गत पेश की जा सकती है। अतः उ.प्र. सरकार द्वारा दाखिल अपील पूर्णतः पोषणीय है। आयुक्त ने 'पर्याप्त कारण' होने के कारण विलम्ब क्षमा का आवेदन पर विधिपूर्वक आदेश पारित किया। आयुक्त द्वारा बिना नोटिस दिये विलम्ब क्षमा का आदेश पारित करने में यदि कोई विधिक त्रुटि थी तो भी याची द्वारा रिकॉल (प्रत्याहार) प्रार्थना पत्र पर याची को सुनकर पूर्व में पारित विलम्ब क्षमा का आदेश यथावत रख कर आयुक्त द्वारा उक्त त्रुटि को दूर कर लिया गया है।

6. उभय पक्षों के विद्वान अधिवक्ताओं के तर्कों को ध्यान पूर्वक सुना व प्रकरण के अभिलेखों व याची के द्वारा पेश की गयी लिखित बहस का परिशीलन ध्यान पूर्वक किया।

7. **(i).** प्रथम बिन्दू जिस पर इस न्यायालय को विचार करना है, वो है कि, प्रस्तुत प्रकरण में विहित प्रधिकारी के आदेश दिनांक 1.4.2015 के विरुद्ध उ. प्र. सरकार के द्वारा पेश की गयी अपील 'अधिनियम 1960' की धारा 13 के अंतर्गत पोषणीय है या नहीं?

(ii). 'अधिनियम 1960' के वो उपबंध जो इस प्रकरण को निस्तारित करने के लिए सुसंगत है, वो निम्न है।

धारा 10. ***विवरण प्रस्तुत न करने वाला या अपूर्ण अथवा गलत विवरण प्रस्तुत करने वाले खातेदारों को नोटिस- (1).*** *यदि कोई जोतदार आधार 9 के अधीन प्रस्तुत किये जाने हेतु अपेक्षित कोई विवरण प्रस्तुत न करे या अपूर्ण अथवा गलत विवरण प्रस्तुत करे तो ऐसी हर एक दशा में विहित प्राधिकारी या तो स्वयं या अपने अधीनस्थ किसी व्यक्ति के माध्यम से ऐसी जांच करने के बाद जो वह आवश्यक समझे, एक विवरण तैयार करवायेगा जिसमें ऐसे ब्यौरे दिये होंगे जो विहित किये जायें इस विवरण में विशेष रुप से धारा 6 के अधीन विमुक्त भूमि, यदि कोई हो, दिखाई जायेगी तथा वह गाटा या वे गाटे भी दिखाये जायेंगे जिसे या जिन्हें अतिरिक्त भूमि घोषित करने का विचार हो।*

(2). *तत्पश्चात विहित प्राधिकारी उपधारा (1) के अधीन तैयार किये गये विवरण की एक प्रति के सहित एक नोटिस ऐसी रीति से, जो विहित की जाए, हर एक ऐसे जोतदार पर तामील कराएगा, जिसमें उससे कहा जाएगा कि वह उस नोटिस में निर्दिष्ट अवधि के अन्दर कारण प्रकट करें कि विवरण क्यों ठीक न मान लिया जाए। निर्दिष्ट अवधि नोटिस की तामील की तारीख से 10 दिन से कम की न होगी।*

धारा 11. आपत्ति प्रस्तुत न किये जाने पर अतिरिक्त भूमि का अवधारण-(1). *यदि धारा 9 के अधीन प्रकाशित नोटिस के अनुसरण में किसी जोतदार द्वारा प्रस्तुत किया गया कोई विवरण विहित प्राधिकारी द्वारा स्वीकार कर लिया जाए अथवा यदि धारा 10 के अधीन विहित प्राधिकारी द्वार तैयार किए गए विवरण पर निर्दिष्ट अवधि के अन्दर आपत्ति न की जाये तो विहित प्राधिकारी जोतदार की अतिरिक्त भूमि तद्नुसार अवधारित करेगा।*

(2). *विहित प्राधिकारी ऐसे जोतदार द्वारा जो अपनी अनुपस्थिति में दिए गए आदेश से क्षुब्ध हो, उपधारा (1) के अधीन आदेश की तारीख से 30 दिन के अन्दर प्रार्थना को रद्द कर देगा और उस जोतदार को धारा 10 के अधीन तैयार किए गए विवरण के विरुद्ध आपत्ति प्रस्तुत करने की अनुमति देगा तथा धारा 12 के उपबन्धों के अनुसार उसका निर्णय करने हेतू कार्यवाही करेगा।*

(3). *धारा 13 के उपबन्धों के अधीन रहते हुए विहित प्राधिकारी का आदेश अंतिम तथा निश्चायक होगा तथा उन पर किसी विधि न्यायालय में आपत्ति नहीं की जाएगी।*

धारा 12. आपत्ति प्रस्तुत किए जाने पर विहित प्राधिकारी द्वारा अधिशेष

भूमि का अवधारण- *(1) यदि धारा 10 की उपधारा (2) के अधीन या धारा 11 की उपधारा (2) के अधीन अथवा धारा 13 के अधीन अपील में दिए गए किसी आदेश के परिणामस्वरुप कोई आपत्ति प्रस्तुत की गई हो तो विहित प्राधिकारी पक्षों की सुनवाई का और साक्ष्य प्रस्तुत करने का समुचित अवसर देने के बाद अपने कारणों को अभिलिखित करके आपत्तियों का निर्णय करेगा तथा अतिरिक्त भूमि अवधारित करेगा।*

(2). *धारा 13 के अधीन में दिए गए किसी आदेश के अधीन रहते हुए उपधारा (1) के अधीन विहित प्राधिकारी का आदेश अंतिम तथा निश्चायक होगा तथा उस पर किसी विधि न्यायालय में आपत्ति नहीं की जायेगी।*

धारा 12-क कतिपय मामलों के सिवाय खातेदार का विकल्प माना जाना- *धारा 11 या धारा 12 के अधीन अतिरिक्त भूमि का अवधारण करने में विहित प्राधिकारी, यथा सम्भव, खातेदार द्वारा प्लाट या प्लाटों के सम्बन्ध में जिन्हें वह और उसके परिवार के अन्य सदस्य, यदि कोई हो, इस अधिनियम के उपबन्धों के अधीन अपने पर अथवा उन पर प्रयोज्य अधिकतम क्षेत्र के भाग के रुप में रखना चाहे, इंगित विकल्प को स्वीकार करेगा, चाहे वह उसके द्वारा धारा 9 के अधीन अपने विवरण-पत्र में या किन्ही अनुवर्ती कार्यवाहियों में इंगित किया गया हो:*

परन्तु यह कि-

(क) विहित प्राधिकारी खातेदार के संबंध में प्रयोज्य अधिकतम क्षेत्र में शामिल की जाने वाली भूमि की संपार्श्विकता को ध्यान में रखेगा;

(ख) यदि जोतदार की पत्नी की पास कोई ऐसी भूमि हो तो अधिकतम क्षेत्र का अवधारण करने के प्रयोजनार्थ जोतदार द्वारा धृत भूमि के साथ शामिल की गई हो, तथा उसकी पत्नी ने उन पर प्रयोज्य अधिकतम क्षेत्र के भाग के रुप में रखे जाने वाले प्लाट या प्लाटों के सम्बन्ध में जोतदार द्वारा इंगित विकल्प के विषय में सम्मति न दी हो, तो विहित प्राधिकारी यथासंभव, ऐसी रीति से अतिरिक्त भूमि घोषित करेगा कि जोतदार की पत्नी द्वारा धृत भूमि में से लिये जाने वाले क्षेत्र का कुल अतिरिक्त क्षेत्र में वही अनुपात हो जो उसके (पत्नी) द्वारा मूलतः धृत क्षेत्र का परिवार द्वारा धृत कुल भूमि में हो;

(ग) यदि किसी व्यक्ति के पास राज्य सरकार या उत्तर प्रदेश कृषि उधार अधिनियम, 1973 की धारा 2 खण्ड (ग) में यथा परिभाषित किसी बैंक अथवा किसी सहकारी भूमि विकास बैंक या अन्य सहकारी समिति या निगम या किसी सरकारी कम्पनी के पास गिरवी रखी गई भूमि को शामिल करके अधिकतम क्षेत्र से अधिक भूमि हो तो, यथा संभव, इस प्रकार गिरवी रखी गई भूमि से भिन्न भूमि अतिरिक्त भूमि अवधारित की जाएगी;

(घ). यदि किसी व्यक्ति के पास, धारा 5 की उपधारा (6) या उपधारा (7) में निर्दिष्ट किसी अन्तरण या विभाजन विषयक किसी भूमि को शामिल करके, अधिकतम क्षेत्र से अधिक भूमि हो तो, यथासम्भव ऐसे अन्तरण या विभाजन विषयक भूमि से भिन्न भूमि अतिरिक्त भूमि अवधारित की जाएगी तथा यद अतिरिक्त भूमि के अन्तर्गत कोई ऐसी भूमि शामिल है जो ऐसे अन्तरण या विभाजन का विषय हो तो ऐसा अन्तरण या विभाजन जहाँ तक उसका सम्बन्ध अतिरिक्त भूमि में शामिल भूमि से है, शून्य समझा जाएगा और सदैव से शून्य होगा, तथा-

(1) अंतरिती अपने द्वारा अंतरक को अग्रिम दिये गये प्रतिफल की आनुपातिक धनराशि को, यदि कोई हो, लौटाने हेतु दावा कर सकता है, तथा यह धनराशि धारा 17 के अधीन अंतरक को देय राशि पर तथा अधिकतम क्षेत्र के अन्दर अंतरक द्वारा रखी गई किसी भूमि पर भी धारित होगी और उत्तर प्रदेश जमींदारी विनाश और भूमि व्यवस्था अधिनियम, 1950 की धारा 153 में अन्तर्विष्ट

किसी बात के होते हुए भी ऐसी भूमि को उस प्रभार की पुष्टि हेतु बेचा जा सकेगा;

(2). बटवारा से सम्बन्धित (ऐसे खातेदार जिसके सम्बन्ध में अधिशेष भूमि अवधारित की गयी हो, से भिन्न) कोई पक्ष जिसकी भूमि उक्त जोतदार की अतिरिक्त भूमि में शामिल की गयी हो, बटवारा को फिर से कराने का हकदार होगा।

धारा 13. अपील- *(1) धारा 11 की उपधारा (2) या धारा 12 के अधीन दिये गये किसी आदेश से क्षुब्ध कोई पक्ष उक्त आदेश की तारीख से 30 दिन के अन्दर उस आयुक्त के समक्ष अपील पेश कर सकता है जिसके अधिक्षेत्र में वह भूमि याउसका कोई भाग स्थित हो।*

(2) अपील को यथाशक्य शीघ्र निस्तारित करेगा तथा उस पर उसका आदेश अन्तिम और निश्चायक होगा तथा किसी विधि न्यायालय में उस पर आपत्ति नहीं की जाएगी।

(3) यदि इस धारा के अधीन अपील की जायें तो आयुक्त उस आदेश के प्रवर्तन को जिसके विरुद्ध अपील की गयी हो तो ऐसे समय के लिये और ऐसी शर्तो पर स्थगित कर सकता है, जो ठीक और उचित समझी जायें:

प्रतिबन्ध यह कि भूमि के उस भाग के सम्बन्ध में जिसके अतिरिक्त होने के विषय में या तो धारा 10 की उपधारा (2) के अधीन या धारा 11 की उपधारा (2) के अधीन आपत्ति में विवाद नहीं उठाया गया था अथवा अपील में विवाद न उठाा गया हो उस आदेश का प्रवर्तन जिसके विरुद्ध अपील की गयी हो, स्थगित नहीं किया जायेगा और 28 सितम्बर, 1970 के पहले इस उपधारा के अधीन दिया गया कोई स्थगन आदेश राज्य सरकार द्वारा अपील न्यायालय को तदर्थ आवेदन-पत्र दिये जाने पर उस न्यायालय द्वारा तद्नुसार परिष्कृत कर दिये जायेगा।

स्पष्टीकरण- *इस प्रतिबन्धात्मक के प्रयोजनार्थ धारा 9 या धारा 10 के अधीन किसी नोटिस की, अथवा विहित प्राधिकारी के समक्ष कार्यवाहियों की नियमितता, विधिमाविहिता या वैधता के सम्बन्ध में कोई विवाद स्वतः भूमि का अतिरिक्त भूमि होने से सम्बन्धित विवाद नहीं समझा जायेगा।"*

(**iii**) उपरोक्त वर्णित उपबंधों से यह विदित है कि अधिनियम 1960 की धारा 11 की उपधारा (2) या धारा 12 के अधीन दिये गये किसी आदेश से क्षुब्ध कोई पक्ष धारा 13 के अंतर्गत आयुक्त के समक्ष अपील पेश कर सकता है। प्रस्तुत प्रकरण में यह देखना आवश्यक है कि क्या विहित प्राधिकारी द्वारा पारित आदेश दिनांक 1.4.2015 धारा 11 की उपधारा (2) या धारा 12 के अधीन पारित आदेश है या नहीं। प्रकरण के तथ्यों से यह भी विदित है कि वाद सं0 7/2009 में याची को धारा 10(2) के अंतर्गत प्रेषित नोटिस पर याची द्वारा पेश की गयी आपत्ति को विहित प्राधिकारी ने आदेश दिनांक 1.4.2005 द्वारा निरस्त किया गया था। अतः यह आदेश धारा 12(1) के अन्तर्गत पारित किया गया है। अतः आदेश दिनांक 1.4.2015 के विरुद्ध अपील धारा 13, अधिनियम 1960 के अंतर्गत पोषणीय है। उच्चतम न्यायालय द्वारा पारित निर्णय ***सुपर कैसट इंडस्ट्रीज लि. बनाम उत्तर प्रदेश सरकार: 2009 (10) एस सी सी 531*** में भी यही प्रतिपादित किया गया है कि यदि कोई आदेश धारा 12, अधिनियम 1961 के अंतर्गत पारित होता है तो उसके विरुद्ध धारा 13, 'अधिनियम 1961' में अपील पेश की जा सकती है। धारा 12 की कार्यवाही, धारा 10(2) के नोटिस पर आरम्भ होती है तथा उक्त नोटिस पर आपत्ति धारा 12(1) के अन्तर्गत विनिश्चित की जाती है, जैसा प्रस्तुत प्रकरण में हुआ है। अतः प्रस्तुत प्रकरण में धारा 13 के अन्तर्गत ऊ.प्र. सरकार द्वारा पेश की गई अपील पोषणीय है।

8. **(i).** वर्तमान प्रकरण में द्वितीय बिन्दू जिस पर निर्णय लिया जाना है वो है कि क्या धारा 13 अधिनियम 1961 के अंतर्गत अपील पेश करने में विलम्ब को क्षमा करने का प्रार्थना पत्र, प्रतिवादी

(यहाँ याची) को बिना नोटिस दिये, स्वीकार किया जा सकता है या नहीं? यदि नहीं, तो उक्त आदेश के विरुद्ध रिकॉल (प्रत्याहार) प्रार्थना पत्र पर उभय पक्ष को सुनकर पूर्व में पारित 'विलम्ब क्षमा' का आदेश यथावत बनाये रखने के आदेश का क्या असर होगा?

(ii). प्रस्तुत प्रकरण के तथ्यों से यह निर्विवाद है कि आयुक्त, ने प्रतिवादी (यहां याची) को पूर्व नोटिस दिये बिना ही उ.प्र. सरकार द्वारा अपील पेश करने में हुए 4 माह के विलम्ब को क्षमा कर दिया था। उसके उपरान्त याची की रिकॉल (प्रत्याहार) प्रार्थना पत्र पर उभय पक्षों को सुनकर पूर्व में पारित 'विलम्ब क्षमा' के आदेश को ही यथावत रखा।

(iii). अधिनियम 1960की धारा 38, अपीलीय न्यायालय की शक्तियों तथा उसके द्वारा अनुकरणीय प्रक्रिया को वर्णित करती है। धारा 38 (1) के अनुसार इस अधिनियम के अधीन अपील की सुनवाई करने में तथा उसका निर्णय करने में अपीलीय न्यायालय को व्यवहार न्यायालय (सिविल कोर्ट) की सब शक्तियां तथा विशेषाधिकार प्राप्त है तथा वह उस प्रक्रिया का अनुसरण करेगा जो सिविल प्रक्रिया संहिता, 1908 में अपीलों की सुनवाई तथा उनके निर्णय हेतु दी हुई हैं। अर्थात् विलम्ब क्षमा करने की प्रक्रिया का स्रोत सिविल प्रक्रिया संहिता 1908 (संक्षेप में सि.प्र.सं.) से होगा। आदेश 41 नियम 3A सि.प्र.सं. में अपील पेश करने में हुए विलम्ब क्षमा के प्रार्थना पत्र को निस्तारित करने की प्रक्रिया वर्णित की गयी है। 'अधिनियम 1960' की धारा 38 व सि.प्र.सं. का आदेश 41 नियम 3क निम्न उद्धृत किया गया है:-

*"**धारा 38. अपीलीय न्याायालय की शक्तियाँ तथा उसके द्वारा अनुकरणीय प्रक्रिया-** (1) इस अधिनियम के अधीन अपील की सुनवाई करने में तथा उसका निर्णय करने में अपीलीय न्यायालय को व्यवहार न्यायालय (सिविल कोर्ट) की सब शक्तियाँ तथा विशेषाधिकार प्राप्त होंगे तथा वह उस प्रक्रिया का अनुसरण करेगा जो सिविल प्रक्रिया संहिता, 1908 में अपीलों की सुनवाई तथा उनके निर्णय हेतु दी हुई है।*

***आदेश 41 नियम 3क. विलम्ब की माफी के लिए आवेदन-** (1) जब कोई अपील उसके लिए विहित परिसीमाकाल के पश्चात् उपस्थापित की जाती है, तब उसके साथ ऐसे शपथपत्र द्वारा समर्थित आवेदन होगा जिसमें वे तथ्य उपवर्णित होंगे जिन पर अपीलार्थी न्यायालय का यह समाधान करने के लिए निर्भर करता है कि ऐसी अवधि के भीतर भीतर अपील न करने के लिए उसके पास पर्याप्त कारण था ।*

(2) यदि न्यायालय यह समझता है कि प्रत्यर्थी को सूचना जारी किए बिना आवेदन को नामंजूर करने का कोई कारण नहीं है तो उसकी सूचना प्रत्यर्थी को जारी की जाएगी और, यथास्थिति, नियम 11 या नियम 13 के अधीन अपील को निपटाने के लिए अग्रसर होने के पूर्व न्यायालय द्वारा उस मामले का अन्तिम रूप से विनिश्चय किया जाएगा ।

(3) जहां उपिनयम (1) के अधीन कोई आवेदन किया गया है वहां न्यायालय उस डिक्री के जिसके विरुद्ध अपील फाइल किए जाने की प्रस्थापना है, निष्पादन, को रोकने के लिए आदेश उस समय तक नहीं करेगा जब तक न्यायालय नियम 11 के अधीन सुनवाई के पश्चात अपील सुनने का विनिश्चय नहीं कर लेता है।"

(iv). उपरोक्त वर्णित प्रक्रिया से यह विदित होता है कि विलम्ब से पेश की गई अपील पर 'विलम्ब क्षमा' का प्रार्थना पत्र मंजूर करने से पहले प्रत्यार्थी को नोटिस देना चाहिये,

परन्तु वर्तमान प्रकरण में ऐसा कोई नोटिस नहीं दिया गया था। अतः आदेश 41 नियम 3क (2) में वर्णित प्रक्रिया का विशुद्ध रुप से अनुपालन नहीं किया है, परन्तु यहां यह उल्लेखित करना प्रासंगिक है, कि याची ने एक रिकॉल(प्रत्याहार) प्रार्थना पत्र दिनांक 3.11.2016, आयुक्त के समक्ष पेश किया था, जिसके माध्यम से 'विलम्ब क्षमा' का आदेश अपास्त करने का निवेदन किया गया था। उक्त प्रार्थना पत्र पर आयुक्त ने उभय पक्षों को सुनकर निर्णय दिनांक 1.12.2016 पारित किया जिसके द्वारा उक्त प्रार्थना पत्र को निरस्त कर दिया तथा विलम्ब क्षमा का पूर्व में पारित आदेश को यथावत रखा। अतः इस प्रक्रिया से आयुक्त ने आदेश 41 नियम 3A सि.प्र.सं. में उल्लेखित प्रक्रिया का अनुपालन कर लिया तथा पूर्व में हुयी प्रक्रिया दोष का निवारण भी कर लिया, क्योंकि पूर्व में बिना नोटिस दिये, विलम्ब क्षमा का आदेश पारित करना मात्र प्रक्रिया दोष था। आयुक्त ने आदेश दिनांक 1.12.2016 में उभय पक्षों को सुनकर स्पष्ट रुप से उल्लेखित किया है कि धारा 5, के प्रार्थना पत्र पर उदारता का दृष्टिकोंण अपनाना चाहिए, इसलिए 4 माह के विलम्ब को क्षमा करने में कोई वैधानिक त्रुटि नहीं है।

(v). उपरोक्त विवेचना से यह न्यायालय इस निष्कर्ष पर पहुँचता है कि याची की शिकायत कि क्षमा विलम्ब के प्रकरण में उसका पक्ष नहीं सुना गया, सत्य नहीं है। आयुक्त ने याची का पक्ष पूर्ण रुप से अपने आदेश दिनांक 1.12.2016 जो रिकॉल (प्रत्याहार) प्रार्थना पत्र पर पारित करने से पहले सुना व इस पर विचार भी किया। अतः आयुक्त के क्षमा विलम्ब के आदेश में कोई त्रुटि नहीं है। याची के विद्वान अधिवक्ता यह बताने में असमर्थ रहे कि वर्तमान तथ्यों पर ध्यान देते हुए 4 माह का विलम्ब, क्षमा क्यों नहीं किया जाना चाहिए। उच्चतम न्यायालय ने अपने कई निर्णयों में प्रतिपादित किया है कि 'विलम्ब क्षमा' के प्रार्थना पत्र का निर्णय करते समय, न्यायालय को 'उदार' व 'व्यावाहारिक' दृष्टिकोण रखना चाहिये न कि 'तकनीकी' या 'रुढ़िवादी' दृष्टिकोण। शम्भू सरन चौबे (पूर्व में उल्लेखित) के निर्णय में इस उच्च न्यायालय की एकल पीठ ने यह प्रतिपादित किया है कि विलम्ब से पेश की गयी अपील, विलम्ब क्षमा प्रार्थना पत्र के पेश किये बिना तथा उक्त प्रार्थना पत्र को स्वीकार किये बिना अंगीकृत नहीं की जा सकती। एकल पीठ ने आदेश 41 नियम 3 A सी.प्र.सं. की प्रक्रिया को पूर्ण रुप से अनुपालन करने पर बल दिया है। वर्तमान वाद में आयुक्त ने पूर्व में उक्त प्रक्रिया को पूर्णरुप से न अपनाने का दोष, रिकॉल (प्रत्याहार) प्रार्थना पत्र को निस्तारित करते समय पूर्णरुप से उक्त प्रक्रिया का अनुपालन करके दूर कर लिया है, अतः शम्भू सरन चौबे (पूर्व में उल्लेखित) में प्रतिपादित विधि सिद्धांतो का पालन कर लिया गया है। **अतः आयुक्त द्वारा पारित आदेश दिनांक 3.9.2015 व 1.12.2016 में कोई विधिक त्रुटि नहीं है। अतः उक्त आदेशों के विरुद्ध पेश की गयी रिट याचिका सं 58295/2011 बलहीन होने के कारण, निरस्त करने योग्य है, अतः निरस्त की जाती है।**

9.**(i).** इस प्रकरण का अन्तिम बिन्दू जिस पर इस न्यायालय को विचार करना है वो यह है कि आयुक्त द्वारा पारित आदेश दिनांक 29.12.2016 गुण दोष पर विधि सम्मत है अथवा नहीं? आयुक्त ने अपने उक्त आदेश में स्पष्ट रुप से उल्लेखित किया है, कि समस्त कार्यवाही उच्च न्यायालय के आदेश दिनांक 9.12.1996 के अनुपालन में ही की गयी है तथा पूर्व कार्यवाही का ही भाग है, जो तहसीलदार की आख्या से भी विदित होता है। नोटिस पर जो आपत्तिया प्रस्तुत करी गई उसमें भी यह उल्लेखित नहीं है कि खातेदार की जोत में 1976 के बाद, भूमि का क्षेत्रफल अधिक या कम हुआ है। अतः इस कार्यवाही से याची के विरुद्ध किसी भी प्रकार से पूर्वाग्रह ग्रस्त होने

की आकांक्षा नहीं है। याची को यह अधिकार है कि वो अपना पक्ष अधिनियम 1961 में दी गयी प्रक्रिया के अंतर्गत रख सकता है।

(ii). पत्रावली न मिलने के कारण, तहसीलदार धामपुर द्वारा याची के जोत में सम्मिलित समस्त भूमि के आधार पर सीलिंग प्रपत्र तैयार किया गया था और उसके अनुक्रम में ही याची को नोटिस दिया गया था। विहित प्राधिकारी ने समस्त प्रक्रिया 'अधिनियम 1960' के उपबन्धों के परिपालन में की गयी है। सम्पूर्ण प्रक्रिया इस न्यायालय के आदेश दिनांक 9.2.1996 के परिपालन में ही की गयी है। अतः आयुक्त महोदय द्वारा पारित आदेश 29.12.2016 में कोई विधिक त्रुटि नहीं है।

(iii). रामा गोउडा (पूर्व में उल्लेखित) के निर्णय में उच्चतम न्यायालय ने प्रतिपादित किया है किविलम्ब क्षमा के आदेश के विरुद्ध कोई याचिका विचाराधीन हो तथा उसी दौरान अपील में निर्णय पारित हो जाये तो पहली याचिका का अन्तिम निर्णय पर अपील के निर्णय के विरुद्ध याचिका का निर्णय निर्भर रहेगा, क्योंकि अपील में पारित आदेश एक 'आश्रित आदेश' (Dependent Order) है। परन्तु वर्तमान प्रकरण में विलम्ब क्षमा के आदेश के विरुद्ध याचिका वर्तमान आदेश के द्वारा निरस्त की जा रही है। अतः रामा गोउडा (पूर्व में उल्लेखित) के निर्णय की कोई प्रासंगिकता वर्तमान प्रकरण में नहीं रह जाती है।

10. उपरोक्त विवेचना के आधार पर यह न्यायालय इस निष्कर्ष पर पहुँचता हैः-

(i). 'अधिनियम 1960' की धारा 10 (2) के अन्तर्गत दिये गये नोटिस की आपत्ति का निस्तारण विहित प्राधिकारी द्वारा 'अधिनियम 1960' की धारा 12(1) के अन्तर्गत वर्णित प्रक्रिया के द्वारा किया जायेगा तथा जो आदेश पारित होगा उसकी अपील 'अधिनियम 1960' की धारा 13 के अन्तर्गत आयुक्त के सामने पेश की जा सकती है। जैसा की वर्तमान प्रकरण में किया गया है। अतः उत्तर प्रदेश सरकार द्वारा पारित अपील पोषणीय है।

(ii). 'अधिनियम 1960' की धारा 13 के अन्तर्गत पेश की गयी अपील की सुनवायी की अनुकरणीय प्रक्रिया 'अधिनियम 1960' की धारा 38 में उल्लेखित है। जिसके अनुसार सि.प्र.सं. 1908 में वर्णित अपीलों की सुनवाई की वर्णित प्रक्रिया का अनुसरण करना चाहिए। सि.प्र.सं. के आदेश 41 नियम 3 क, अपील में विलम्ब की माफी के आवेदन को निस्तारण करने की प्रक्रिया को वर्णित करता है। जिसके अनुसार यदि न्यायालय यह समझता है कि प्रत्यार्थी को सूचना जारी किये बिना आवेदन को नामंजूर करने का कोई कारण नहीं है तो उसकी सूचना प्रत्यार्थी को जारी की जायेगी। इस प्रकरण में प्रत्यार्थी/याची को बिना सूचना दिये, विलम्ब क्षमा का आवेदन स्वीकार कर लिया गया था। परन्तु यह प्रकिया दोष को रिकॉल (प्रत्याहार) आवेदन पर उभय पक्षों को सुनकर पूर्व में पारित आदेश को यथावत रखने के कारण निवारण किया जा चुका है अतः वर्तमान प्रकरण में कोई प्रक्रिया दोष नहीं रह जाता है। तथा पूर्व में उत्पन्न प्रक्रिया दोष का प्रतिकार कर लिया गया है।

(iii). विलम्ब क्षमा के प्रार्थना पत्र का निस्तारण करते समय न्यायालय को उदार व व्यवहारिक दृष्टिकोंण रखना चाहिए न कि तकनीकी या रुढ़िवादी दृष्टिकोंण। अतः वर्तमान प्रकरण में आयुक्त ने उदार व व्यवहारिक दृष्टिकोंण अपनाकर कोई विधिक त्रुटि नहीं की है वरन् उच्चतम न्यायालय द्वारा प्रतिपादित न्यायिक सिद्धांतो का परिपालन ही किया है। 'विलम्ब क्षमा' के प्रार्थना पत्र पर विचार करते समय न्यायालय को उदार, व्यावहारिक, न्याय उन्मुखी, गैर रूढ़िवादी दृष्टिकोंण रखना चाहिए, क्योकि न्यायालय अन्याय को दूर करने के लिए

उपकृत है, न की अन्याय को क़ानूनी रूप देने का लिए। ***(ईशा भट्टाचारजी बनाम रघुनाथपुर नाफर अकादमी; (2013) 12 एस सी सी 649: पैरा: 21 (21.1))***

(iv). उपरोक्त विवेचना के आधार पर यह न्यायालय इस निष्कर्ष पर पहुँचता है कि आक्षेपित आदेश दिनांक 29.12.2016 में गुण दोष पर कोई विधिक त्रुटि नहीं है। अतः आक्षेपित आदेश न्याय संगत है।

(v). अतः याचिका संख्या 5712/2017 भी बलहीन होने के कारण निरस्त की जाती है।

11. **याचिका सं 58295/2016 तथा याचिका सं 5712/2017 बलहीन होने के कारण निरस्त की जाती है। व्यय पर कोई आदेश पारित नहीं किया जा रहा है।**

(2020)1ILR999

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ C No. 6109 of 2004

State of U.P. & Ors. ...Petitioners
Versus
Shri Brahma Dev Tripathi & Anr. ...Respondents

Counsel for the Petitioners:
S.C.

Counsel for the Respondents:
S.C. Sri Anil Yadav, Sri Shyam Narain, Sri Sudhanshu Narain

Industrial Dispute Act, 1947 - Workman were engaged as Beldar-worked regularly and without break-240 days of service during successive calendar year-service terminated without notice or payment of wages in lieu of notice-without payment of retrenchment compensation-termination illegal-in violation of section 6 N-entitled to re-engagement with back wages-no infirmity in order of Labour Court.

Writ Petition dismissed. (E-9)

Cases cited: -

1. State of U.P. through Executive Engineer vs. Raj Karan and another -writ petition No. 6108 of 2004

2. State of U.P. vs. Presiding Officer, Industrial Tribunal (V), Meerut and another, 1990 (83) FLR 497
3. State of U.P vs. Labour Court, Dehradun and another, [2000(86) FLR 649]

4. Banglore Water Supply Sewerage Board vs. A. Rajappa, AIR 1978 SC 548

5. State of U.P. vs. Jai Bir Singh, 2005 (5) SCC 1

6. R.M. Yellatti vs. Assistant Executive Engineer,2006(1) SCC 106

7. State of U.P. through Executive Engineer, Nichali Ganga Nahar, Phoolpur, Kanpur vs. the Labour Court (II) U.P. Kanpur and another in Writ Petition No. 35086 of 1998

8. State of U.P. and another Vs. Hind Majdoor Sabha and others, (2011) 3 UPLBEC 2568

9. ViceChancellor, Lucknow University, Lucknow, Uttar Pradesh Vs. Akhilesh Kumar Khare and another, (2016) 1 SCC 521

10. District Development Officer and another Vs. Satish Kantilal Amreliya, 2018(12) SCC 298

11. Devinder Singh Vs. Municipal Council, Sanaur, (2011) 6 SCC 584

12. Deepali Gundu Surwase Vs. Kranti Junior Adhyapak and others, 2013(139) FLR 541

13. U.P. Power Corpration Ltd. vs. Bijli Mazdor Sangh, (2007) 5 SCC 755

14. Maharashtra State Road Transport Corporation Vs. Casteribe Rajya Parivahan Karmchari Sanghatana, 2009 (8) SCC 556

15. State of Karanataka Vs. Uma Devi, (3) 2006(4) SCC 1

16. B.S.N.L. Vs. Bhurumal, 2014 (7) SCC 177

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against an award made by the Presiding Officer, Labour Court, U.P., Gorakhpur, dated 05.03.2003 in Adjudication Case No. 532 of 1992 and published on 08.09.2003. The aforesaid award is hereinafter referred to as the "impugned award'. By the impugned award, the Labour Court, on reference of an industrial dispute between the petitioners, hereinafter referred to as the "employers' and respondent no. 1, Brahma Dev Tripathi, hereinafter referred to as the "workman', have held termination of services of the workman with effect from 01.09.1991 to be illegal and unjustified. It has further been awarded that the workman would be entitled to reinstatement with continuity in service. About the period during which the workman remained out of employment and the date of the impugned award, the workman has been held entitled to 50% backwages. Costs of Rs. 300/- have also been awarded to the workman.

2. The case of the workman briefly put is that he was engaged as a *Beldar* in the year 1979, by the employers in their Tubewell Construction Division. He worked as such regularly and without break, putting in 240 days of service during successive calendar years. His services were terminated with effect from 01.09.1991, without notice or payment of wages in lieu of notice and also without payment of any retrenchment compensation. He urged, therefore, that his termination from service by the employers is illegal and improper. He is entitled to re-engagement with backwages.

3. At the instance of the workman, the Deputy Labour Commissioner, Gorakhpur, vide his memo dated 31.08.1992 made the following reference under Section 4-K of the U.P. Industrial Disputes Act, 1947 (for short the "Act') for adjudication to the Labour Court (translated into English from Hindi vernacular):-

"Whether the act of the employers in terminating the services of their workman, Sri Brahma Dev Tripathi S/o Radhey Shyam Tripathi, Beldar with effect from 01.09.1991 is justified, and/or lawful? If not, to what relief/compensation the workman is entitled, and in what terms?"

4. Records from the lower Court, in this case, were summoned that have been perused with the assistance of learned counsel.

5. Post reference the case was registered before the Labour Court as Adjudication Case No. 532 of 1992 and notice was issued to the parties. The workman filed his written statement, dated 17.03.1993 supported by an affidavit of the said date. A written statement was filed on behalf of the employers (also supported by an affidavit of a supervisor in their establishment) dated 29.09.1993. A rejoinder statement was filed on behalf of the workman (supported by an affidavit of his own) dated 18.01.1994. A rejoinder statement in answer to the written statement filed by the workman (supported

by an affidavit of a supervisor in their establishment) dated 19.09.1997 was filed. These make for all the pleadings that the parties filed before the Labour Court. In order to establish his case, the workman filed the best evidence available with him, secondary of course, in order to establish his case of being in engagement of the employers as their workman for the claimed period of time, and for the specified number of days, during each calendar year. In all, five documents (all photostat copies) were filed through a list dated 26.11.1997, bearing paper no. 15/B-(ii). A summary of these documents is as follows:

(I) A photostat copy of an application made after disengagement by the workman (along with some others similarly situate) demanding that the workman be re-engaged.

(II) A photostat copy of registered postal receipts regarding dispatch of the application above mentioned to the employers.

(III) A photostat copy (in three leaves) of a bonus payment bill drawn by the employers dated 04.09.1990, whereby a lump sum bonus for three years (1986-87, 1987-88 and 1988-89) was paid to the workman.

(IV) A photostat copy of a seniority list of daily wage workmen drawn up by the office of the Executive Engineer, Drainage Division-II, Basti, bearing memo no. 123/Drain. (kha), Basti-II.

(V) A list of workmen in current employment (at the time of submission of the documents) engaged after the workman but still retained in service, the list being signed by one Vijay Raj Singh, an Executive Engineer with the employers.

6. On 26.11.1997, an application was made to the Labour Court with a prayer that the documents mentioned therein, numbering three, be summoned from the employers. Against each of the documents indicated in a schedule at the foot of the application, on the right side, the purpose of summoning the relative documents is indicated. The first document sought to be summoned is the one a copy of which has been mentioned at serial no. 3 of the list of documents filed by the petitioner, that is to say, the bonus bill dated 14.09.1990. In addition, all muster rolls have been sought relating to the period of time, claimed by the workman to be the engagement period. A further document sought to be summoned is mentioned at serial no. 4 of the list dated 26.11.1997, that is the seniority list of employees, part of the letter of the Executive Engineer, Drainage Division-II, Basti dated 13.05.1991. The last document mentioned at the serial no. 5 in the application dated 26.11.1997 is one that carries the seniority list of workmen, signed by one Vijay Raj Singh,an Executive Engineer with the employers.

7. A perusal of the application dated 26.11.1997 would show that there is an order passed by the Presiding Officer, issuing notice to the employers. The order is endorsed on the face of the application and does not bear a date. Presumably, it was passed on the same date when the application was made. An objection to the said application was filed by the employers on 24.05.1999 enclosing therewith xerox copies of the muster roll for the year 1990, that is to say, the year preceding the one when the services of the workman were terminated. It is said in this objection dated 24.05.1999 that so far as the documents mentioned at serial nos. 1, 2 and 3 of the application dated

26.11.1997 are concerned, the said documents are not available in the office of the employers and are also not within their knowledge or information. It is, however, said that muster roll is necessary to demonstrate the number of days in the year that the workman has discharged his duties, and, therefore, a photostat copy of the muster roll for one year is being enclosed with the objection. A copy of the said objection dated 24.05.1999 is on record as paper no. 21-D. A photostat copies of the enclosed muster roll are also on record. At this stage, it must be remarked that this Court has gone through the original records and finds that the photostat copies of the muster roll filed, relates to the year 1990. It is there from the month of January to December, 1990, except for the months of February and March. There is no explanation about the missing muster roll for these two months. It must also be noticed here that on the face of the objections dated 24.05.1999, there is an order dated 01.11.2001 passed by the Presiding Officer that reads thus (part of the order that is in Hindi translated into English):

"Seen. This does not carry the summoned documents and this is not required at this stage.
Signed
illegible
1.11.2001"

8. So much for the documentary evidence led on both sides. The workman has examined himself as a witness in support of his case on 01.11.2001 and has been cross-examined by the employers. The said deposition is on record. Likewise, on behalf of the employers, one Vindhyachal Prasad, a Junior Engineer posted with Devkali Pump Canal Division-II, Ghazipur, has testified as EW-1 on 03.05.2002. He has been cross-examined by the workman. The said deposition is also on record. On these pleadings and evidence, the Labour Court proceeded to hear and determine the adjudication case which led to the reference being answered by means of the impugned award, in favour of the workman, in terms already set out hereinabove.

9. Aggrieved, the present writ petition has been filed.

10. Heard Sri Shriprakash Singh, learned Standing Counsel appearing on behalf of the petitioners-employers and Sri Sudhanshu Narain, learned counsel appearing for the respondent-workman.

11. Learned counsel for the petitioner has argued that a specific plea has been taken before the Labour Court that the employers do not fall within the definition of "Industry' as envisaged under the Act. As such, the Labour Court has no jurisdiction to decide the reference. It is urged on the basis of pleadings in paragraph nos. 12 and 13 of the writ petition that this plea about the Act being not applicable has not been considered. A perusal of the written statement filed on behalf of the employer and also the rejoinder statement does not show that the aforesaid plea was raised before the Labour Court. It appears to have been raised for the first time before this Court, which has been disputed by the workman. The workman has submitted that the department of Irrigation, Drainage and Tubewell Division are an Industry earning heavy profit from their activities. It has been submitted on behalf of the workman that the Act is squarely applicable. In writ petition No. 6108 of 2004 **State of U.P. through Executive Engineer vs. Raj Karan and another** decided on 01.09.2015, this question

was raised before this Court on behalf of the petitioner, in the case of a similarly circumstanced workman. The workman employed with the Irrigation Department of the State, claimed illegal termination from service in breach of the provisions of the Act. This Court, relying on the authorities in **State of U.P. vs. Presiding Officer, Industrial Tribunal (V), Meerut and another** and **State of U.P vs. Labour Court, Dehradun and another**, held the Department of Irrigation to be an industry within the meaning of the Act.

12. Sri Shriprakash Singh, learned Standing Counsel appearing on behalf of the employers has emphasized that the principal basis in times contemporaneous, when this reference was decided by the Labour Court to hold or readily assume the Irrigation Department to be an industry is the decision of the Constitution bench of the Supreme Court in **Banglore Water Supply Sewerage Board vs. A. Rajappa**. He emphasized that now the correctness of their Lordships decision in **Banglore Water Supply Sewerage Board** (*Supra*), which is a Constitution Bench decision of five Judges has been referred for reconsideration to a larger Bench vide an order made in **State of U.P. vs. Jai Bir Singh**. It is urged that in the the order of reference, where correctness of the principles laid down governing the definition of an industry have been doubted by their Lordships, relates to the Department of Irrigation, State of U.P. Learned counsel for the petitioner, therefore, submits that the matter may be adjourned, awaiting decision by the larger Bench of their Lordships.

13. Learned counsel for the workman, Sri Sudhanshu Narain points out that so far as there are no prospects of an early decision by the larger Bench of their Lordships of the Supreme Court, as the record of proceedings would show. He has urged that by a subsequent order dated 17.11.2016, judgment was reserved in the case by a seven Judge Bench of their Lordships, but on 02.01.2017 an order was passed referring the matter to a Bench of nine Judges. It is urged by learned counsel for the workman that there is no prospect of an early judgment by the nine Judge Bench of their Lordships in **State of U.P. vs. Jai Beer Singh** (*Supra*). It is not for this Court to speculate about the time when their Lordships would decide the issue, referred to the larger Bench of nine Judges. What this Court is concerned about is how the present cause ought to be decided. To the understanding of this Court, the law in **Banglore Water Supply Sewerage Board** (*Supra*) still holds the field and is the law so long it is not overruled by a decision of their Lordships, sitting in a Bench of larger strength. This issue was determined by their Lordships in **R.M. Yellatti vs. Assistant Executive Engineer**, where the plea to adjourn decision pending outcome of the reference to the larger Bench in **State of U.P. vs Jai Bir Singh** (*Supra*) was declined in the following words:-

"11.At the outset, we may mention that we are not inclined to adjourn the matter sine die pending the decision of the larger Bench as urged on behalf of the management, particularly in view of the fact that there is nothing on record to indicate that the management had argued the point in question. As stated above, the Labour Court had ruled that the "irrigation department" was an "industry" in terms of Section 2(j) of the 1947 Act. Against the award of the Labour Court, the department had filed its writ petition in which the

ground was taken as a plea to the effect that the irrigation department was not an industry in terms of Section 2(j) of the said Act. However, there is nothing in the decision of the learned Single Judge as well as in the impugned judgment to show as to whether the management had argued on this aspect of the case and, therefore, we are not inclined to await the decision of the larger Bench following the referral order in Jai Bir Singh [(2005) 5 SCC 1 : 2005 SCC (L&S) 642] . Even in the counter-affidavit filed before this Court, no such plea has been taken."

14. The plea was raised before the learned Single Judge of this Court in **State of U.P. through Executive Engineer, Nichali Ganga Nahar, Phoolpur, Kanpur vs. the Labour Court(II), U.P. Kanpur and another in Writ Petition No. 35086 of 1998,** decided on 21.02.2013. In the said decision, the prayer to adjourn pending decision by the larger Bench of their Lordships was also declined, holding thus:

"The Supreme Court in R.M.Yellatti vs. Assistant Executive Engineer vs. Assistant Executive Engineer, 2006(1) SCC 106 was faced with the same dilemma wherein it was contended before the Supreme Court that the matter should be adjourned since the judgment of the Supreme Court in Bangalore Water Supply was referred to a Larger Bench by a referral order, dated 5.5.2005 in State of U.P. vs. Jaibir Singh, 2005 (5)SCC 1. The Supreme Court declined to adjourn the matter sine die, in view of the fact that there was nothing on record to indicate that the Management had argued the point in question. Taking clue from the Supreme Court itself, the Court finds, that there is nothing on record indicating that the petitioner is not an "industry". Merely by alleging that the petitioner is not an "industry" does not take them outside the realm of the U.P. Industrial Disputes Act. The dominant nature test as illustrated in Bangalore Water Supply case (*supra*) has not been followed. Consequently, the Court is of the opinion, that the matter cannot be adjourned sine die."

15. In the present case also there is nothing pleaded before the Labour Court to show that the employers are not an industry. There is no case set up to that effect much less seriously, or evidence offered to establish the same. No doubt, a ground has been raised before this Court and it has been argued by Sri Shriprakash Singh that the employers are not an industry, but there is nothing seriously said to establish the fact that what the employers do is a sovereign function and that the workman was employed in aid of a sovereign function of the State. On this state of the pleaded case and evidence, this Court does not consider it appropriate to adjourn the matter as suggested by Sri Shriprakash Singh, learned Standing Counsel for the petitioner. In adopting this course, this Court is in respectful agreement with the decision in **State of U.P. through Executive Engineer, Nichli Ganga Nahar** (*supra*).

16. Turning to the issue whether the workman has been wrongly awarded relief/reinstatement with backwages, the case of the petitioner is based on a plea that he was retained on daily wage basis against a permanent vacancy, and that the employers terminated his services illegally, in an unauthorized manner, with effect from 01.09.1991. It has been specifically pleaded by the workman that during the entire period of his engagement,

he has rendered continuous service with no break whatsoever. It has also been pleaded that the workman's services have been terminated without prior notice or payment of wages in lieu of notice or any retrenchment compensation. It has further been specifically pleaded by the workman that his services have not been terminated in consequence of any disciplinary proceedings, or any charge of misconduct. The further specific case is that workman has, prior to the termination of his services, completed 240 days and more of service in the preceding year, and in the each calendar year, that he has been in the service of the employer. The submission of learned counsel for the petitioner, on the basis of said case is that the employers have committed a clear violation of Section 6N of the Act. The employers rebutting the workman's case have pleaded in their written statement that the workman's services have not been terminated and he has never worked continuously. It is urged that it is wrong to say that the workman has been retrenched. The fact that the workman's services have not been dispensed with, in consequence of any disciplinary proceedings on a charge has not been denied. It has been averred, in particular, in paragraph no. 10 of the written statement that the petitioner was a daily-wager borne on the muster roll and that he did not work continuously. He was engaged from time to time, according to exigencies. The Labour Court on the basis of the evidence available has recorded the following finding relating to the issue whether the workman did work for 240 days in a calendar year, and about the nature of his engagement, as well as the legality of his termination from service (in Hindi vernacular):-

6– वादी की ओर से अभिलेख सेवायोजकों से तलब किये गये थे जिनमें से कुछ अभिलेख प्रस्तुत किये गये है। डब्लूडब्लू/1 श्रमिक ब्रहमदेव त्रिपाठी को परीक्षित किया गया। सेवायोजक की ओर से मस्टर रोल की छाया प्रतियां दाखिल की गई है और सेवायोजक साक्षी विंध्याचल प्रसाद, अवर अभियन्ता को परीक्षित किया गया। उन्होने यद्यपि अपने साक्ष्य में कहा है कि वादी को आवश्यकतानुसार रखा जाता था किन्तु प्रतिपरीक्षण में उनका ध्यान सेवायोजक के लिखित ब्यान की ओर दिलाते हुये पूछे जाने पर उन्होने कहा कि उसमें जो यह लिखा है कि वादी ने कभी भी एक वर्ष में 240 दिन से अधिक कार्य नही किया है, गलत है। उन्होने यह भी कहा कि वह 89 से 91 तक ड्रेनेज खण्ड–2 बस्ती में थे। वादी को मेरे कार्यकाल में कभी बैठकी नहीं की गई। वादी को बोनस मिला है। बोनस उसको मिलता है जो एक वर्ष मे 240 दिन से अधिक काम कर लेता है। इस प्रकार यह मान लिया गया है कि वादी ने एक वर्ष में 240 दिन से अधिक कार्य कर लिया था।

7– प्रार्थना पत्र 27/डी सेवायोजक प्रतिनिधि द्वारा साक्षी को होस्टाइल घोषित करने हेतु प्रार्थना पत्र दिया गया जो निरस्त कर दिया गया किन्तु सेवायोजक को अतिरिक्त साक्ष्य देने का अवसर दिया गया। उन्होने कोई अतिरिक्त साक्ष्य प्रस्तुत नही किया। इस साक्षी ईडब्लू/1 से विभागीय प्रतिनिधि ने कोई जिरह नही की जिससे उसे होस्टाइल दर्शाया जा सके। अन्यथा भी यह न्यायालय के विवेक पर रहता है कि यदि साक्षी होस्टाइल हो गया तो उसके साक्ष्य पर विचार किया जाय या नहीं। मेरे विचार से साक्षी के कथन और प्रतिपरीक्षण को देखते हुए यह कही से नहीं लगता कि उक्त साक्षी होस्टाइल हो गया है। उसके महत्वपूर्ण साक्ष्य को स्वीकार न करना अनुचित होगा।

8– यह ठीक है 240 दिन की तारतम्य सेवा एक वर्ष में सिद्ध करने भार वादी पर था किन्तु वादी यह सिद्ध करने में सफल रहा है। ईडब्लू/1 के साक्ष्य से यही निष्कर्ष निकलता है कि वादी ने एक वर्ष में 240 दिन से अधिक की सेवा पूर्ण कर ली थी। श्रमिक द्वारा दाखिल 15/बी(2) के पेपर सं0 4/2 वरिष्ठता सूची है जिसमें वादी श्रमिक का नाम क्रमांक 7 पर है और उसकी नियुक्ति का वर्ष 1979 दर्शाया गया है। इसका मूल सेवायोजकों से तलब किया गया था परन्तु उसे दाखिल नहीं किया गया।

9– मस्टर रोल की छाया प्रतियां जो दाखिल की गई है उसमें जनवरी व नवम्बर 91 के मस्टर रोल की छाया प्रतियां नहीं दाखिल की गई। शेष समस्त मस्टर रोल दाखिल किये गये है।

10– स्वीकृत रूप से श्रमिक को कोई नोटिस या नोटिस के बदले वेतन तथा छंटनी प्रतिकर नहीं दिया गया। इस प्रकार धारा 6एन यू0पी0 औट्योमिक विवाद अधिनियम 1947 के प्राविधानों का अनुपालन नहीं किया गया। इस कारण वादी को सेवा से वंचित किया जाना अनुचित एवं अवैधानिक है।

17. This Court has also looked into the evidence on record and found that there is on record, documentary evidence regarding payment of bonus to the workman for three consecutive years, that is to say, 1986-87, 1987-88 and 1988-89. The employers have not produced the original of the documents that have been filed by the workman. They have not said in their objection to the application, seeking to summon the original, that the documents are got up, or challenged the veracity of those documents. All that they have said is that these documents are not traceable. The Labour Court has, therefore, not at all erred in looking into documents, filed by the workman as secondary evidence, going by the best evidence rule. There is also this fact that the employers have filed photostat copies of the muster roll, and not the original for the year 1990. They have not filed the muster roll of any earlier period of time.

18. In objection dated 24.05.1999, along with which muster roll for the year 1990 has been filed, it has not been said that no muster roll relating to the workman, for an earlier period of time is available. It is just said that the employers are filing photostat copies of the muster roll, for one year, in order to show the number of days during the year preceding his termination that the workman has been engaged. The muster roll has been filed for ten months of the year 1990; it is filed for each month of the year, except for months of February and March, 1990. The total number of working days during ten months in the muster roll that has been filed aggregate a figure of 198 days. It is not the employers' case that during the year 1990, the workman did not turn up during the months of February and March, or that he was not engaged during those months. There is absolutely no explanation why muster roll for the two months of February and March, 1990 has not been filed. Therefore, the Labour Court has rightly drawn an adverse inference against the employer that the workman has worked for those two months also, and that would make for 240 days in the year, preceding his termination from service. It is also not disputed by the employers that the workman was not paid bonus or that his seniority, regarding which the workman has produced a seniority list is a bogus document. On the foot of these facts and evidence the Labour Court has drawn a plausible inference that the workman has been engaged for 240 days, during preceding calendar year, when his services were terminated and further that the workman has rendered services from 1979, continuously until 01.09.1991. Admittedly, no notice in accordance with Section 6 N of the Act has been served upon the workman in writing, indicating the reasons for retrenchment or the workman has been paid for the period of notice in lieu and/or paid any retrenchment compensation, in accordance with the provisions of Section 6 N of the Act.

19. At this Stage, notice must be taken of the submission made very forcibly by Sri Shriprakash Singh, learned Standing Counsel to the effect that even if termination from service is bad in law on account of a wholesome violation of Section 6 N of the Act, relief of reinstatement and that too with 50% backwages, ought not have been granted by the Labour Court, as a matter of course. It is urged that the Labour Court has not noticed any special circumstances, why relief of reinstatement has been granted, even if termination of services has been

found to be fowl of the provisions of Section 6N of the Act, inasmuch as, in the case of a daily wager reinstatement ought not to be normally granted. He submits that in case of daily wage engagement of a few years, even if termination of services is found to be illegal and in violation of Section 6N of the Act, a lump sum compensation appropriately assessed, would serve as good remedy.

20. The aforesaid submission of the learned counsel for the petitioner has been disputed by Sri Sudhanshu Narain, learned counsel for the workman, who says that relief of reinstatement has been granted bearing in mind the long and continuous engagement of the workman as a daily-wager, which in this case is a period of 11 years and more. He submits that it is not a case where the workman has been engaged for a short period of 2-3 years to take care of some exigency, but one where long engagement of the workman on daily wages shows that he was employed to do work referable to a permanent post, though he was not appointed to any post. He submits that this course of long engagement clearly shows a case of unfair labour practice.

21. Learned counsel for the employer relied upon a decision of this Court in **State of U.P. and another Vs. Hind Majdoor Sabha and others**. He has drawn attention of this Court to paragraphs nos. 7, 8, and 21 of the report, which read thus:

"7. For the purpose of granting relief the relevant aspects which have to be considered are the nature of employment/engagement of workman concerned, the manner in which he was engaged, his right to hold the post, right to continue in service, the wages to which he is entitled etc. If a person is a permanently employed and has been terminated/retrenched without following the procedure prescribed under Section 6-N of the Act, in such a case since the workman has a right to the post and right to continue, relief of reinstatement may be justified. But there also various other aspects, namely, whether industrial establishment is continuing, whether the post on which the incumbent was working, is continuing or not and similar other relevant factors. In a case of casual or daily wage employee, even in ordinary circumstances, he neither has any right to hold the post nor to continue in service. A daily wage employee commences his service in morning and it comes to an end in evening. The very next day he has no right unless the employer choses to engage him. It is for this reason, law contemplate that a workman in order to attract Section 6-N of the Act need not work throughout the year but it would be sufficient if he has worked for 240 days in a year.

8. Existence of post, the manner in which one was engaged, whether engagement was consistent with some statutory provisions prescribing mode of recruitment and selection etc. are other relevant factors which have to be considered while granting relief. These aspects have been referred to and pointed out in a catena of decisions, some of which I may refer hereat.

21. In the facts and circumstances of the case since the workman was engaged on daily wage basis only for a short period of four years and was disengaged on 01.09.1992 and also considering the fact that his initial recruitment was not in accordance with procedure prescribed in law consistent with Article 16 of the Constitution, in my

view, the relief of reinstatement and back wages to the extent of 50% ought not to have been granted. The workman may be granted a lumpsum compensation which is equivalent to six months' wages and would be calculated on the basis of payment last made to workman at the time of his termination....."

22. He has further relied on a decision of the Supreme Court in **Vice-Chancellor, Lucknow University, Lucknow, Uttar Pradesh Vs. Akhilesh Kumar Khare and another**. He has invited the attention of the Court to what their Lordships have held regarding the right of reinstatement of a daily-wager, even if his services were terminated in violation of the statutory mandate of Section 25-F of the Industrial Disputes Act, 1947 (equivalent of Section 6N of the Act). In **Vice-Chancellor, Lucknow University, Lucknow** (*Supra*), it has been held:

"18. In considering the violation of Section 25-F of the Industrial Disputes Act, 1947 in*Incharge Officer v. Shankar Shetty* [(2010) 9 SCC 126 : (2010) 2 SCC (L&S) 733] and after referring to the various decisions, this Court held that the relief by way of back wages is not automatic and compensation instead of reinstatement has been held to meet the ends of justice and it reads as under: (SCC pp. 127-28, paras 2-4)

"2. Should an order of reinstatement automatically follow in a case where the engagement of a daily wager has been brought to end in violation of Section 25-F of the Industrial Disputes Act, 1947 (for short "the ID Act')? The course of the decisions of this Court in recent years has been uniform on the above question.

3. In *Jagbir Singh v. Haryana State Agriculture Mktg. Board* [(2009) 15 SCC 327 : (2010) 1 SCC (L&S) 545] , delivering the judgment of this Court, one of us (R.M. Lodha, J.) noticed some of the recent decisions of this Court, namely, *U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey* [(2006) 1 SCC 479 : 2006 SCC (L&S) 250] , *Uttaranchal Forest Development Corpn. v. M.C. Joshi* [(2007) 9 SCC 353 : (2007) 2 SCC (L&S) 813] , *State of M.P. v. Lalit Kumar Verma* [(2007) 1 SCC 575 : (2007) 1 SCC (L&S) 405] , *M.P. Admn. v. Tribhuban* [(2007) 9 SCC 748 : (2008) 1 SCC (L&S) 264] , *Sita Ram v. Moti Lal Nehru Farmers Training Institute* [(2008) 5 SCC 75 :(2008) 2 SCC (L&S)71], *JaipurDevelopmentAuthority v. Ramsahai* [(2006) 11 SCC 684 : (2007) 1 SCC (L&S) 518] , *GDA v. Ashok Kumar* [(2008) 4 SCC 261 : (2008) 1 SCC (L&S) 1016] and *Mahboob Deepak v. Nagar Panchayat, Gajraula* [(2008) 1 SCC 575 : (2008) 1 SCC (L&S) 239] and stated as follows: (*Jagbir Singh case* [(2009) 15 SCC 327 : (2010) 1 SCC (L&S) 545] , SCC pp. 330 & 335, paras 7 & 14)

"7. It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.'

4.*Jagbir Singh*[(2009) 15 SCC 327 : (2010) 1 SCC (L&S) 545] has been applied very recently in*Telegraph Deptt. v. Santosh Kumar Seal*[(2010) 6 SCC 773 : (2010) 2 SCC (L&S) 309] , wherein this Court stated: (SCC p. 777, para 11)

"11. In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice.'"

19. In the light of the above discussion, the impugned judgment [*Lucknow University v. Manoj Misra*, 2009 SCC OnLine All 2079] of the High Court is modified and keeping in view the fact that the respondents are facing hardship on account of pending litigation for more than two decades and the fact that some of the respondents are overaged and thus have lost the opportunity to get a job elsewhere, interest of justice would be met by directing the appellant University to pay compensation of rupees four lakhs to each of the respondents. By order dated 11-7-2011, this Court directed the appellant to comply with the requirements of Section 17-B of the Industrial Disputes Act, 1947 and it is stated that the same is being complied with. The appellant University is directed to pay the respondents rupees four lakhs each within four months from the date of receipt of this judgment. The payment of rupees four lakhs shall be in addition to wages paid under Section 17-B of the Industrial Disputes Act, 1947."

23. In order to buttress his submission, learned Counsel for the employer has placed reliance upon a recent decision of the Supreme Court in **District Development Officer and another Vs. Satish Kantilal Amreliya**. It has been held in **District Development Officer and another** (*Supra*) thus:

12. Having gone through the entire record of the case and further keeping in view the nature of factual controversy, the findings of the Labour Court, the manner in which the respondent fought this litigation on two fronts simultaneously, namely, one in the civil court and the other in the Labour Court in challenging his termination order and seeking regularisation in service, which resulted in passing the two conflicting orders -- one in the respondent's favour (Labour Court) and the other against him (civil court) and lastly, it being an admitted fact that the respondent was a daily wager during his short tenure, which lasted hardly two-and-half years approximately and coupled with the fact that 25 years have since passed from the date of his alleged termination, we are of the considered opinion that the law laid down by this Court in BSNL v. Bhurumal [BSNL v. Bhurumal, (2014) 7 SCC 177 :

(2014) 2 SCC (L&S) 373] would aptly apply to the facts of this case and we prefer to apply the same for disposal of these appeals.

13. It is apposite to reproduce what this Court has held in *BSNL [BSNL v. Bhurumal,* (2014) 7 SCC 177 : (2014) 2 SCC (L&S) 373] : (SCC p. 189, paras 33-35)

"33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimisation, unfair labour practice, etc. However, when it comes to the case of termination of a daily-wage worker and where the termination is found illegal because of a procedural defect, namely, in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view that in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [see *State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3),* (2006) 4 SCC 1 : 2006 SCC (L&S) 753]]. Thus when he cannot claim regularisation and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

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

14. We have taken note of one fact here that the Labour Court has also found that the termination is bad due to violation of Section 25-G of the Act. In our opinion, taking note of overall factual scenario emerging from the record of the

case and having regard to the nature of the findings rendered and further the averments made in the SLP justifying the need to pass the termination order, this case does not fall in exceptional cases as observed by this Court in para 35 of *BSNL case [BSNL v. Bhurumal*, (2014) 7 SCC 177 : (2014) 2 SCC (L&S) 373] due to finding of Section 25-G of the Act recorded against the appellant. In other words, there are reasons to take out the case from exceptional cases contained in para 35 because we find that the appellant did not resort to any kind of unfair practice while terminating the services of the respondent.

15. In view of the foregoing discussion, we are of the considered view that it would be just, proper and reasonable to award lump sum monetary compensation to the respondent in full and final satisfaction of his claim of reinstatement and other consequential benefits by taking recourse to the powers under Section 11-A of the Act and the law laid down by this Court in *BSNL case [BSNL v. Bhurumal*, (2014) 7 SCC 177 : (2014) 2 SCC (L&S) 373] .

16. Having regard to the totality of the facts taken note of *supra*, we consider it just and reasonable to award a total sum of Rs 2,50,000 (Rs two lakhs fifty thousand) to the respondent in lieu of his right to claim reinstatement and back wages in full and final satisfaction of this dispute."

24. Learned counsel for the workman Sri Sudhanshu Narain, on the other hand, has placed reliance upon a decision of the Supreme Court in **Devinder Singh Vs. Municipal Council, Sanaur**, where the argument that had prevailed with the High Court to set aside the award of the Labour Court directing reinstatement of the workman, was that the employment of the workman with the respondent Municipal Council from 01.08.1994 to 19.09.1996 was engagement on contractual basis and that it was an appointment made contrary to the recruitment rules. The High Court had taken view that it would be violative of Articles 14 and 15 of the Constitution, and, that it would not be in public interest to sustain the award of reinstatement after a long lapse of time. Learned counsel for the workman has relied on paragraph nos. 10, 12, 13, 14, 19, 20, 27 and 28 of the report in **Devinder Singh** (*supra*), where it is held thus:-

10. The definition of the term "retrenchment" is quite comprehensive. It covers every type of termination of the service of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. The cases of voluntary retirement of the workman, retirement on reaching the age of superannuation, termination of service as a result of non-renewal of the contract of employment or of such contract being terminated under a stipulation contained therein or termination of the service of a workman on the ground of continued ill health also do not fall within the ambit of retrenchment.

12. Section 2(s) contains an exhaustive definition of the term "workman". The definition takes within its ambit any person including an apprentice employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward and it is immaterial that the terms of employment are not reduced into writing. The definition also includes a person, who has been dismissed, discharged or retrenched in connection with an industrial dispute or as a consequence of such

dispute or whose dismissal, discharge or retrenchment has led to that dispute. The last segment of the definition specifies certain exclusions. A person to whom the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957, is applicable or who is employed in the police service as an officer or other employee of a prison or who is employed mainly in managerial or administrative capacity or who is employed in a supervisory capacity and is drawing specified wages per mensem or exercises mainly managerial functions does not fall within the definition of the term "workman".

13. The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act. It is apposite to observe that the definition of workman also does not make any distinction between full-time and part-time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on a regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

14. Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of Section 2(s) of the Act, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of "workman".

19. In *Anoop Sharma v. Public Health Division* [(2010) 5 SCC 497 : (2010) 2 SCC (L&S) 63] the Court considered the effect of violation of Section 25-F, referred to various precedents on the subject and held the termination of service of a workman without complying with the mandatory provisions contained in Sections 25-F(a) and (b) should ordinarily result in his reinstatement.

20. We may now advert to the impugned order. A careful analysis thereof reveals that the High Court neither found any jurisdictional infirmity in the award of the Labour Court nor it came to the conclusion that the same was vitiated by an error of law apparent on the face of the record. Notwithstanding this, the High Court set aside the direction given by the Labour Court for reinstatement of the appellant by assuming that his initial appointment/engagement was contrary to law and that it would not be in public interest to approve the award of reinstatement after long lapse of time. In our view, the approach adopted by the High Court in dealing with the award of the Labour Court was ex facie erroneous and contrary to the law laid down in *Syed Yakoob v. K.S. Radhakrishnan* [AIR 1964 SC 477] , *Sawarn Singh v. State of Punjab* [(1976) 2 SCC 868] , *PGI of Medical Education & Research v. Raj Kumar*[(2001) 2 SCC 54 : 2001 SCC (L&S) 365] , *Surya Dev Rai v. Ram Chander Rai* [(2003) 6 SCC 675] and *Shalini Shyam Shetty v. Rajendra Shankar Patil* [(2010) 8 SCC 329 : (2010) 3 SCC (Civ) 338] .

27. It is true that the engagement of the appellant was not preceded by an advertisement and consideration of the competing claims of other eligible persons but that exercise could not be undertaken by the respondent because of the ban imposed by the State Government. It is surprising that the Division Bench of the High Court did not notice this important facet of the employment of the appellant and decided the writ petition by assuming that his appointment/engagement was contrary to the recruitment rules and Articles 14 and 16 of the Constitution. We may also add that failure of the Director, Local Self-Government, Punjab to convey his approval to the resolution of the respondent could not be made a ground for bringing an end to the engagement of the appellant and that too without complying with the mandate of Sections 25-F(a) and (b).

28. The other reason given by the High Court is equally untenable. The appellant could hardly be blamed for the delay, if any, in the adjudication of the dispute by the Labour Court or the writ petition filed by the respondent. The delay of four to five years in the adjudication of disputes by the Labour Court/Industrial Tribunal is a normal phenomena. If what the High Court has done is held to be justified, gross illegalities committed by the employer in terminating the services of workman will acquire legitimacy in majority of cases. Therefore, we have no hesitation to disapprove the approach adopted by the High Court in dealing with the appellant's case.

25. Further, reliance has been placed by the learned counsel for the workman on a decision of their Lordships of the Supreme Court in **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak and others**, where attention of this Court has been drawn to paragraph no. 33 of the report, holding thus:

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

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

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

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed onlesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the

employee was gainfully employed and was getting the same or substantially similar emoluments.

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

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

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

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal5 (*supra*) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

26. This Court has given a thoughtful consideration to the matter. It appears that

the law, with regard to the reinstatement of a dailywager employed with the State or a State instrumentality, has become an instance of overlap between principles of service law and labour law in those spheres of state activity that have come to be regarded as "industry' in the aftermath of the decision in **Bangalore Water Supply Sewerage Board** (*supra*). While, service law frowns upon employment under the State through any means otherwise than open public recruitment, or in a manner other than that the relevant service rules envisage, Industrial Law has no such ambitions. Difficulties, therefore, arise where engagement of a workman is made by a Government Department on dailywage basis and continued long enough to entitle him to the protection of Industrial Laws.

27. The aforesaid question fell for consideration of their Lordships of the Supreme Court in **U.P. Power Corpration Ltd. vs. Bijli Mazdor Sangh**, where the jurisdiction of Labour Court to administer the Industrial Laws was considered vis-à-vis the constitutional commitment of the State to uphold the rule of equality envisaged under Article 14, which particularly applies to services under the State. In that context, it was held in **U.P. Power Corporation Ltd.** (*supra*) thus:-

6. It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in *Umadevi (3) case* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . But the foundational logic in *Umadevi (3) case* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] is based on Article 14 of the Constitution of India. Though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularisation, the same cannot be viewed differently.

7. The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in *Umadevi (3)* case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] was not rendered is really of no consequence. There cannot be a case for regularisation without there being employee-employer relationship. As noted above the concept of regularisation is clearly linked with Article 14 of the Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of *Umadevi (3) case* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in *Umadevi (3) case* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] about the regularisation.

28. The subject received more comprehensive treatment by their Lordships of Supreme Court in **Maharashtra State Road Transport Corporation Vs. Casteribe Rajya Parivahan Karmchari Sanghatana**, where the question was, whether the Constitution Bench decision of the Supreme court in **State of Karanataka Vs. Uma Devi** would detract from the rights of a workman under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971. It was held thus by their Lordships in **Maharashtra State Road Transport Corporation** (*supra*):-

30. The question that arises for consideration is: have the provisions of the MRTU and PULP Act been denuded of the statutory status by the Constitution Bench decision in *Umadevi (3)*[(2006) 4

SCC 1 : 2006 SCC (L&S) 753] ? In our judgment, it is not.

31. The purpose and object of the MRTU and PULP Act, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedules II, III and IV. The MRTU and PULP Act empowers the Industrial and Labour Courts to decide that the person named in the complaint has engaged in or is engaged in unfair labour practice and if the unfair labour practice is proved, to declare that an unfair labour practice has been engaged in or is being engaged in by that person and direct such person to cease and desist from such unfair labour practice and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the court be necessary to effectuate the policy of the Act.

32. The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer.

33. The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in *Umadevi (3)*[(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . *Unfair labour practice* on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.

34. It is true that *Dharwad Distt. PWD Literate Daily Wages Employees' Assn.* [(1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902] arising out of industrial adjudication has been considered in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] leaves no manner of doubt that what this Court was concerned in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.

35. *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.

36. *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established.

(Emphasis by Court)

29. It must be remarked here that though the present case does not relates to a claim for regularization in service, that question assumes some relevance in context of the fact that if just for the violation of the rule under Section 6N of the Act, a daily-wager is to be reinstated in service, it may be nothing more that reinstatement for sake of it. This is so because the employer may dispense with the services of the workman, again immediately upon reinstatement, after following the procedure prescribed under Section 6N of the Act. It is in this context that the most workable principles have been laid down by their Lordships on the subject in **B.S.N.L. Vs. Bhurumal** which have been quoted with approval in **District Development Officer** (*supra*). One of the exceptions to the rule that does not favour reinstatement of a daily-wage worker is the one referred in paragraph 35 of the report in **B.S.N.L. vs. Bhurumal** (*supra*). It has been said there that a daily-wager, whose termination is found to be illegal, would be entitled to reinstatement, if it was as a measure of unfair labour practice, or in violation of the principle of the last come first go, that is to say, a case where juniors to the retrenched workman are retained. There is also reference to a contingency, where the juniors to the retrenched workman may have been regularized under some policy of the employer, whereas the workman's engagement has been terminated. It has been held that in such circumstances, reinstatement should be ordered as a rule and denial only in exceptional circumstances for reasons recorded.

30. Here, the workman has taken a specific plea in his written statement that he was employed on a regular basis against a permanent vacancy in the year 1979. Assuming that there is no proof about a regular selection and appointment on record, the workman's case that he was retained against a permanent vacancy has not been dispelled by any evidence on behalf of the employer. Rather, in the cross-examination of the employer's witness, Vindhyachal Prasad, an Executive Engineer, it has been admitted that the stand of the employers in the written statement that the workman had never worked for more than 240 days in a

calendar year, was incorrect. The employer's witness has further admitted that he was posted with the Drainage Division-II, Basti from the year 1989 to 1991. During the said period of time, the workman never absented from duty. It is also admitted that workman was paid bonus and that this bonus was paid to those workmen, who put in more than 240 days in a calendar year. There is evidence on record about a seniority list, where the workman is at serial No. 9 and also documentary evidence about payment of bonus to the workman for the years 1986-87, 1987-88 and 1988-89. On the basis of this evidence, the Labour Court has drawn an inference that the workman has been in continuous employment with the employer for a period as long as 11 years and more. It does appear that this long period of retention in service lends credence to the workman's case that he was engaged against a permanent vacancy; it is quite another matter that he was not selected or appointed to it, in accordance with law. There is also a further plea by the workman specifically pleaded in paragraph No. 13 of written statement that juniors to him have been retained in service, and many of these juniors have been appointed later on, violating the principle of first come last go. In his evidence, the workman has specifically said in the cross-examination that one Gyan Das is working in his stead. He has said in his examination-in-chief that his name was at serial No. 7 of the seniority list, but juniors to him have been retained in service. It has also been said in his examination-in-chief that the workman at serial No. 8 of the divisional seniority list which does not carry his name, is continuing in service. It has also been asserted that before raising this industrial disputes, he demanded re-engagement from the employer. This evidence of the workman remains unrebutted on record.

31. Under the circumstances, the conclusions drawn by the Labour Court in favour of reinstatement of the workman, seems to accord with the law. It must also be remarked here that the decision to reinstate in accordance with principles generally accepted, laid down in **BSNL vs. Bhurumal** (*supra*) clearly appear to obtain in the present case. It is particularly so on account of fact that the workman was engaged against a permanent vacancy, the fact that he was permitted to continue in regular service for as long a period as 11 years and more, and, the fact that juniors to him have been retained in service, whereas the workman's services were terminated in violation of Section 6N of the Act. It would be worthy to note also that in the decision of this Court rendered in **State of U.P. Vs. Hind Mazdoor Sabha** (*supra*), the workman had worked for a period of four years. Likewise, in the decision of their Lordships of the Supreme Court in **Vice-Chancellor, Lucknow University Lucknow vs. Akhilesh Kumar Khare** (*supra*), the workman had worked for about one and a half years and not against any sanctioned post, and likewise, in the decision in **District Development Officer Vs. Sateeh Kantilal Amerilya** (*supra*), the workman concerned had broken engagements of a short duration in two spells, one being 5 months 15 days, and the other, 1 year and 9 months. Thus, the decision in those cases by their Lordships of the Supreme Court or by this Court would not come to rescue of the employer, in the facts that obtain here.

32. In view of the facts indicated above, this Court does not find any good ground to interfere with the impugned award passed by the Labour Court.

33. Accordingly, the writ petition fails and is hereby **dismissed**.

34. The interim order dated 16.02.2004 stands vacated. Costs easy.

(2020)1ILR1018

ORIGINAL JURISDICTION
CIVIL SIDE

Counsel for the Petitioner:
Sri Satyendra Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Anadi Krishna Narayana, Sri Amit Srivastava, Sri Sandeep Kumar Singh

A. Petitioner's bank account seized under the orders of Police u/s 102 Cr.P.C.-order of seizing any property to be passed only upon suspicion that property is stolen-and such order to be immediately communicated to Magistrate-Magistrate to pass further orders-impugned order is not u/s 102Cr. P.C.-nor any communication to the Magistrate-bad.

Writ Petition allowed with cost of Rs. 25,000/-. (E-9)

Cases cited: -

1. State of Maharashtra Vs. Tapan D. Neogy [(1999) 7 SCC 685]

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

1. Heard Sri Satyendra Kumar Mishra, learned counsel for petitioner, Sri Amit Srivastava, Advocate, holding brief of Sri Anadi Krishan Narayana, Advocate and learned Standing Counsel for respondents.

2. Grievance of petitioner is that she had opened a bank account bearing No. 37830100003500 in her name in respondent-Bank and there she deposited Rs. 3,50,000/- in the form of fixed deposit and maturity period for the same was 444 days. After maturity period was over and petitioner wanted to withdraw money, respondent-Bank refused the same on the ground that account has been freezed. Petitioner, therefore, has come up before this Court for release of money which she had put in a fixed term deposit.

3. In the counter affidavit filed by Bank, stand taken is that bank account of petitioner has been frozen under orders of police dated 06.06.2012 and said letter which is alleged to be an order in purported exercise of power under Section 102 Cr.P.C., has been filed as Annexure No. 1 to counter affidavit.

4. Rival submissions fall for consideration. Before proceeding further in the matter, it is necessary to examine the powers of police in respect of seizure of property as has been conferred upon it by virtue of Section 102 Cr.P.C. reads as under:-

"102. Power of police officer to seize certain property.- *(1) Any police officer, may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.*

DATED: ALLAHABAD 12.10.2017

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 7473 of 2015

Soni Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale."

5. From bare reading of aforesaid provision, it is clear that a police officer for seizing the property which may be suspected to have been stolen or which may be found under particular circumstances to create suspicion regarding commission of an offence, shall pass an order of seizure of property and after passing order of seizure shall immediately communicate to Magistrate about act of seizure and thereafter, procedure is for Magistrate to further take care of property by issuing appropriate orders.

6. From the perusal of documents which has been filed as Annexure No. 1 to counter affidavit, we do not find any whisper of any order having been passed in exercise of power under Section 102 Cr.P.C. by concerned police officer nor there is any communication thereof to Magistrate concerned. The documents seems to be a simple letter of request not to permit any meddling with account of petitioner during investigation. Thus, there was not even any request for seizure of account.

7. In the case of **State of Maharashtra Vs. Tapan D. Neogy [(1999) 7 SCC 685],** Supreme Court has held that in case of bank account it can be treated as property and during investigation it can be seized by police by exercising power under Section 102 Cr.P.C. However, Supreme Court has held that for this purpose either police officer shall pass an order of seizure or shall issue a direction to Bank to prohibit operation of account. Thus, it is clear that police officer during investigation can pass an order for seizure of account in the first instance or even can make a direction to Bank to prohibit operation of account as may be necessary during the investigation but in both cases, police officer has to pass a positive order.

8. From the perusal of letter which has been relied upon by petitioner for seizing bank account of petitioner and withholding of credit of fixed deposit receipt, it is absolutely clear that there was no order passed by police officer to seize the account or to prohibit operation of account because it merely made a request that meddling with account should not be done.

9. We fail to understand that what actually meddling with account means. It can either be seizure or its operation can be prohibited. There is no averment in the entire counter affidavit as to in what manner meddling of account was there which was sought to be prohibited.

10. Branch Manager of concerned Bank instead of making a request for an Bank is absolutely an illegal act and cannot be sustained in law and has resulted in utter harassment to the widow lady.

12. We, therefore, direct the Bank to immediately credit the amount of fixed deposit of petitioner in her account and permit her to withdraw the same.

13. Accordingly, this writ petition is allowed with a cost which we quantify to Rs. 25,000/- to be paid to petitioner by the bank in first instance and same shall be recovered from the concerned Bank Manager who has committed default.

(2020)1ILR 1021

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

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

Writ C No. 13520 of 2018

Pal Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Madhusudan Dikshit

order of seizure immediately, it appears, acted upon request letter on his own and seized the account which the Banking Regulations do not permit in the absence of any order to that effect either by police or by competent authority.

11. In view of above, we hold that seizure or withholding of fixed deposit money of petitioner on its maturity by

Counsel for the Respondents:
C.S.C.

A. The Urban Land (Ceiling & Regulation) Act, 1976 - Sections 2(o) - urban land – Section 2(q) - vacant land - Section 10(5) – notice calling upon the land owner to hand over possession of the land declared surplus - Section 10(6) - power upon the competent authority to take forceful possession - The Urban Land (Ceiling & Regulation) Repeal Act, 1999 – section 3 – saving clause – section 4 - Abatement of legal proceeding - if at the time of the enforcement of the Repeal Act the possession has not been taken by the State in terms of sub-section (5) or sub-section (6) of Section 10 of the Act, 1976, then the proceedings under Section 1976 shall be abated. (Para 22)

Actual possession was never handed over to the Saharanpur Development Authority except a Dakhalnama wherein the land has been shown to be agricultural land - no construction has been made - In any view of the matter, if the possession has not been taken in terms of Sections 10(5) and 10(6) of the Act, 1976, the petitioners are entitled for the benefit under Sections 3 and 4 of the Repeal Act. (Para 34)

Held: - The physical possession of the land in question was never taken from the petitioners - They are still in physical possession over the land in question - The ceiling proceedings stood lapsed and the petitioners are entitled for the land in question which has been declared surplus. (Para 35)

Writ Petition allowed. (E-7)

List of cases cited: -

1. State of Uttar Pradesh v. Hari Ram (2013) 4 SCC 280

2. State of U.P. and another v. Vinod Kumar Tripathi and others (Special Leave Petition (C) No. 16582 of 2014

3. State of U.P. and another v. Nek Singh 2010 LawSuit (All) 3581

4. Ram Chandra Pandey v. State of U.P. and others 2010 (82) ALR 136

5. Ehsan v. State of U.P. and another (Writ C No. 21009 of 2012

6. Lalji v. State of U.P. and others 2018 LawSuit (All) 1276: 2018 (5) ADJ 566

7. Yasin and others v. State of U.P. and others 2014 (4) ADJ 305 (DB)

8. State of Assam v. Bhaskar Jyoti Sarma and others (2015) 5 SCC 321

9. State of U.P. and others v. Surendra Pratap and others AIR 2016 SC 2712

10. Shiv Ram Singh v. State of U.P. and others 2015 (5) AWC 4918

11. Gajanan Kamlya v. Addl. Collector & Comp. Auth.& Ors. JT 2014 (3) SC 211

12. Special Leave Petition (C) No.17799 of 2015

13. Special Leave Petition (C) No. 38922 of 2013

14. State of U.P. and another v. Vinod Kumar Tripathi and others

15. State of Uttar Pradesh and another v. Nek Singh 2010 LawSuit (All) 3581

16. Ram Singh v. State of U.P. and others 2013 (7) ADJ 662 (DB)

17. State of U.P. Thru Secy Avas Avam Shahri Niyojan v. Ruknuddin and others (Writ-C No. 54830 of 2011

18. Mohd. Islam & 3 Others Vs. State of U.P. in Writ Petition No. 15864 of 2015

19. Rati Ram Vs. State of U.P. & Others 2018 (4) ALJ 338

20. Mohammad Suaif and another v. State of U.P. and others 2019 (5) ADJ 764 (DB)

21. Shiv Ram Singh 2015 (5) AWC 4918

22. Bhaskar Jyoti Sarma (2015) 5 SCC 321

(Delivered by Hon'ble Piyush Agrawal, J.)

1. By means of the present petition, the petitioners seek a writ of mandamus declaring the entire proceedings, initiated against the petitioners under the Urban Land (Ceiling & Regulation) Act, 1976 as abated in view of the Urban Land (Ceiling & Regulation) Repeal Act, 1999.

2. The brief facts of the case on record are that the petitioners claim that an area of 8041.08 square meters of Khasra Nos. 271 Mi, 272 Mi, 277 Mi, 289 Mi, 279 Mi, 290 Mi, 291 Mi, 392 Mi, 330 Mi and 331 Mi situated in Village - Shekhpura Kadeem, District Saharanpur and Khasra No. 61 situated in Village - Chakpuragpur be exempted from the ceiling proceedings as the petitioners claim to be the owners of the said land.

3. The proceedings under Urban Land (Ceiling & Regulation) Act, 1976 (hereinafter referred to as, 'the Act of 1976') were initiated against the petitioner's predecessor. Thereafter, the father of the petitioners filed statement under section 6(1) of the Act of 1976. As the land was agricultural land and does not come under section 2(o) of the Act of 1976, i.e., the 'vacant land', the proceedings of ceiling were dropped on 29.09.1986. Thereafter, again the ceiling

proceedings were initiated against the father of the petitioners. On 29.09.1987, the Mahayojana (Master Plan) was introduced in Saharanpur Nagar Basti and on the basis of the old returns, draft statement under section 8(3) of the Act of 1976 was issued on 15.03.1991, in which the total land/building of the tenure holder measuring 11,397.23 square meters and thereafter, a total area of 8041.08 square meters from Khasra Nos. 271 Mi, 272 Mi, 277 Mi, 289 Mi, 279 Mi, 290 Mi, 291 Mi, 392 Mi, 330 Mi and 331 Mi situated in Village - Shekhpura Kadeem, District Saharanpur and Khasra No. 61 situated in Village - Chakpuragpur was proposed to be declared surplus. It is averred that by ex parte order dated 12.06.1998 under section 8(4) of the Act, the land in question was declared surplus.

4. Thereafter, notification under section 10(1) of the Act of 1976 and notification under section 10(3) of the Act of 1976 were sent for publication in the official Gazette on 26.03.1993 and 21.08.1993 respectively. After the publication of the notification, notice under section 10(5) of the Act of 1976 was issued to the tenure holder on 27.01.1994, calling upon the tenure holder to voluntarily surrender their surplus vacant land of 8246.00 square meters. This notice is alleged to be served upon the tenure holders personally by process server.

5. On 29.03.1998, the State claims that *Parwana Amal Daramad* was issued and the name of the State Government was recorded in the revenue records pursuant to the notice under section 10(5) of the Act of 1976. Thereafter, the surplus land was handed over to the Saharanpur Development Authority on 19.02.2002 and since then, the land in question is in the custody of Saharanpur Development Authority.

6. It is averred that the petitioners are still in physical possession of the land in question, which has been declared surplus. It is further averred that no notice under section 10(5) of the Act of 1976 was issued to the petitioners and the petitioners have never signed any document regarding delivery of possession and in view of section 10(6) of the Act of 1976, no forcible possession was taken by the State Government from the petitioners and actual tenure holder, i.e., the father of the petitioners. It is further averred that the petitioners have not received any compensation of the land in dispute which has been declared surplus. It is further averred that the State Government is alleged to have transferred the land in question in favour of Saharanpur Development Authority on 19.02.2002, much after the coming into force of the Urban Land (Ceiling & Regulation) Repeal Act, 1999 (hereinafter referred to as, 'the Act of 1999'). It is clear from the record that the land is agricultural land which shows that at the time of handing over the possession to the Saharanpur Development Authority, the land was not of urban land, but it was agricultural land. It is further averred that in terms of section 2(o) of the Act of 1976, the urban land is defined which does not include the land which is mainly used for the purposes of agriculture. As per section 2(q) of the Act of 1976, the "vacant land" is defined as the land not being the land mainly for the purposes of agriculture.

7. A counter affidavit has been filed on behalf of the State - respondents, in which it is contended that due process of law as prescribed under the relevant Act

has been followed and only thereafter, the physical possession of the land has been taken in an absolutely legal manner. It has been further averred in the counter affidavit that after publication of notification in the Gazette under sections 10(1) and 10(3) of the Act of 1976, the land vested in the State Government. Thereafter, notice under section 10(5) of the Act was issued on 17.01.1994, which was duly served upon the tenure holder and the possession of the surplus land was taken on 27.03.1998 after adopting all procedures as per the law. Thereafter, the aforesaid surplus land was handed over to the Saharanpur Development Authority on 19.02.2002 for implementation of the Master Plan. In support of the submission, the possession letter dated 27.03.1998 has been annexed along with the counter affidavit to justify the taking over the possession much before the enforcement of the repeal Act of 1999.

8. We have heard Shri Madhusudan Dikshit, learned counsel for the petitioners and learned standing counsel for the State - respondents and perused the material on record.

9. Learned counsel for the petitioners submits that the State Government has failed to establish that actual possession has been taken in terms of sections 10(5) and 10(6) of the Act, 1976. It is further submitted that the tenure holder has not handed over the possession of the declared surplus land to the Collector in terms of the notice under section 10(5) of the Act, which is evident from the material on record. He further submits that no proceedings, whatsoever, have been initiated against the tenure holder in terms of section 10(6) of the Act of 1976 as no pleading has been taken by the answering respondents in their counter affidavit that forcible possession has been taken over under section 10(6) of the Act of 1976. He further submits that in view of the said fact, the entire proceedings initiated against the petitioners stood abated in terms of section 3 of the Act of 1999 and the expression "deemed to have been acquired" or "deemed to have been vested" are not applicable in view of the aforesaid fact as the State has failed to establish that the actual possession has been taken over in view of sections 10(5) and 10(6) of the Act.

10. Learned counsel for the petitioner further submits that it is not the case of the respondents that the tenure holder has voluntarily surrendered the possession of the land in question. Thus, it was imperative that the possession should have been taken in terms of section 10(6) of the Act of 1976 and there is no pleading in the affidavit filed by the respondents that forcible possession was taken from the tenure holder and the land in question has been transferred in favour of the Saharanpur Development Authority on 19.02.2002 (as mentioned in paragraph no. 3 of the counter affidavit). It is further argued by the learned counsel for the petitioners that the possession memo does not bear the signatures of the tenure holder at the time of delivery of possession of the land in question. The said fact itself shows that the original tenure holder has not given possession voluntarily pursuant to the notice under section 10(5) of the Act. Learned counsel for the petitioners further submits that in view of the fact that the land in question is still in possession of the petitioners and no compensation, whatsoever, has been paid, therefore, the proceedings stood abated when the repeal Act of 1999 came into force.

11. Sri Dikshit has placed reliance on the judgments of the Supreme Court in the case of *State of Uttar Pradesh v. Hari Ram (2013) 4 SCC 280; State of U.P. and another v. Vinod Kumar Tripathi and others* (Special Leave Petition (C) No. 16582 of 2014 decided with Special Leave Petition (C) No. 38922 of 2013, on 19th January, 2016); and the judgments of this Court in *State of U.P. and another v. Nek Singh 2010 LawSuit (All) 3581; Ram Chandra Pandey v. State of U.P. and others 2010 (82) ALR 136; Ehsan v. State of U.P. and another* (Writ C No. 21009 of 2012, decided on 08.10.2018); *Lalji v. State of U.P. and others 2018 LawSuit (All) 1276: 2018 (5) ADJ 566; and Yasin and others v. State of U.P. and others 2014 (4) ADJ 305 (DB).*

12. Rebutting the submissions of the learned counsel for the petitioners, learned standing counsel appearing for the State - respondents submits that the possession has been taken over by the State Government in accordance with law on 27.03.1998 and thereafter, the land in question was transferred in favour of Saharanpur Development Authority on 19.02.2002 and the stand taken by the learned counsel for the petitioners is of no consequence. In his submission, the writ petition lacks merit and deserves to be dismissed.

13. Learned Standing Counsel has placed reliance on the judgments of the Supreme Court in the cases of *State of Assam v. Bhaskar Jyoti Sarma and others (2015) 5 SCC 321 and State of U.P. and others v. Surendra Pratap and others AIR 2016 SC 2712,* and judgment of this Court in *Shiv Ram Singh v. State of U.P. and others 2015 (5) AWC 4918.*

14. We have summoned the original record and we have perused the same. We find that the record no where indicates as to how possession was taken and what is the name of the witness in whose presence such possession was taken. There is no name indicated in the counter affidavit filed by the State. The signature of the tenure holder is also not there.

15. At this stage, before adverting to the submissions raised on behalf of the parties, it is quite relevant to reproduce the relevant provisions of the Act for proper appreciation of the controversy involved in the matter.

16. Sections 2(o), 2(q) and sub-sections (5) and (6) of Section 10 of the Act, 1976 are reproduced hereunder:

*"**2(o)** "urban land" means,--*

(i) any land situated within the limits of an urban agglomeration and referred to as such in the master plan; or

(ii) in a case where there is no master plan, or where the master plan does not refer to any land as urban land, any land within the limits of an urban agglomeration and situated in any area included within the local limits of a municipality (by whatever name called), a notified area committee, a town area committee, a city and town committee, a small town committee, a cantonment board or a panchayat,

but does not include any such land which is mainly used for the purpose of agriculture.

Explanation.--For the purpose of this clause and clause (q),--

(A) "agriculture" includes horticulture, but does not include--

(I) raising of grass,

(ii) dairy farming,

(iii) poultry farming,

(iv) breeding of live-stock, and

(v) such cultivation, or the growing of such plant, as may be prescribed;

(B) land shall not be deemed to be used mainly for the purpose of agriculture, if such land is not entered in the revenue or land records before the appointed day as for the purpose of agriculture:

Provided that where on any land which is entered in the revenue or land records before the appointed day as for the purpose of agriculture, there is a building which is not in the nature of a farm-house, then, so much of the extent of such land as is occupied by the building shall not be deemed to be used mainly for the purpose of agriculture:

Provided further that if any question arises whether any building is in the nature of a farm-house, such question shall be referred to the State Government and the decision of the State Government thereon shall be final;

(C) Notwithstanding anything contained in clause

(B) of this Explanation, land shall not be deemed to be mainly used for the purpose of agriculture if the land has been specified in the master plan for a purpose other than agriculture;"

***"2(q)** "vacant land" means land, not being land mainly used for the purpose of agriculture, in an urban agglomeration, but does not include--*

(i) land on which construction of a building is not permissible under the building regulations in force in the area in which such land is situated;

(ii) in an area where there are building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day with the approval of the appropriate authority and the land appurtenant to such building; and

(iii) in an area where there are no building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day and the land appurtenant to such building:

Provided that where any person ordinarily keeps his cattle, other than for the purpose of dairy farming or for the purpose of breeding of live-stock, on any land situated in a village within an urban agglomeration (described as a village in the revenue records), then, so much extent of the land as has been ordinarily used for the keeping of such cattle immediately before the appointed day shall not be deemed to be vacant land for the purposes of this clause."

***"10(5)** Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice."*

***"10(6)** If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.*

Explanation.--In this section, in sub-section (1) of section 11 and in sections 14 and 23, "State Government", in relation to--

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government."

17. Section 2(o) of the Act, 1976 defines "urban land" and Section 2(q) defines "vacant land". Section 6 of the Act, 1976 provides that owner of the land shall submit a statement giving detail of the vacant land. Section 8(1) enjoins that the competent authority shall get a survey of the land conducted and on the basis of the said survey a draft statement under sub-section (3) of Section 8 of the Act, 1976 was required to be served upon the land owner calling for objection to the said statement within thirty days and the order is passed under sub-section (4) of Section 8 of the Act, 1976 and later a notification is issued under sub-section (1) of Section 10 for publication in the Gazette giving particulars of the vacant land. Thereafter another notice is published stating that the land shall be deemed to have been vested on the Government free from all encumbrances. Thereafter a notice under sub-section (5) of Section 10 of the Act, 1976 is issued calling upon the land owner to hand over possession of the land declared surplus. If the land owner fails to handover the possession voluntarily in response to the aforementioned notice, sub-section (6) of Section 10 of the Act, 1976 confers a power upon the competent authority to take forceful possession.

18. In the year 1999 the Parliament enacted the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short Act 15 of 1999). The said Act was adopted by the State of U.P. also by a notification dated 18.03.1999. It is apposite to reproduce Sections 3 and 4 of the Repeal Act.

***"3. Saving.--** (1) The repeal of the principal Act shall not affect--*

(a) the vesting of any vacant land under sub-section 10, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land

then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

***4. Abatement of legal proceedings.--** All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of*

this Act, before any court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to sections 11,12,13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

19. In exercise of the powers under Section 35 of the Act, 1976 the State Government issued the Directions, 1983 known as The Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976). The direction no.3 is relevant for our purpose which is extracted below:

"3. Procedure for taking possession of vacant land in excess of ceiling limit.--*(1) The competent authority will maintain a register in Form No.ULC - 1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the gazette."*

*4. (1) * * **

(2) An order in Form No. ULC-II will be sent to each land holder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No. ULC-I.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No. ULC-1. The competent authority shall in token of verification of the entries, put his signatures in Column 11 of Form No. ULC-1 and Column 10 of Form No. ULC-III.

Form No. ULC-1
Register of notice under Sections 10(3) and 10(5)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Sl. No.	Sl.No. of register of receipt Sl. No. of register of taking possession	Case Number	Date of Notification under Section 10(3)	Land to be acquired village Mohali	Date of taking over possession	Remarks	Signature of competent authority			

Form No. ULC-II
Notice order under Section 10(5)
[See clause (2) of Direction (3)]
In the court of competent authority
U.L.C. .....
No..... Date .....
Sri/Smt..... T/o .....

In exercise of the powers vested under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), you are hereby informed that vide Notification No..... dated ..... under Section 10(1) published in Uttar Pradesh Gazette dated ..... following land has vested absolutely in the State free from all encumbrances as a consequence Notification under Section 10(3) published in Uttar Pradesh Gazette dated ..... Notification No..... dated .... With effect from ..... you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District Authorised in this behalf under Notification No.324/II-27- U.C.77 dated February 9, 1977, published in the gazette, dated March 12, 1977, within thirty days from the date of receipt of this order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of vacant land

Location	*Khasra No. identification*	*Area*	*Remarks*
1	*2*	*3*	*4*

Competent Authority

.....

.....

No. .....

Dated.....

Copy forwarded to the Collector ..... with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenancemay, kindly be taken an intimation be given to the undersigned along with the copy ofcertificate to verify.

Competent Authority

.....

....."

20. In addition, the State Government has issued a Government Order on 29.09.2015 pursuant to the judgment of the Supreme Court in the case of Hari Ram (supra) and to avoid the unnecessary litigation the State Government has issued detailed directions in respect of the possession and abatement of the proceedings. The said Government Order reads as under:

"संख्या – 2228/आठ–6–15–124 यूसी/13

प्रेषक,

पनधारी यादव

सचिव,

उत्तर प्रदेश शासन।

सेवा में,

जिलाधिकारी,

गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर

आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

आवास एवं शहरी नियोजन अनुभाग–6

लखनऊः दिनांक 29 सितम्बर 2015

विषय– नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 ततक्रम में निर्गत शासनादेश तथा मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 के सम्बन्ध में।

————

महोदय,

उपयुर्क्त विषय पर मुझे यह कहने का निर्देश हुआ है कि भारत सरकार के अधिनियम संख्या–15/1999 दिनांक 18.03.1999 द्वारा नगर भूमि (अधिकतम सीमा एवं विनियमन) अधिनियम 1976 को निरसित करते हुए नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम 1999 प्राख्यापित किया गया जिसके क्रम में शासनादेश संख्या– 502/9– न0

भू0–99–21यू0सी0/99, दिनांक 31.03.1999 द्वारा उक्त निरसन अधिनियम को उत्तर प्रदेश राज्य में अंगीकृत किया गया। निरसन अधिनियम 1999 की धारा–3 में यह प्राविधान है कि मूल अधिनियम का निरसन निम्नलिखित को प्रभावित नहीं करेगा–

(1) (क) धारा–10 की उपधारा– (3) के अधीन ऐसी रिक्त भूमि का निहित होना, जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से अधिकश्तक किसी व्यक्ति या सक्षम प्राधिकारी ने ले लिया है।

(ख) धारा– 20 की उपधारा– (1) के अधीन छूट देने संबंधी किसी आदेश या उसके अधीन की गयी किसी कार्यवाही की किसी न्यायालय के किसी निर्णय में उसके विरूद्ध किसी बात के होते हुए भी विधिमान्यताः

(ग) धारा– 20 की उपधारा– (1) के अधीन प्रदान की गयी छूट की शर्त के रूप मे राज्य सरकार को किया गया कोई संदायः

(2) जहां–

(क) मूल अधिनियम की धारा–10 की उपधारा (3) के अधीन किसी भूमि को राज्य सरकार में निहित होना मानी गयी है किन्तु जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से प्राधिकृत किसी व्यक्ति या सक्षम प्राधिकारी द्वारा नही लिया गया : और

(ग) ऐसी किसी भूमि के बाबत जिसके लिए राज्य सरकार द्वारा किसी रकम का संदाय कर दिया गया है तब तक प्रत्यावर्तित नही की जाय और जब तक कि राज्य सरकार को संदाय की गयी रकम का यदि कोई हो, प्रतिदाय नही कर दिया जाता।

उक्त के क्रम में शासनादेश संख्या–777/9न0भू0–135 यू0सी0/99 दिनांक 09.02.2000, शासनादेश संख्या–1623/ 9–न0भू0–2000 दिनांक 09.08.2000 एवं शासनादेश संख्या–190/9–आ–6–2001 दिनांक 24.01.2001 निर्गत किये गये जिसमे मुख्य रूप से यह व्यवस्था की गई कि मूल अधिनियम धारा –8 (4) के अन्तर्गत जो भूमि रिक्त घोषित की गई थी और धारा–10 (3) के अन्तर्गत राज्य में निहित हो चुकी थी एवं धारा–10 (5) की कार्यवाही का आदेश हो चुका था परन्तु इस भूमि पर राज्य सरकार का कब्जा प्राप्त नही हो सका था, ऐसी भूमि के सम्बन्ध मे मूल भूधारक को अदा की गई धनराशि भूधारक द्वारा वापस करने पर भूमि मूल भूधारक को प्रत्यावर्तित की जा सकती है किन्तु अदा की गई धनराशि भू– धारक द्वारा वापस न करने की दशा में भूमि पर कब्जा किये जाने के सम्बन्ध मे विधि अनुसार अग्रिम कार्यवाही अमल मे लायी जाय। यह भी व्यवस्था की गई कि जिस भूमि के सम्बन्ध में धारा–10 (5) की कार्यवाही के उपरान्त धारा–10 (6) की कार्यवाही पूर्व हो चुकी है और भूमि पर राज्य सरकार द्वारा कब्जा लिया जा चुका है वह सरप्लस भूमि अन्तिम रूप से राज्य सरकार में निहित मानी जायेगी।

3. नगर भूमि सीमारोपण– गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर में लम्बित अर्बन सीलिंग प्रकरणों का समुचित रूप से निस्तारण ने होने की स्थिति मे भू–धारकों/वादियों द्वारा मा0 उच्च न्यायालय में अधिक संख्या में रिट याचिकायें योजित की जा रही है। नगर बस्ती कार्यालयों द्वारा रिट याचिकाओं में विभागीय पक्ष समयान्तर्गत साक्ष्यों सहित प्रबलता से प्रस्तुत न किये जाने के कारण मा0 न्यायालय द्वारा पारित आदेशों के क्रम में शासन को असमंजसपूर्ण स्थिति का सामना करना पड़ रहा है।

4. अर्बन सीलिंग के अन्य प्रकरण में राज्य सरकार द्वारा मा0 उच्चचम न्यायालय नई दिल्ली में विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम योजित की गयी। कालान्तर मे अन्य जनपदों के अर्बन सीलिंग से संबधित प्रकरणों मे योजित विशेष अनुमति याचिकायें उक्त विशेष अनुमति याचिका से क्लब की गयी। उक्त विशेष अनुमति याचिका संख्या–12960/2008 तथा उससे क्लब अन्य विशेष अनुमति याचिकाओं में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 मे अर्बन सीलिंग से संबधित प्रकरणों मे मार्गदर्शक सिद्धान्त प्रतिपादित किये गये हैं। निर्णय दिनांक 11.03.2013 का महत्वपूर्ण एवं कियात्मक अंश निम्नवत हैः–

प्रस्तर– 39

The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the

respondent is entitled to get the benefit of Section 3 of the Repeal Act.

प्रस्तर–40

We, therefore, find no infirmity in the judgment of the High Court and the appeal is, accordingly dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 3 of the Repeal Act. However, there will be no order as to cost.

5. नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 में विहित प्राविधान तथा तत्क्रम में निर्गत शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 स्वतः स्पष्ट है। विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम तथा उससे क्लब अन्य विशेष अनुमति याचिकाओं में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्त/आदेश भी स्वतः स्पष्ट हैं।

6. कृपया नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 तथा उक्त शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 में विहित व्यवस्था, विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्तों/आदेशों के आलोक में लम्बित प्रकरणों मे स्महंस पदहतमकपमदजे देखते हुए आवश्यक कार्यवाही की जाय।

भवदीय

ह0 अपठनीय

(पनधारी यादव)

सचिव

संख्या एवं दिनांक तदैव।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1. निदेशक नगर भूमि सीमारोपण, उ0प्र0 जवाहर भवन– लखनऊ

2. सक्षम प्राधिकारी नगर भूमि सीमारोपण गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

3. मुख्य स्थायी अधिवक्ता मा0 उच्च न्यायालय, इलाहाबाद

4. गार्ड फाईल।

आज्ञा से

(कल्लू प्रसाद द्विवेदी) उप सचिव।"

21. In view of the aforesaid provisions, referred to above, the question, which emerges to be decided by this Court, is as to whether in the present set of fact ceiling proceedings shall be abated in view of the sub-section (2) of section 3 of the Act of 1999.

22. The Supreme Court in various cases has taken the view that if at the time of the enforcement of the Repeal Act the possession has not been taken by the State in terms of sub-section (5) or sub-section (6) of Section 10 of the Act, 1976, then the proceedings under Section 1976 shall be abated.

23. The Supreme Court has elaborately considered the scope of sub-section (5) and sub-section (6) of Section 10 of the Act, 1976 and the directions framed by the State Government under Section 35 of the Act, 1976 and the directions framed by the State Government under U.P. Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Direction 1983 in the case of State of U.P. v. Hari Ram (2013) 4 SCC 280. The relevant part of the judgment of the Supreme Court reads thus:

***"30.** Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless*

there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in hands of few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words "acquired" and "vested" have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.

Voluntary surrender

31. *The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The Court in Maharaj Singh v. State of U.P.13, while interpreting Section 117(1) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 held that "vesting" is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in Rajendra Kumar v. Kalyan14 held as follows: (SCC p. 114, para 28)*

"28. ...We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. 'To "vest", generally means to give a property in.' (Per Brett, L.J. Coverdale v. Charlton15 : Stroud's Judicial Dictionary, 5th Edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To 'vest', cannot be termed to be an executor devise. Be it noted however, that 'vested' does not necessarily and always mean 'vest in possession' but includes 'vest in interest' as well."

32. *We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.*

33. *Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.*

Peaceful dispossession

34. *Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.*

35. *If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession."*

24. The case of Hari Ram (supra) was followed by the Supreme Court in the case of *Gajanan Kamlya v. Addl. Collector & Comp. Auth.& Ors. JT 2014 (3) SC 211.* The relevant part of the judgment is extracted below:

*"**13.** We have, therefore, clearly indicated that it was always open to the authorities to take forcible possession and, in fact, in the notice issued under Section 10(5) of the ULC Act, it was stated that if the possession had not been surrendered, possession would be taken by application of necessary force. For taking forcible possession, certain procedures had to be followed. Respondents have no case that such procedures were followed and forcible possession was taken. Further, there is nothing to show that the Respondents had taken peaceful possession, nor there is anything to show that the Appellants had given voluntary possession. Facts would clearly indicate that only de jure possession had been taken by the Respondents and not de facto possession before coming into force of the repeal of the Act. Since there is nothing to show that de facto possession had been taken from the Appellants prior to the execution of the possession receipt in favour of MRDA, it cannot hold on to the lands in question, which are legally owned and possessed by the Appellants. Consequently, we are inclined to allow this appeal and quash the notice dated 17.2.2005 and subsequent action taken therein in view of the repeal of the ULC Act. The above reasoning would apply in respect of other appeals as well and all proceedings initiated against the Appellants, therefore, would stand quashed."*

25. In *Special Leave Petition (C) No.17799 of 2015,* which was also taken up with Special Leave Petition (C) No. 38922 of 2013, State of U.P. and another v. Vinod Kumar Tripathi and others, vide order dated 19th January, 2016 the Supreme Court has held as under:

"As could be seen from the original record, possession of the land in question is taken neither by the competent authority or his authorised representative by following the procedure as laid down

under Section 10(5) and Section 10(6) of the Urban Land (Ceiling & Regulation) Act, 1976 (now repealed), therefore, the impugned order cannot be interfered. Hence, the special leave petition is liable to be dismissed and is hereby dismissed accordingly."

26. This Court in *State of Uttar Pradesh and another v. Nek Singh 2010 LawSuit (All) 3581*, has considered extensively the procedure which has to be followed for taking possession from the land holder. The relevant paragraph of the judgment reads as under:

"9. Otherwise also, the statutory benefit of the Repealing Act is also available to the landholder-respondent in the fact-situation of the matter, as the taking of the "possession" in the present case was neither de jure nor de facto. The term "possession" as per sections 3 and 4 of the Repealing Act and section 10(6) of the U.L.C.R Act means and implies the lawful "possession" after "due compliance of the statutory provisions". In State of U.P v. Boon Udhyog (P) Ltd. . 1999 4 AWC 3324 para 16, a Division Bench of this Court has held that where possession has been taken, its legality is to be decided on merits. Similarly, another Division Bench of this Court in State of U.P v. Hari Ram . 2005 60 ALR 535., has held that "in case possession is purported to be taken under section 10(6) of the Act, still Court is required to examine whether "taking of such possession' is valid or invalidated on any of the considerations in law. If Court finds that one or more grounds exist which show that the process of possession, though claimed under section 10(5) or 10(6) of the Act is unlawful or vitiated in law, then such possession will have no reorganization in law and it will have to be ignored and treated as of no legal consequence". On examination of the facts on record, it is crystal clear that the possession allegedly taken on 23.1.1986 was unlawful for plurality of reasons which are--Firstly, the possession allegedly taken on 23.1.1986 was pursuant to the CA's order dated 19.12.1985 under section 10(5) which was addressed to deceased Dhan Singh and, therefore, it was nullity and non est factum having no legal consequence and the possession taken on the basis was also void. Secondly, as per the Government Order dated 9.2.1977 issued by the State Government (filed with Supplementary Counter Affidavit and taken on record), the Collector was alone authorised under section 10(6) of the U.L.C.R Act to take possession on behalf of the State Government, but in the instant case, the possession was taken by the Tehsil officials and not by the Collector or the Additional Collector or by the Competent Authority himself. The Collector could not have delegated his authority to anyone else as a delegate could not have further delegated in view of the maxim--Delegatus non potest delegare. As such, the taking of possession by the Tehsil Officials was per se illegal being not as per the authorisation dated 9.2.1977 and, therefore, had no consequences. Thirdly, the possession was taken on 23.1.1986, while the alleged affixation of the order dated 19.12.1985 under section 10(5) of the U.L.C.R Act was made on 9.1.1986 by the process-server and, as such, the possession was taken on 23.1.1986 only after the expiry of 14 days instead of the statutory period of 30 days as enjoined in section 10(5) of the U.L.C.R Act. Fourthly, the possession certificate (Annexure-7 to the WP) did not mention the factum of "taking' possession, and it merely stated

the factum of the transfer of possession to the State Government. Needless to say that unless the possession was first "taken', the same could not have been "transferred' to the State Government. The plain reading of the possession certificate does not show taking of possession from the occupants and, therefore, it cannot be termed as a possession certificate under section 10(6). Fifthly, the stand of the State Government before the Appellate Authority was that the State Government has "taken over only symbolic possession over the plots in question and the same cannot be treated physical possession". If it be so, then also, it would not be deemed to be "possession" within the meaning of section 10(6) of the U.L.C.R Act which meant actual and physical possession and not symbolic one."

27. The similar view has also been expressed by this Court in *Ram Singh v. State of U.P. and others 2013 (7) ADJ 662 (DB).* The relevant part of the judgment is extracted below:

***"36.** It is a matter of common notice and also matter of record that large number of cases which earlier came before this court and were decided and even at present also on getting the record it is clear that proceedings are either without any notice on the land holders or after the notice to the dead person or after the notice but not the proper service stating the name of the witnesses and their details and in most of the cases proceedings did not progress after the notice under Section 10(5) of the Urban Land (Ceiling and Regulation) Act 1976 and if there is notice under Section 10(6) of the Act it again do not contain proper service with the name/identity of the witnesses. For taking Dakhal document demonstrates the authority signing the paper is not competent. The emphasis on the word 'actual physical possession' has some special meaning and thus that rules out the paper possession and it is for this reason it has been said that mere entry will not reflect taking of actual physical possession."*

28. In the case of *State of U.P. Thru Secy Avas Avam Shahri Niyojan v. Ruknuddin and others* (Writ-C No. 54830 of 2011, decided on 03.10.2018: LawSuit(All) 3470), the Court has observed as under :

*"We having gone through the records and we find that the possession memo which was prepared on 22/23.03.1998, no where indicates as to how possession was taken and what is the name of witness in whose presence such possession was taken. There is no name indicated in the writ petition filed by the State or even in the rejoinder affidavit. The name of the Lekhpal in whose presence the alleged possession is said to have been taken has not been mentioned and the printed proforma of the possession memo is blank to that effect. The question as to how the factum of taking actual physical possession has been established by the State was discussed by a Division Bench in the case of **Mohd. Islam & 3 Others Vs. State of U.P.** in Writ Petition No. 15864 of 2015 decided on 4th December, 2017. The said decision was quoted with approval by a Division Bench in the case of **Rati Ram Vs. State of U.P. & Others 2018 (4) ALJ 338** paragraph no. 8 as follows:-*

"8. The 'Dakhalnama' a certified copy whereof has been produced before us does not even bear the signatures of any attesting witness. We find this to be a lapse and patent illegality the benefit whereof

has to be given to the land holder in view of the Division Bench judgment in the case of Mohd. Islam and 3 others v. State of U.P. and 2 others, Writ Petition No. 15864 of 2015 decided on 4th December, 2017. It was also a case of District-Saharanpur. We extract paragraph Nos. 44 to 47 of the said judgment which are as under:

"44. Since, in the present case, neither factum of taking actual physical possession by Competent Authority under Ceiling Act has been fortified by placing any document nor factum of possession of Development Authority at any point of time has been shown, therefore, argument advanced by learned Standing Counsel on the basis of State of Assam (supra) will not help.

45. Viewed from the above exposition of law we find in the present case that no such exercise of issuing notice under Section 10(6) of the Act, 1976 and thereafter execution of memo on the spot had taken place which is mandatory for ceiling authorities as admittedly the original tenure-holder and then his successors had never voluntarily surrendered the possession of land. In the absence of voluntary surrender of possession of surplus land, the authorities were required to proceed with forcible possession. The document of possession memo would not by itself evidence the actual taking of possession unless it is witnessed by two independent persons acknowledging the act of forcible possession. As discussed above in the earlier part of this judgment we are not able to accept the alleged possession memo worth calling a document as such in the absence of certain requisites, nor does it bear the details of witnesses who signed the document. It bears mainly signatures of Chackbandi Lekhpal, a person taking possession and then the document has been directed to be kept on file. This is no way of taking forcible possession nor, a document worth calling possession memo. A mere issuance of notification under Section 10(3) and notice under Section 10(5) regarding delivery of possession does not amount to actual delivery of possession of land more especially in the face of the fact that the tenureholder had in fact not voluntarily made surrender of possession of surplus land and no proceeding under Section 10(6) had taken place.

46. Since, we have held that possession memo dated 20.06.1993 is not a possession memo and is a void document for want of necessary compliance under Section 10(6) of the Act, 1976, the petitioners are entitled to the benefit under Section 4 of the Repeal Act, 1999 that came into force w.e.f. 20.03.1999.

47. We may also place on record that respondents claim that possession of land in question was handed over to Saharanpur Development Authority pursuant to Government Order dated 29.12.1984 but here also we find that no material has been placed on record to show that any such actual physical possession was handed over to Saharanpur Development Authority and the said authority is in de facto possession of land in dispute. Except bare averment made in the counter-affidavit respondent have not chosen to place anything on record to support the stand that de facto possession over land in dispute is that of Saharanpur Development Authority. Therefore even this stand has no legs to stand and is rejected."

29. The decisions in the case of *Bhaskar Jyoti Sarma* (2015) 5 SCC 321 and a Division Bench of this Court in *Shiv Ram Singh* 2015 (5) AWC 4918 have been

relied upon by the learned standing counsel. Both the judgments have been considered by a Division Bench of this Court in the case of *Mohammad Suaif and another v. State of U.P. and others* 2019 (5) ADJ 764 (DB) and *Lalji* (supra).

30. The case of Shiv Ram Singh (supra), the petitioner therein had challenged the order passed by the District Magistrate holding that the possession of the land declared surplus has been taken on 25th June, 1993, much before Repeal Act came into force. Hence, it was found that he was not entitled to the benefit of the provisions of Section 3 (2) of the Repeal Act. In the said case, the notice under Section 10(1) was issued on 15th May, 1985, thereafter on 02nd June, 1986 a notification under Section 10(3) was issued and published in the official gazette, and on 25th February, 1987 a notice under Section 10(5) of the Act, 1976 was issued. The respondents-State had taken a stand that the possession was taken on 25th June, 1993 pursuant to the notice dated 25th February, 1987 i.e. prior to enforcement of the Repeal Act and in the revenue record the name of the State was mutated. The petitioner therein had earlier approached the Court by means of Writ Petition No. 47279 of 2002 claiming that he is still in possession over the land which was declared surplus, hence after the Repeal Act the possession cannot be taken over from him. The said writ petition was disposed of by this Court by issuing a direction upon the District Magistrate to consider his representation. The District Magistrate, after furnishing opportunity to the petitioner, by an order dated 10th May, 2007 held that the possession has already been taken on 25th June, 1983, hence the petitioner would not be entitled to the benefit of the Repeal Act. The petitioner challenged the said order of the District Magistrate after two years in July, 2009. In the meantime in the year 2008 the construction of a Sewage Treatment Plant (STP) for treating 210 MLD of sewage was commenced. The Jal Nigam, in whose favour the land was transferred, filed a counter affidavit in the said writ petition and took the stand that by the time the writ petition was filed, nearly 65% of the work had been completed at a cost of Rs.73 crores and the petitioner was fully aware of the said facts but he did not file the writ petition for two years. In the light of those peculiar facts the Court did not interfere. Moreover, the Court has also found that the procedure for taking possession was followed by the administration. The District Magistrate after affording opportunity to the petitioner has recorded a finding that the possession was taken on 25th June, 1993.

31. We have carefully gone through the judgment of Shiv Ram Singh (supra) and we find that the said judgment is distinguishable for the reasons recorded above.

32. In the case of Bhaskar Jyoti Sarma (supra) the land owner has not denied the fact that possession was taken from him by the State before enactment of the Repeal Act. In view of the admitted fact the Supreme Court refused to examine the matter that whether the possession was taken forcefully or illegally. Once possession was taken by the State and land vested in the State Government, the benefit of Section 4 of the Repeal Act shall not be applicable. Hence, the said case is distinguishable as in the present case the main issue raised by the petitioners is that they are still in physical possession and the State has never taken possession from them.

33. Keeping in the mind the principle laid down by the Supreme Court and this Court, as indicated in the authorities referred herein-before, we find that in the counter affidavit the State has taken a very general and vague stand about the possession. In Paragraph-3 of the counter affidavit of the State the only averment made in this regard is that the notice under Section 10(5) of the Act, 1976 was issued on 27.01.1994. It is also averred therein that *"thereafter the State Government obtained possession on the surplus vacant land of 8246.00 square meters on 27.03.1998, the possession was obtained in accordance with law"*. It is not mentioned in the counter affidavit that the petitioners have given voluntary possession after receiving the notice under Section 10(5) of the Act, 1976. From the original record it was evident that there was no material to show that the petitioners have given voluntary possession to the State authorities after receiving the notice under Section 10(5). If they had not given the voluntary possession then the only course open to the authorities was to take forceful possession under Section 10(6) of the Act, 1976. There is no material on the record or averment made in the counter affidavit to show that the forceful possession was taken from the petitioners under Section 10(6) of the Act, 1976. In the counter affidavit filed on behalf of the State, the name of the officer, who has taken the possession, is not disclosed.

34. In addition to above, as discussed above, there is no material on the record to demonstrate that actual possession was handed over to the Saharanpur Development Authority except a Dakhalnama wherein the land has been shown to be agricultural land. But except bald statement no other material is on the record to show that any construction has been made. In any view of the matter, if the possession has not been taken in terms of Sections 10(5) and 10(6) of the Act, 1976, the petitioners are entitled for the benefit under Sections 3 and 4 of the Repeal Act.

35. In view of the above, we find that the physical possession of the land in question was never taken from the petitioners. They are still in physical possession over the land in question. For all the reasons stated above, we find that the ceiling proceedings stood lapsed and the petitioners are entitled for the land in question which has been declared surplus.

36. With the aforesaid observations and directions, the writ petition is allowed.

37. No order as to costs.

(2020)1ILR 1038

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C No. 14201 of 2014
Connected with Writ C Cases No. 34702 of 2018 & 37541 of 2018

Smt. Anarkali & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pramod Kumar Jain, Sri Arvind Kumar, Sri Birendra Kumar, Sri Vijay Kumar

Counsel for the Respondents:

C.S.C.,Sri Ajit Kumar Singh (Addl. A.G.), Sri Sudhanshu Srivastava (Addl. C.S.C.), Sri Nimai Dass, Sri Amit Verma

A. Nazul - defined - historic evolution - Article 296 of the Indian Constitution - power of State Government or Union of India to get ownership of land which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

The 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. (Para 54)

legislature is almost *pari materia* with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of Transfer of Property Act, 1882. (Para 68)

Entire lease deed shows that if premises is assigned, within one calendar month, a notice was to be given to Collector giving details of persons but in case of any non observance or breach, it was lawful for Lessor to enter upon demised premises. (Para 86)

That after 30th June, 1932 i.e. expiry of first term of lease, there was no renewal of term of lease at all. Therefore, rights of the petitioner ceased after expiry of lease on 30.06.1932. (Para 87)

In fact, the initial lease commenced on 01.07.1902, the period of 90 years lapsed on 30.6.1992. If renewal would have been allowed, even then no lease to lessees could have been granted for period subsequent to 30.6.1992 since maximum period of lease including two renewals was 90 years. Thus, petitioners had no legal right whatsoever over property in dispute in any manner after 30.6.1932 and, in any case, after 30.6.1992. (Para 89)

C. Transfer of Property Act, 1882 - Section 106 - once the lease stood determined by efflux of time(stand expired), there is no necessity to issue quit notice - status of lessee is that of 'tenant at sufferance' i.e., one who wrongfully continues in possession after extinction of lawful title - section 116 is not applicable.

B. Government Grants Act, 1985 - Section 2 and 3 - any grant or transfer of land or of any interest, as the case may be, excludes applicability of Transfer of Property Act, 1882, for all purposes - therefore, 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise - Grant includes 'lease'.

After the U.P. Amendment Act, 1960, Section 2 and 3 got amalgamated in Section 2 of Government Grants (U.P. Amendment) Act, 1960. The intent, effect and declaration by

D. Resumption of land - State is empowered to resume/re-enter Nazul land at any time, more so for public purpose.

Writ Petitions rejected. (E-10)

List of cases cited: -

1. Sangam Upniveshan Avas Evam Nirman Sahkari Samiti Ltd. Vs. State of U.P. and ors 2018 (7) ADJ 617 (DB)
2. State of U.P. and ors Vs. United Bank of India and ors 2016 (2) SCC 757

3. Smt. Shakira Khatoon Kazmi and Ors Vs. State of U.P. and ors 2002(1) AWC 226

4. Azim Ahmad Kazmi and ors Vs. State of U.P. and ors 2012 (7) SCC 278

5. Chintamani Ghosh and anr Vs. State of U.P. and ors 2001 (2) UPLBEC 1003

6. M/s Madhu Colonizers Pvt. Ltd. Vs State of U.P. and ors Writ Petition No. 62588 of 2010

7. Dyke Vs. Walford 5 Moore PC 434=496-13 557 (580)

8. Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare AIR 1969 SC 843

9. Collector of Masulipatam Vs. C. Vencata Narainapah 8 MIA 500, 525

10. Ranee Sonet Kowar Vs. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101

11. Bombay Dyeing and Manufacturing Co. Ltd. Vs. State of Bombay [1958] SCR 1122, 1146

12. Superintendent and Legal Remembrancer Vs. Corporation of Calcutta [1967] 2 SCR 170, 204

13. Raja Rajinder Chand Vs. Mst. Sukhi AIR 1957 Sc 286

14. Nayak Vajesingji Joravarsinghji Vs. Secretary of State for Indian Council AIR 1924 PC 216

15. Dalmia Dadri Cement Co. Ltd. Vs. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816

16. Promod Chandra Deb Vs. State of Orissa AIR 1962 SC 1288

17. Amarsarjit Singh Vs. State of Punjab AIR 1962 SC 1305

18. Thakur Amar Singhji Vs. State of Rajasthan AIR 1955 SC 504

19. State of Rajasthan Vs. Sajjanlal Panjawat AIR 1975 SC 706

20. Director of Endowments, Govt. of Hyderabad Vs. Akram Ali AIR 1956 SC 60

21. Sarwarlal Vs. State of Hyderabad

22. Biswambhar Singh Vs. State of Orissa 1964 (1) SCJ 364

23. State of U.P. Vs. Zahoor Ahmad 1973 (2) SCC 547 *(followed)*

24. Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. Vs. Government of Tamil Nadu (1997) 3 SCC 466

25. Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and ors (2011) 5 Scc 270

26. Anand Kumar Sharma Vs. State of U.P. and ors 2014 (2) ADJ 742 (FB)

27. Sevoke Properties Ltd. Vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664*(followed)*

28. R.V. Bhupal Prasad Vs. State of A.P. (1995) 5 SCC 698 *(followed)*

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

1. Writ Petition No. 14201 of 2014 *(hereinafter referred to as "WP-1")* has been filed by eight petitioners i.e. Smt. Anarkali wife of (late) Hari Shanker; Brijesh Patel, Rajesh Patel and Akhilesh Patel, all sons of (late) Hari Shanker; Smt. Urmila Patel wife of (late) Shiv Shanker, Himanshu Patel, Sudhanshu Patel and Divyanshu Patel (minor) all sons of (late) Shiv Shanker, with a prayer to issue a writ of certiorari to quash order dated 14.06.2012 (Annexure-14 to the writ petition) whereby petitioners' application for conversion of Nazul land in dispute into freehold has been rejected by District Magistrate, Allahabad. Petitioners have also prayed for issue of a writ of mandamus commanding District Magistrate, Allahabad to freehold Bungalow No. 23/29 (New No. 85/29), R-Naseebpur, Bakhtiyara, Clive Road, Allahabad (Area 5050 square meters).

2. Writ Petition No. 34702 of 2018 *(hereinafter referred to as "WP-2")* has been filed by a Housing Society namely, "Ravi Sahkari Avas Samiti Limited" through its Secretary, Ravi Kumar *(hereinafter referred to as "R.S.A.Society"),* praying for issue of a writ of certiorari to quash notice/order dated 06.09.2018 (Annexure-1 to the WP-2) allotting land in dispute i.e. Nazul Land R-Naseebpur, Bakhtiyara, Bungalow No.

23, Clive Road and Bungalow No. 19 Muir Road, Allahabad, Area 4 acres, 3 roods, 21 poles to "Allahabad Development Authority" *(hereinafter referred to as "ADA")* for construction of affordable houses for weaker section under "Pradhan Mantri Avas Yojana (Urban)".

3. Writ Petition No.37541 of 2018 *(hereinafter referred to as "WP-3")* has been filed by petitioners of WP-1 except Rajesh Patel, who has died in the meanwhile and therefore, has been substituted and replaced by his wife Smt. Suman Patel and minor son Master Aditya. Therefore, in all, there are nine petitioners namely Smt. Anarkali wife of (late) Hari Shanker; Brijesh Patel and Akhilesh Patel, both sons of (late) Hari Shanker; Smt. Suman Patel wife of (late) Rajesh Patel; Master Aditya (minor) through his mother Suman Patel as natural guardian; Smt. Urmila Patel wife of (late) Shiv Shanker, Himanshu Patel, Sudhanshu Patel and Divyanshu Patel all sons of (late) Shiv Shanker. They have prayed for issue of a writ of certiorari to quash order dated 06.09.2018 in respect of Nazul Plot No.R Naseebpur Bakhtiyara, Bungalow No.23 and Bungalow No.19, Muir Road, Allahabad, area 4 acres, 3 roods, 21 poles, which has also been challenged by R.S.A.Society in WP-2. Therefore, order challenged in WP-2 and WP-3 is the same. Petitioners in WP-3 have further sought a writ of mandamus restraining respondents 2 to 4 from evicting petitioners from property situate at R-Naseebpur Bakhtiyara, Bungalow No.23 and Bungalow No.19, Muir Road, Allahabad. Petitioners of WP-2 claimed their interest in half of the aforesaid disputed property though claim of petitioner in WP-2 has been disputed by petitioners of WP-3 on the ground that petitioners in WP-2 have no right over property in dispute at all.

4. Since all these writ petitions relate to same Nazul plot/land, we have heard all these matters together and are deciding the same by this common judgement. Before dealing with the issues raised by learned counsel for parties, it would be appropriate to refer relevant facts of these three writ petitions separately.

Writ Petition No. 14201 of 2014 (WP-1)

5. Dispute relates to Bungalow No. 21, Clive Road, Allahabad (renumbered by Nagar Nigam, Allahabad as 23, Clive Road and later on as 29, Clive Road).

6. Secretary of State for India in Council through Collector, Allahabad executed a lease deed registered on 06.11.1902 in favour of Sri Sahai son of Sri Sheo Din (Kurmi), resident of village Rajapur, Allahabad in respect of Nazul Plot, measuring 4 acres 3 rods 21 poles, situate at Naseebpur Bakhtiyara alias Chikatpur, Allahabad for a period of 30 years, commencing from 01.07.1902, on an yearly rent of Rs. 146 and 8 annas. Lease was renewable for two terms of 30 years each, and total term not to exceed 90 years. A partition suit was filed by one Prithvi Pal son of Mahavir being Suit No. 81 of 1974 in the Court of Civil Judge, Allahabad impleading Asharfi Lal son of Mewa Lal; Mrs. Shanti Devi daughter of Mewa Lal; Mrs. Ganeshia wife of Mewa Lal; Moti Lal son of Mewa Lal and Raja Ram son of Pitamber Lal as defendants-1 to 5 claiming that he has four and half annas share out of six annas i.e. 3/4 share of property in dispute i.e. Bungalow No. 23A (new number 29, Clive Road,

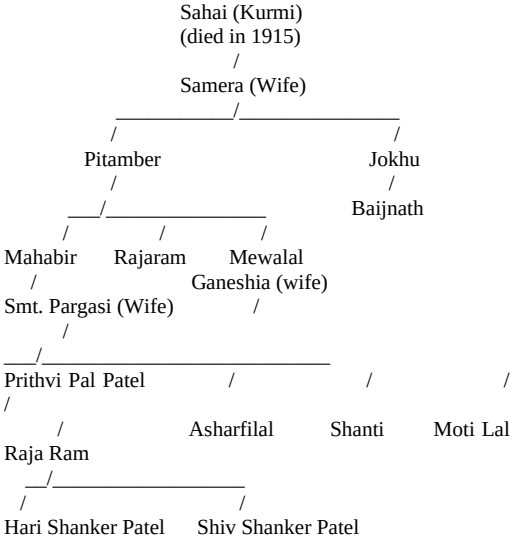
Allahabad) and the said property be partitioned and separate possession be given to plaintiff. Suit stood decreed in terms of a compromise entered between the parties, vide judgment dated 04.04.1977 and decree dated 31.08.1977. As a result of compromise decree, name of predecessors in interest, Mewa Lal and Raja Ram was recorded in respect of Bungalow No. 23A/29A, Clive Road, Allahabad (new number 85A/25A-1, Clive Road) and petitioners have no concern with the same. Petitioners' name was recorded in respect of Bungalow No. 23/29, Clive Road, Allahabad (new number 85/29, Clive Road, Allahabad). It is also said that earlier, sons and grand-sons of Sri Sahai went in a litigation, a partition suit being Suit No. 51 of 1916 in the Court of Sub-Judge, Allahabad. In the aforesaid suit, Smt. Pargasi widow of Mahavir was also impleaded as defendant-3. Petitioners claimed their succession from Pargasi, widow of Mahavir, who was allotted Bungalow No. 4, Beli Road, Allahabad in her share. After death of Sri Sahai *(Kurmi)*, name of Smt. Pargasi was recorded as legal heir and after her death, Prithvi Pal Patel was declared as legal heir. Petitioners' submitted an application dated 24.04.2000 for freehold of Bungalow No. 85/29 Clive Road, Allahabad, area 5050 square meter in the light of Government Order *(hereinafter referred to as 'G.O.')* dated 01.12.1998. It was stated that lease had expired on 30.06.1992 whereafter application for renewal of lease was given but the same has not been disposed of.

7. One Smt. Suraj Kali filed Writ Petition No. 31358 of 2009 for a direction to decide representation dated 29.05.2009. Writ petition was subsequently dismissed as not pressed on 16.06.2009. Petitioners then filed Writ Petition No. 21011 of 2012 seeking a direction to District Magistrate, Allahabad to decide freehold application dated 24.04.2000. This writ petition was disposed of on 01.05.2012 giving direction to District Magistrate to take a decision on petitioner's aforesaid application. Ultimately, vide order dated 14.06.2012 (Annexure-14 to the writ petition), District Magistrate rejected application dated 24.04.2000 and representation dated 08.05.2012. Petitioners then filed recall application dated 09.07.2012 seeking recall of exparte order dated 14.06.2012 but nothing has been done thereon, hence, W.P.-1 has been filed challenging aforesaid order dated 14.06.2012.

8. Impugned order has been challenged on the ground that it is exparte order; no opportunity was given to petitioners; G.Os. with regard to freehold were not followed; in the Master Plan, land use was shown as 'Commercial' and to treat disputed land as 'Residential' is erroneous and decision of Collector is arbitrary, shows non application of mind and unfair. Reliance has been placed on a Division Bench decision of this Court in **Sangam Upniveshan Avas Evam Nirman Sahkari Samiti Ltd. vs. State of U.P. and Others 2018 (7) ADJ 617 (DB).**

9. A counter affidavit has been filed by respondents sworn by Sri Rajesh Kumar Rai, Additional District Magistrate (Nazul), Allahabad. It is said that Plot No. R-Naseebpur, Bakhtiyara, Allahabad, area 4 acres 3 roods 2 poles (i.e. 19731.96 square metre) is a 'Nazul land'. Lease deed was executed on 11.10.1902 in favour of Sri Sahai (kurmi) sons of Sheo Din for a period of 30 years, with effect from 01.07.1902. The initial period of lease was subject to renewal twice of 30 years each and a total period, not more than 90 years. Initial tenure of lease expired on

30.06.1932. Thus, taking maximum period of lease it would have expired on 30.06.1992. In Nazul Register, names of Mewa Lal, Raja Ram, grand-sons of Sri Sahai (Kurmi) and sons of Pitamber as well as Smt. Pargasi, daughter-in-law of Pitamber, Jokhu another son of original lessee, i.e., Sri Sahai (Kurmi) and Baijnath, grandson of Sri Sahai (Kurmi) and son of Jokhu were recorded. Later on, half portion of disputed land was shown in the name of U.P. Agricultural Credit Bank *(hereinafter referred to as "U.P.A.C. Bank")*. The family tree of Sri Sahai Kurmi is as under:



10. As per record Sri Baijnath, grand-son of Sri Sahai (Kurmi) created mortgage over disputed Nazul land, which came into his share, in favour of U.P.A.C. Bank. He failed to pay loan whereupon recovery suit was filed by U.P.A.C.Bank and in execution sale, U.P.A.C.Bank itself purchased that part of disputed Nazul land on 04.09.1943. Possession was delivered to U.P.A.C.Bank on 04.05.1946. This is evident from the judgment dated 05.10.1961 of this Court passed in Second Appeal No. 2189 of 1951, U.P. Agricultural Credit Bank Limited versus Baij Nath and 2 Others. After expiry of first term of lease in 1932, no application for renewal of lease was given by anyone. The partition suits, referred to in writ petition, are not concerned with respondents since State of U.P. and its authorities were not party, either in Suit No. 51 of 1916 or 81 of 1974. Moreover, parties to the suit did not own land. The only right, at the best they could have, was lease right, which also expired on 30.6.1932. Hence, there could not have been any division or partition of ownership of land in dispute. Petitioner and other heirs of original lessee committed breach of conditions of lease, inasmuch as, they raised construction of non-residential buildings on disputed land, hence, an order was passed by Collector, Allahabad on 24.09.1992 (Annexure CA-3) directing Mukhya Nagar Adhikari, Nagar Mahapalika, Allahabad to enter the name of State Government in 'Nazul Register' and take appropriate action for possession of entire land from unauthorized occupants. Order dated 24.09.1992 was challenged by Smt. Ram Dulari wife of Prithvi Pal in Writ Petition No. 36227 of 1992 seeking following reliefs:-

"i. issue a writ order or direction in the nature of certiorari quashing the impugned notice dated 18.2.1992 as issued by the respondent no. 2 (Annexure-4), the impugned order passed by the respondent no. 2 dated 24.9.1992 (Annexure-6) the news item as published in Nav Bharat Times dated 2.10.1992 (Annexure-7) and the entire proceedings consequent upon ***the notice dated 18.2.1992 (Annexure-4) in respect to the property situated over Plot No. 'R' of village Naseebpur, Bakthiara Pargana Chail, District Allahabad, known as 19 Muir Road 23***

Clive Road, now numbers 277/87 Muir Road, 85/29 Clive Road.

ii. issue a writ order or direction in the nature of mandamus directing the respondent no. 2 to consider the petitioners application for renewal of lease dated 17.9.1990 (Annexure-2) in accordance with law.

iii. issue any other alternative and suitable writ order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case.

iv. award costs of the petitioner throughout to the petitioners."

11. Writ Petition was ultimately dismissed as not pressed, vide Court's order dated 22.11.1999. In the aforesaid writ petition, wife, sons and daughters of Prithvi Pal were petitioners and besides State of U.P., District Magistrate, Allahabad and Others, Asharfi Lal and Moti Lal, sons of Mewa Lal, and Raja Ram son of Pitamber were impleaded as respondents. As a result of dismissal of writ petition, order dated 24.09.1992 attained finality in respect of those petitioners and in respect of others also since they did not challenge the said order.

12. Later on, Smt. Suraj Kali claiming herself to be legal heir of Sri Sahai (*kurmi*), filed Writ Petition No. 31358 of 2009 seeking a direction for deciding her claim for freehold rights of land in dispute and therein present petitioners were impleaded as respondents-5 to 9. Suraj Kali pleaded that they (respondents 5-9) were not entitled to have any right over disputed plot. Aforesaid writ petition was also dismissed as not pressed.

13. Collector thereafter examined claim of petitioners for freehold and passed a detailed order holding that they were not entitled for freehold, in the facts stated above. Opposing the writ petition, it is said in the counter affidavit that petitioners are not entitled for grant of freehold for following reasons:-

"(a) the concerned lease deed dated 11.10.1902 has already been rescinded/ cancelled by the order dated 24.09.1992, and the name of the State of Uttar Pradesh has been re-entered, and thus, the petitioners could/cannot be treated to have entered into the shoes of the aforementioned "Sri Sahai Kurmi" (original lessee) in any manner whatsoever qua the disputed plot.

Without prejudice to the aforesaid, even otherwise,

(b) the petitioners could/ cannot be treated to be the exclusive owners of the said specific portion of the disputed-plot for which, the application was submitted by the petitioners for the grant of free-hold rights.

As stated hereinbefore, no reliance could/ can be placed upon the partition decree passed in the aforementioned Suit No. 81 of 1974 on account of the reasons mentioned hereinbefore, and thus, without prejudice, if there has been any right upon the disputed-plot of t he heirs of the said "Sri Sahai Kurmi" then the same has been equally of all the surviving heirs of the said "Sri Sahai Kurmi" since all of them, if entered, then jointly, entered into the shoes of the said "Sri Sahai Kurmi", and thus, the petitioners should have submitted that consent of all the remaining surviving heirs of "Sri Sahai Kurmi" for the purpose of grant of free-hold rights in favour of the petitioners upon the particular/ specific

portion of the disputed plot for which the concerned application for the grant of free hold rights upon the disputed plot was filed by the petitioners;

Without prejudice to the aforesaid, even otherwise,

(c) the unauthorized constructions without the permission of the Answering-Respondent No. 2 that too for the commercial purposes, have been raised upon the disputed-plot, and thus, the petitioners have ***violated the terms of the said lease-deed*** *and as per the report of the Nagar Nigam, Allahabad, the "****land use" of the disputed-plot in the Master-Plan during the relevant period was residential and the said violation could not be treated to have been waived by the State Government,*** *particularly at the time of the submissions of the application by the petitioners for the grant of free-hold rights upon the disputed plot;*

Without prejudice to the aforesaid, even otherwise,

(d) in view of the averments made in the said Writ Petition No. 31358 of 2009, it is evident that all the surviving heirs of the said "Sri Sahai Kurmi" have not come/ reached upon an amicable settlement with regard to the grant of free-hold rights upon the disputed plot, and thus, the petitioners are not entitled for the free hold rights upon the disputed plot in this view of the matter."

14. A rejoinder affidavit has been filed stating that on 17.09.1990, application for renewal of lease was submitted. Alleging that lease was not got renewed; unauthorized construction has been made and possession has been given to unauthorized persons, a show-cause notice was given by District Magistrate, Allahabad to petitioners and other legal heirs of original lessee on 18.02.1992. Petitioners submitted reply on 02.03.1992. In the meantime, in respect of Bungalow No. 19, Muir Road, Allahabad, R.S.A.Society claiming its own right over disputed Nazul land, filed Writ Petition No. 26876 of 1993 wherein this Court made an observation that matter may be examined by competent authority and subject to such observation, writ petition was dismissed. The order passed by this Court on 05.02.2009 reads as under:-

"Having heard Sri Rahul Sripat learned counsel for the petitioner at some length and after going through the record ***we find that lease deed was executed in the year 1902 for 30 years in favour of original lessee, who transferred the same in favour of the company namely U.P. Agriculture Credit Bank Limited. The company did not get lease renewed after 30 years and continued in possession.*** *The company went in liquidation proceeding and the* ***property in dispute so leased to the original lessee and sold to the company was sold in liquidation proceeding.*** *Since the lease was not renewed in favour of the company, therefore,* ***right of the purchaser from the company i.e. right of the vendor and the right of the petitioner vendee was subject to renewal of the lease. Therefore no writ of mandamus can be issued for renewal of the lease after such a long gap.*** *In our opinion the initial order of Collector, Allahabad was by way of mistake which was corrected by him by withdrawing the said order.* ***Thus the position emerges that the terms of the lease has already expired and the petitioner has no right to claim writ of mandamus from this Court.*** *However, it is open to the petitioner to approach the State Government for grant of fresh lease under the Government Grant Act.*

Considering the entire facts of the case and taking into account the fact that the petitioner has paid consideration for purchasing the land from the company in liquidation proceeding and in the liquidation proceeding the Government did not raise any objection that it cannot be sold in liquidation proceeding as lease was not renewed in favour of the company. Therefore the State Government is otherwise stopped from taking such an objection as the doctrine of estoppel will directly come in the way.

In view of the above discussion ***the matter is relegated to the State government to pass a fresh order on merits after scrutinizing and examining the rival claims of the parties and material available on record. It may also consider the claim of Smt. Ram Dulari and others, who have filed impleadment application in the writ petition.***

For the aforesaid reasons ***this writ petition is dismissed."***

(Emphasis added)

15. In the meantime, it appears that a complaint was made by one Brijesh Patel and others to State Government whereupon State Government sought comments from District Magistrate, Allahabad who sent its report vide letter dated 26.11.2012. It was mentioned therein that Bungalow No. 19, Muir Road, Allahabad/ 21 Clive Road, Allahabad was never given in possession to Umeshwar Nath son of Harihar Nath as no such document was available on record. With regard to litigation between U.P.A.C. Bank and Jokhulal, it is said that petitioners were neither party in Suit No. 913 of 1946 nor in Civil Appeal No. 97 of 1950 nor in Second Appeal No. 2189 of 1991. It is also said that matter is pending for consideration before State Government pursuant to an order passed by this Court in Writ Petition No. 26876 of 1993. (We have already observed that this writ petition was dismissed on 05.02.2009). Predecessor in interest of petitioners constructed Bungalow over land of 21, Clive Road, R-Naseebpur, Bakhtiyara. The order cancelling lease deed was challenged by petitioners in Writ Petition No. 36227 of 1992 wherein an interim order was passed and matter is pending before State Government and petitioners were not entitled for freehold of land in dispute in the light of G.O. dated 28.01.2011 and G.O. dated 04.03.2014 is not applicable to petitioners.

Writ Petition No. 34702 of 2018 (WP-2)

16. The case set up by petitioner is that it is a Housing Society registered by U.P. Avas Evam Vikas Parishad under U.P. Cooperative Societies Act, 1965 *(hereinafter referred to as "Act, 1965")* vide Registration Certificate issued by Deputy Housing Commissioner/Sub-Registrar, U.P. Avas Evam Vikas Parishad, Lucknow on 11.02.1982 and has been renewed from time to time. Property in dispute was leased out to Sri Sahai son of Sri Sheo Din in 1902, for a period of 90 years, initially for 30 years and renewable for two terms of 30 years each. Partition suit between two sons of Sahai i.e. Pitamber and Jokhu resulted in property in dispute going to share of Jokhu. He got loan from U.P.A.C. Bank creating an equitable mortgage of Bungalow No. 19, Muir Road, Allahabad. Jokhu committed default in payment of dues. U.P.A.C. Bank filed Original Suit No. 173 of 1940 under Order XXXIV CPC for sale of Bungalow. Suit was decreed in favour of

U.P.A.C.Bank vide decree dated 01.05.1946 and pursuant thereto, Bungalow was auctioned which was purchased by U.P.A.C.Bank itself and possession was taken by Bank on 01.05.1946. In the meantime, Baij Nath son of Jokhu filed suit for setting aside decree on the ground that mortgage was without legal necessity. Suit was dismissed whereagainst appeal was also dismissed by this Court. Thereafter, sale was confirmed and sale certificate dated 09.04.1946 was issued giving possession of Bungalow on 04.05.1946 to auction purchaser. Bank filed another Suit No. 913 of 1946 for recovery of certain dues from Baij Nath, which was decreed but Bank lost in Civil Appeal No. 97 of 1950 and then matter came to this Court in Second Appeal No. 2189 of 1951. This Court allowed appeal vide judgement dated 05.10.1961 and a decree of Rs. 3,100/- was passed with six per cent future interest against Baij Nath and Others. Name of U.P.A.C.Bank was entered in Nazul Register on half of the disputed Nazul land. The total area was 23600 square yards out of which 11800 square yards at Bungalow No. 19, Muir Road, Allahabad and remaining 11800 square yards at Bungalow No. 23, Clive Road, Allahabad. U.P.A.C.Bank underwent liquidation proceedings whereupon one Sridhar, Advocate was appointed as Liquidator vide Court's order dated 11.09.1958. U.P.A.C.Bank had two Directors namely, Harihar Nath and his wife Malti Devi who resolved in the meeting that assets of U.P.A.C.Bank may be disposed of by transferring Bungalow No. 19, Muir Road, Allahabad to Sri Umeshwar Nath son of Harihar Nath. Information of said transfer was given to official Liquidator. U.P.A.C.Bank was ultimately dissolved on 23.05.1960. Umeshwar Nath son of Harihar Nath executed sale-deed of disputed property i.e. Bungalow No. 19, Muir Road, Allahabad on 06.02.1989 in favour of petitioner and intimation was also given to Collector, Allahabad vide letter dated 07.04.1989. Lease deed of 1902 was an intimated lease. Additional District Magistrate, Allahabad approved renewal of lease in favour of petitioner and communicated to Mukhya Nagar Adhikari, Nagar Mahapalika, Allahabad vide letter dated 24.07.1993 directing it to prepare requisite document for registration of lease deed. A similar direction was also given vide letter dated 31.07.1993. Vide letter dated 04.08.1993, In-charge Adhikari (Nazul) required petitioner to deposit lease rent. Since lease deed was not executed, petitioner approached this Court in Writ Petition No. 26876 of 1993. Thereafter, respondent-2 withdrew earlier order vide order dated 09.09.1993. The order dated 09.09.1993 was also challenged in above writ petition by way of amendment. Subject to certain observations, the writ petition was ultimately dismissed vide judgement dated 05.02.2009. Though in writ petition, para-34, petitioner has said that writ petition was disposed of but in fact it was dismissed.

17. Petitioner also filed a review application which was disposed of vide order dated 30.03.2009 and order reads as under:-

"This is an application for review/recall of the order dated 5th February, 2009.

Having heard learned counsel for the petitioners as well as learned counsel for the respondents, ***we are of the opinion that the order does not require any review,*** *except slight modification to the extent that* ***the State Government shall not be influenced by any observation or any fact record in the order.***

In this view of the matter, the review/ recall application is finally disposed of."

18. Petitioner then made a representation to State Government vide letter dated 19.05.2009 whereafter vide letter dated 15.07.2016, respondent-1 relegated the matter to respondent-2 observing that on the subject in question it is respondent-2 who is competent authority to pass order. Thereafter, District Magistrate, Allahabad has passed impugned order which has been challenged on the ground that it is in violation of terms of lease deed, arbitrary, malicious, discriminatory and on various other grounds which we will discuss later on.

19. Respondents- 2 to 5 have filed a counter affidavit wherein execution of lease deed with effect from 01.07.1902 in favour of Sri Sahai son of Sheo Din in respect of disputed Nazul land is not disputed. It is said that lease came to an end on 30.06.1932. There was no attempt made by lessee to get it renewed. In terms of lease deed, lessee and his Executors, Administrators or Assignees liable to hand over land to State and now, in public interest, land in dispute is required by State for constructing residences for weaker sections under "Pradhan Mantri Avas Yojana" which is to be developed by ADA. Mortgage of land by Jokhu, over which he himself had no title and its further transfer without consent of owner is void ab initio and would not confer any right upon such transferee. Reliance is placed on **State of U.P. and Others Vs. United Bank of India and Others 2016 (2) SCC 757.** Petitioner had no right over property in dispute as petitioner is not a lessee, and all subsequent transactions from the stage of mortgage by Jokhu are wholly unauthorized, illegal and nullity. Reliance is placed on **Smt. Shakira Khatoon Kazmi and Others Vs. State of U.P. and Others 2002(1) AWC 226 and Azim Ahmad Kazmi and Others Vs. State of U.P. and Others 2012 (7) SCC 278.**

20. A rejoinder affidavit has been filed in which reliance has been placed on Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal Act, 2017")* repealing Government Grants Act, 1895 *(hereinafter referred to as "GG Act, 1895")* to counter the defence taken by respondents on the basis of terms of lease read with GG Act, 1895.

Writ Petition No. 37541 of 2018 (WP-3)

21. The facts in brief in WP-3 are that in 1902, lease of Bungalow No.21, Clive Road, Clive Road, R. Naseebpur Bakhtiyara (Nazul Land) was executed in favour of Sri Sahai son of Shiv Din (Kurmi) by Secretary of State for India in Council. Area of land was 4 acres 3 roods 21 poles. Initially, lease was granted for 30 years subject to renewal of 30 years each and maximum 90 years. Sri Sahai (Kurmi) died in 1915 leaving behind his widow Smt. Sumera and two sons namely Pitamber and Jokhu. Partition suit filed by Pitamber i.e. Suit No.51 of 1916 was decreed allotting a share of 5 anna 4 pai to Sumera and same share was allotted to Pitamber and Jokhu. Jokhu had only one son Baijnath. Baijnath, after the death of Jokhu, executed sale deed transferring his share to Smt. Pargasi wife of Mahavir Prasad (Kurmi). She constructed Bungalow no.19, Muir Road, Allahabad on the land purchased by her. Pitamber

had three sons namely Mahavir, Rajaram and Mewalal. On 06.01.1930, Mewalal and Rajaram transferred their share in favour of Subratan, resident of Shahganj, Allahabad, who further transferred his said share to Pargasi and Prithvipal vide registered sale deed dated 20.09.1938.

22. On the basis of information received under Right to Information Act, 2005 *(hereinafter referred to as "Act, 2005")* from the office of Land Record, petitioners found that Smt. Sumera widow of Sri Sahai (Kurmi) executed a Will on 14.02.1924 and transferred her entire share in favour of her grandson Prithvipal son of Mahavir in respect of Bungalow No.21, Clive Road, R Naseebpur Bakhtiyara and Bungalow No.06, Vake Nepiar Line, Muskat Road, New Cantt., Allahabad. Baijnath, in the year 1938, took loan from U.P.A.C. Bank by mortgaging disputed property though he had no right over it having transferred the same in favour of Pargasi in 1932. Moreover, for transfer of said land, prior permission of Collector was mandatory.

23. Baijnath committed default in payment of his loan amount, which resulted in recovery suit by U.P.A.C. Bank and the same was ultimately finalized upto this Court in Second Appeal No.2189 of 1951 but therein petitioners or Pargasi or Prithvipal were not party. Defendant-respondents in aforesaid appeal were Baij Nath son of Jokhu Lal, Smt. Minda widow of Jokhu Lal and Smt. Sursati widow of Jagmal. U.P.A.C. Bank itself went into liquidation and one Umeshwar Nath son of Harihar Nath claiming to be Director of U.P.A.C. Bank treated property in dispute as his own property though it was never owned by him. R.S.A. Society, petitioner in WP-2 claims its ownership on the basis of sale deed dated 11.03.1989 executed by Umeshwar Nath though Umeshwar Nath had neither any right over property in dispute nor could have transferred any interest or right over the same to R.S.A.Society.

24. R.S.A. Society, on the basis of sale deed dated 11.03.1989 got lease renewed in its favour in 1993 but when petitioners of WP-3 objected, the said order was recalled by Collector, Allahabad. This recall order of Collector was challenged by R.S.A. Society in Writ Petition No.26876 of 1993. The writ petition was dismissed vide judgment dated 05.02.2009 with observation that State Government shall look into the matter and pass fresh order. The judgment dated 05.02.2009 passed by this Court dismissing Writ Petition No.26876 of 1993 reads as under :

"Having heard Sri Rahul Sripat learned counsel for the petitioner at some length and after going through the record we find that sale deed was executed in the year ***1902 for 30 years in favour of original lessee, who transferred the same in favour of the company namely U.P.Agriculture Credit Bank Limited. The company did not get lease renewed after 30 years and continued in possession.*** *The company went in liquidation proceeding and the property in dispute so leased to the original lessee and sold to the company was sold in liquidation proceeding.* ***Since the lease was not renewed in favour of the company, therefore, right of the purchaser from the company i.e. right of the vendor and the right of the petitioner vendee was subject to renewal of the lease.*** *Therefore no writ of mandamus can be issued for renewal of the lease after*

such a long gap. ***In our opinion the initial order of Collector, Allahabad was by way of mistake which was corrected by him by withdrawing the said order. Thus the position emerges that the terms of the lease has already expired and the petitioner has no right to claim writ of mandamus from this Court.*** *However, it is open to the petitioner to approach the State Government for grant of fresh lease under the Government Grant Act.*

Considering the entire facts of the case and taking into account the fact that the petitioner has paid consideration for purchasing the land from the company in liquidation proceeding and in the liquidation proceeding the Government did not raise any objection that it cannot be sold in liquidation proceeding as lease was not renewed in favour of the company. Therefore the State Government is otherwise stopped from taking such an objection as the doctrine of estoppel will directly come in the way.

In view of the above discussion ***the matter is relegated to the State government to pass a fresh order on merits after scrutinizing and examining the rival claims of the parties and material available on record. It may also consider the claim of Smt. Ram Dulari and others, who have filed impleadment application in the writ petition.***

For the aforesaid reasons this writ petition is dismissed."

(Emphasis added)

25. The claim of R.S.A. Society again was rejected vide order dated 26.11.2012 passed by Additional District Magistrate (Nazul). R.S.A. Society filed Review Application in Writ Petition No.26876 of 1993 but same was rejected vide order dated 30.03.2009. In the meantime, petitioners applied for freehold vide applications dated 24.04.2000 and 01.05.2012. Since no action was taken, petitioners filed Writ Petition No.21011 of 2012 Shiv Shanker Patel and others vs. State of U.P. and others, with the prayer that their application for freehold be directed to be decided. Writ Petition was disposed of vide judgment dated 01.05.2012 directing District Magistrate, Allahabad/Authority concerned to take final decision. Consequently, District Magistrate, Allahabad vide order dated 14.06.2012 rejected petitioners' application for freehold. This order has been challenged by petitioners in WP-1.

26. In the meantime, i.e. during pendency of WP-1, District Magistrate has now passed order dated 06.09.2018 directing petitioners to vacate land in dispute as the same has been allotted to ADA for construction of residential houses for weaker section under "Pradhan Mantri Avas Yojana (Urban)". Challenging the same, present writ petition has been filed.

27. On behalf of respondents - 2 and 5 i.e. Collector, Allahabad and Additional District Magistrate (Nazul), Allahabad respectively, a counter affidavit has been filed sworn by Sri Gore Lal Shukla, holding office of respondent-5. It is stated therein that Nazul Plot No.23 Clive Road, Allahabad and 19, Muir Road area 4 Acres, 3 Rod and 2 Pol was demised for a period of 30 years renewable for further two period of 30 years each vide lease deed dated 01.07.1902 executed by Secretary of State in Council for India in favour of Sri Sahai son of Sheo Din (Kurmi). The first tenure of 30 years expired on 30.06.1932 but thereafter there is no renewal of lease. Lease was governed

by provisions of GG Act, 1895 and in terms of Section 2 thereof, provisions of any other Statute including Transfer of Property Act, 1882 (hereinafter referred to as "TP Act, 1882") shall not be applicable to Government Grants. Terms of Government Grant shall construe and prevail as if TP Act, 1882 was not passed. In the lease deed, there was a condition that at the end of lease, Lessee shall hand over peacefully and quietly the land and surrender and yield up the same to Secretary of State but that was not done. Any transfer made without complying conditions mentioned in lease deed is void in view of law laid down in **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757.** Government has right to re-entry in view of law laid down in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** and Division Bench judgment of this Court in **Smt. Shakira Khatoon Kazmi and others vs. State of U.P. and others 2002 (1) AWC 226.** Repeal Act, 2017 has not resulted in affecting rights, consequences etc. already suffered, acquired, accrued or incurred in view of Section 4 thereof, hence, resumption/re-entry by State for public purposes is valid in view of Division Bench judgment of this Court in **Chintamani Ghosh and another vs. State of U.P. and others, 2001 (2) UPLBEC 1003** and **M/s Madhu Colonizers Pvt. Ltd. vs. State of U.P. and others in Writ Petiton No.62588 of 2010** decided on 02.04.2013. Petitioners have no right to get the land freehold and application was already rejected by District Magistrate vide order dated 14.06.2012 hence petitioners have no justification in claiming any right over land in dispute and writ petition is liable to be dismissed.

28. In WP-1 and WP-3 Sri Pramod Kumar Jain, Senior Advocate, assisted by Sri Birendra Kumar, Advocate has advanced his arguments on behalf of petitioners while Sri Ajeet Kumar Singh, Addl. Advocate General, assisted by Sri Nimai Dass and Sri Sudhanshu Srivastava, Additional Chief Standing Counsels, for State of U.P. and its authorities and Sri M.D.Singh 'Shekhar', Senior Advocate, assisted by Sri Amit Verma, Advocate, on behalf of Prayagraj Development Authority have made their submissions. In WP-2 Sri Udai Chandani, Advocate, has advanced argument while for respondents, same counsels have advanced their argument, who appeared in WP-1 and 3.

29. Before going into merits of rival submissions, some glaring important facts borne out from record, we find necessary to recapitulate at this stage.

Date	Events
06.11.1902	Lease Deed executed in favour of Sahai son of Sheo Din (Kurmi) of disputed Nazul Plot area 4 Acres, 3 rods 21 poles situate at Naseebpur Bakhtiyara alias Chikatpur for a period of 30 years **w.e.f. 01.07.1902.**
1915	Sahai (Kurmi) died leaving behind his widow Smt. Sumera and two sons Pitamber and Jokhu.
1916	Original Suit No.51 of 1916 was filed in the Court of Sub-Judge, Allahabad by Pitamber, son of Sahai and two minor sons of Pitamber impleading his brother Jokhu Lal, minor son Baijnath, widow of Sahai i.e. Smt. Sumera and Pargasi widow of Mahavir. Smt. Pargasi is the daughter-in-law of Pitamber and wife of Mahavir.
1917	Aforesaid suit was decreed dividing

	shares between the parties. Disputed land came to the share of Jokhu Lal son of Sahai (original Lessee). He created equitable mortgage of Bungalow No.19 Muir Road, in favour of UPAC Bank in lieu of loan advanced to him
30.6.1932	First thirty years period of lease expired.
1940	Original Suit No.173 of 1940 filed by U.P.A.C. Bank for recovery of loan amount by sale of Bungalow.
01.05.1946	Suit of Bank was decreed. Bungalow was auctioned, sale was confirmed and possession was taken by Bank itself.
11.09.1958	Bank underwent liquidation whereupon Sridhar, Advocate, was appointed as Liquidator.
...	Harihar Nath and his wife Malti Devi, two Directors of U.P.A.C. Bank decided to transfer Bungalow to Umeshshwar Nath son of Harihar Nath.
23.5.1960	U.P.A.C. Bank dissolved.
1974	Suit No.81 of 1974 was filed for partition between Prithvi Pal Patel son of Mahavir and legal heirs of Mewa Lal.
31.8.1977	Partition Suit No.81 of 1974 was decreed in terms of compromise between the parties. Name of Mewa Lal and Raja Ram was recorded in Khatauni of Bungalow No.23A/29A, Clive Road, (old bungalow no.23/29 Clive Road) (New No. 85A/25A-1)
06.02.1989	Umeshwar Nath son of Harihar Nath executed sale deed of Bungalow No.19, Muir Road, in favour of petitioner of WP-2 i.e. Ravi Sahkari Awas Samiti Ltd.
17.09.1990	Application for renewal of lease was submitted.
18.02.1992	District Magistrate, Allahabad issued show cause notice stating violation of terms of lease, non renewal, unauthorised construction, possession by unauthorised persons and therefore, re-entry by State.
02.03.1992	Reply was submitted.
24.09.1992	Collector directed Mukhya Nagar Adhikari to enter name of State Government in Nazul Register in respect of disputed land, after rejecting request for renewal. Writ Petition No.36227 of 1992 filed by Ram Dulari wife of Prithvi Pal.
.....	Writ Petition No.26876 of 1993 was filed by R.S.A. Society, petitioner of WP-2.
24.07.1993	Petitioner of WP-2 applied for renewal of lease and Additional District Magistrate approving the said proposal, forwarded to Mukhya Nagar Adhikari.
22.11.1999	Writ Petition No.36227 of 1992 was dismissed as not pressed.
24.04.2000	Petitioner of WP-1 filed application for freehold of Bungalow No.85/29, Clive Road, Allahabad.
05.02.2009	Writ Petition No.26876 of 1993 was dismissed.
30.03.2009	Review Application filed by petitioner of WP-2 was rejected.
.....	Writ petition No.21011 of 2012 by Shiv Shankar Patel and others for direction to Collector to freehold

land in dispute.

01.05.2012	Writ Petition was disposed of directing District Magistrate to decide application for freehold.
01/8.05.2012	Petitioner of WP-3 applied for conversion of land into freehold.
14.06.2012	Collector rejected application dated 24.04.2000 and representation dated 08.5.2012.
26.11.2012	Report of A.D.M. (Nazul) to Government rejecting application of petitioner of WP-2.
06.09.2018	District Magistrate conveyed decision to construct multi-storied building under Pradhanmantri Awas Yojna (Urban) over disputed land.

30. A copy of lease deed dated 06.11.1902 is also on record as Annexure 2 to WP-1 and relevant terms and conditions thereof are reproduced as under :

"(i) ***AND ALSO shall not nor will without*** *the previous consent in writing of the Secretary of State erect or suppose to be erected on any part of the said demised premises any building* ***other than and except the dwelling house*** *and out buildings hereby covenants to be erected and* ***will not without such consent as aforesaid make any alteration in the plan or elevation of said dwelling house and out buildings or carry on or permit to be carried on the said premises any trade*** *or business whatsoever of use the same or permit the same to be* ***used for any purpose than that of a private dwelling house.***

(ii) AND ALSO that the lessee will from time to time and at all times during the said terms repair and keep the dwelling house and out buildings so to be erected as aforesaid in good and substantial repair and condition both externally and internally ***and the same in such good and substantial repair on the determination of the said term peaceably surrender and yield up unto the Secretary of State.***

(iii) AND ALSO will upon every assignment of the said premises hereby demised or any part there of or within one calendar month thereafter ***deliver a notice of such assignment to the Collector of Allahabad*** *setting forth the names and description of the parties to every such assignment and the particulars and effect there of.*

(iv) AND ALSO that it shall be lawful for the Secretary of State and his agents, during the said term at all reasonable times of ***the day to enter into and upon the said demised premises and the dwelling house and out buildings to be erected thereon and if any defect or want of reparation shall be on any such inspect and view the condition there of and if any defect or want of reparation shall be on any such inspection*** *found and discovered give to the lessee or leave upon the said premises notice in writing to make good and restore the same and that the lease will within three calendar month next after such notice well and sufficiently make good and restore the same accordingly.*

(v) PROVIDED ALWAYS and it is hereby declared that if the said yearly rent hereby reserved or any part there of shall at any time be in arrears and unpaid for the same of one calendar month next after any of the said days whereon the same shall have become due whether the same shall have been lawfully demanded or not or if there shall be any breach or

non observance by the lessee of any of the covenant hereinbefore contained on his part to be observed performable then and in any such case ***it shall be lawful for the Secretary of State of State to enter into and upon the said demised premises and the dwelling house and out buildings so to be rejected as aforesaid or any part thereof in the name of the whole and to be re-prossess retain and enjoy the same as if this demise had not been made***

(vi) And the Secretary of State doth hereby covenant with the ***lessee that the lessee paying the rent hereby reserved and performing and observing the covenants and conditions herein contained and on his part to be exercised and observed shall or may peaceably and quietly*** *hold possess and enjoy the said demised premised during the said term without any lawful interruption or disturbance by the Secretary of State or any person or persons lawfully claiming under him*

(vii) And also that the ***Secretary of State will at the end of the term of years hereby granted and so on from time to time thereafter at the end of each such successive further term of years as shall be granted at the request and cost of the lessee execute to the lessee a new lease of the premises hereby demised by way of renewal for the term of thirty years.***

(viii) ***Provided always that such renewed terms of years as shall be granted shall together with the original term of years not exceeding the aggregate the period of ninety years and*** *(the rent of the said premises hereby demised being hereby expressly made subject to enhancement on the granting of each renewed lease) that such renewed lease shall be granted only at such rents within a percentage of enhancement of 25 % twenty five percent of the rent which shall have been reserved by any lessee either original or renewed immediately preceding the renewed lease to be for the time being granted as the Secretary of State shall determine have as to the amount of the rent to hereby reserved and as to the term to be thereby granted every renewed lease of the said premises hereby demised shall contain such of covenant provisions and condition on these presents contained as shall be applicable.*

(ix) Provided also that the expressions "The Secretary of State and the lessee" hereinbefore used shall unless such an interpretation be consistent with the contest include in the case of the former his successors and assigns and in the case of the latter his heirs, executors, administrators, representatives and assigns.

In witness whereof the parties hereto have hereto set their hands the day and year first above written."

(Emphasis Added)

31. Aforesaid conditions show that parting away of lease land had to be conveyed to Secretary of State within one month. If rent of one month fell due, Government was entitled to determine lease and re-enter and after determination of term of lease, it was to be peacefully surrendered and yield up to the Secretary of State.

32. Now, in this backdrop, we proceed to consider merits of writ petition and relief claimed by petitioners.

33. The **first question** is, *"what is Nazul?"*

34. Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul'.

35. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in State Government results in making the State, owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land. It is only such land which is owned and vested in State on account of its capacity of Sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

36. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

37. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

38. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heirs, his estate came to an end and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as owner. In most cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other Owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a

rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

39. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

40. The above provisions had continued by virtue of section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continue above provision and says :

'Subject as hereinafter provided, ***any property in the territory of India which,*** *if this Constitution had not come into operation,* ***would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union.'***
(Emphasis added)

41. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

42. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843** Court has considered the above principles in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. *In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure.* ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".***

(Emphasis added)

43. Court also placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204.**

44. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired, was an act of State."***

(Emphasis added)

45. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

46. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216,** Lord Dunedin said :

"When a territory is acquired by a sovereign State for the first time, that is an act of State. It matters not how the acquisition has been brought about. It may be ***by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised.* ***Such rights as he had under the rule of predecessors avail him nothing."***
(Emphasis added)

47. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,** Court said (page 523 of 34 ITR) :

*"****The expression 'act of State'*** *is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It* ***includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."***
(Emphasis added)

48. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise.

49. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305,** where in para 12, Court said :

"It is settled law that ***conquest is not the only mode by which one State can acquire sovereignty*** *over the territories belonging to another State, and that the* ***same result can be achieved in any other mode which has the effect of establishing its sovereignty."***

(Emphasis added)

50. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504,** in para 40, Court said :

"The ***status of a person must be either that of a sovereign or a subject.*** *There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject.* ***A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject..."***
(Emphasis added)

51. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

52. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288** "act of the State" was explained in the following words :

*"an "act of State" may be the taking over of sovereign powers either **by conquest or by treaty or by cession or otherwise.** It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State."*
(Emphasis Added)

53. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364,** wherein Court said:

*"16. Thus, a **territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State. The land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.** In such a case the ownership vests in State, like any other individual and **State is free to deal with the same in a manner like any other owner may do so.***

*17. Thus '**Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,** it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition."*

(Emphasis added)

54. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacantia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State, which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups etc. The **first question is answered accordingly.**

55. The **second question** is "lease in question whether governed by provision of Transfer of Property Act, 1882 (hereinafter

referred to as "TP Act, 1882") or GG Act, 1895 and what is inter-relationship of the two?"

56. Historical documents, record as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Rule, or those who remained faithful to Foreign regime and helped them for their continuation in ruling this country and similar other reasons. Sometimes land was given on lease without any condition and sometimes restricted for certain period etc., but in every case, lease was given to those persons who were faithful and shown complete alliance to British Rule. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition after paying compensation or purchase. Further, allocation of Nazul land by English Rulers used to be called "Grant".

57. In other words, we can say that initially land owned by State used to be allotted in the form of 'Grant' by British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 - 12 of TP Act, 1882 made provisions invalidating, with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequence upon such alienation or any insolvency of or attempted alienation by him. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of the Crown in creation of inalienable Jagirs in 'Grants', acting upon advice that it would not be competent for Crown to create an inalienable and impartible Estate in the land comprised in the Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it was sought to make a separate statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this objective, 'GG Act 1895' was enacted.

58. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

59. Section 2 of GG Act, 1895, as it was initially enacted, read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land*** *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(Emphasis added)

60. The above provision was amended in 1937 and 1950. The amended provision read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(Emphasis added)

61. Section 3 of GG Act, 1895 read as under :

3. Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *over* ***contained in any such grant or transfer*** *as aforesaid* ***shall be valid*** *and the* ***effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."***

(Emphasis added)

62. In the State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960), Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply or be deemed ever to have applied to any grant*** *or other transfer of land or of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect, or be deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960, by leases of land by, or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid*** *and* ***take effect according to their tenor,*** *any decree or direction* ***of a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, ***the effect of any enactment relating to the acquisition of***

property, land reforms or the imposition of ceiling on agricultural land."

(Emphasis added)

63. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

64. Thus, GG Act, 1895, in fact, was a declaratory statute. First declaration is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes. Second part of Section 2 clarified that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

65. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, by inserting sub-section (2) in Section 2, a provision in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 also, making a similar declaration, as made in sub section (1) in respect of TP Act, 1882.

66. Sub-section (3) of Section 2 of GG Act, 1895 protect certain leases, already made, declaring the same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have been affected by U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

67. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declares that all provisions of Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

68. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by Government Grants (U.P. Amendment) Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of TP Act, 1882.

69. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said :

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose***

such conditions and limitations as it thinks fit, no matter what the general law of the land be. *The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The* ***Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."***

(Emphasis added)

70. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by a Government would stand insulated from tentacles of any statutory law. Section 3 places terms of such Grant beyond reach of restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

"The two provisions are so framed as to ***confer unfettered discretion on the government to enforce any condition or limitation or restriction in all types of grants made by the government to any person.*** *In other words, the rights, privileges and obligations of any grantee of the government would be* ***completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."***

(Emphasis added)

71. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

72. In **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757,** in para 30 of the judgment, Court said :

"Indisputably, the lease of nazul land is governed by the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the ***provisions of the Transfer of Property Act do not apply to government lands ……"***

(Emphasis added)

73. Thus, a 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise.

74. It neither can be doubted nor actually so urged by petitioners that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895. Broadly, 'Grant' includes 'lease'. In other words, where 'Nazul' is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties therefore have to be seen in the light of stipulations contained in the document of 'Grant'. 'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer i.e.

instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'.

75. In the State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Here Government has made provisions of management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, or, in some cases, through local bodies.

76. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul' have been considered recently in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul", being property of Government, and maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary, notwithstanding. Thus stipulations in "lease deed" shall prevail and govern the entire relation of State Government and lessee.

77. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special Statute and will prevail over general Statute i.e. TP Act, 1882. It says:

*"In the **present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,** i.e. the Government Grants Act, 1895 being **a special statute** would **prevail over the general statute, i.e. the Transfer of Property Act, 1882.** Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the **Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."***

(Emphasis added)

78. Superiority of the stipulations of Grant to deal the relations between Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council, in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner, Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with

permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi, her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on 19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide Government Order dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that State Government's order dated 15.12.2000 has cancelled lease and resumed possession of land in question, as the same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objections against notice to District Magistrate and also stated that they have sent representation/ objection to Chief Minister praying for revocation of Government Order dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101.** Lease holders challenged judgment dated 07.12.2001 in Supreme Court to the extent they failed. State Government filed appeal against part of order of this Court wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose after giving a month's clear notice to lessee to remove any building standing at the time on demised premises and within two months of receipt of notice, to take possession thereof on expiry of that period, and Sections 2 and 3 of GG Act, 1895, Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by Government for its own purpose or for any public purpose, it shall have the right to give one month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property. Under the terms of Grant, it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It also refers to an earlier instance where Nazul Plot No. 13, Civil Station, Allahabad situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without

initiating any proceeding under Land Acquisition Act, 1894 *(hereinafter referred to as "Act, 1894").* Resumption in that case was challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.** and said writ petition was **dismissed on 16.12.1999** by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, was answered in negative and in favour of Government.

79. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under LA Act, 1894, Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary notwithstanding. Court relied on its earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment said:

*"30. In the case of **The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,** this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the **State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period** subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."*

"32. Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required

to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...."

(Emphasis added)

80. Having said so, Court said:

"we are of the view that there is no other procedure or law required to be followed, as ***a special procedure for resumption of land has been laid down under the lease deed".***

(Emphasis Added)

81. Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law holding that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

82. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after enforcement of GG Act, 1895 and rights and entitlement of private parties in respect of land, which was transferred to such person under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. The terms and conditions of 'Grant' shall override any Statute providing otherwise. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also be inapplicable to such 'Grant'.

83. Above discussion, therefore, leaves no manner of doubt that Grant/Lease of Nazul land shall be exclusively governed by stipulations/conditions/terms contained in Grant/Indenture of Lease and no Statute can be resorted to govern rights of parties over Nazul land, which will be governed by aforesaid Grant/Indenture of Lease. We, therefore, answer **second question accordingly.**

84. The **third and fourth questions** are, "Whether petitioners have any actionable claim, right or interest over disputed land after expiry of lease on 30.06.1932, and order of re-entry passed by Collector on 24.9.1992 has attained finality?" and "whether petitioners are entitled to a quit notice?"

85. We have reproduced contents of lease deed constituting terms and conditions to govern the land in dispute. In almost every aspect, some restrictions on exercise of lease rights over Nazul land were imposed by Grantor/Lessor i.e. State. Some such instances are :

(i) If there is any breach in payment of rent or other covenant of lease deed in such case it shall be lawful for Secretary of State to enter into and upon the said demised premises and dwelling house and out buildings erected as aforesaid or any part thereof in the name of whole and thereupon the same shall remain to the use of and be vested in

Secretary of State as if the deed was not executed.

(ii) Renewal of lease shall be at the request and cost of lessee.

(iii) Total period of lease including renewal shall not exceed 90 years.

(iv) No construction other than dwelling house shall be made without permission for trade or business.

86. Entire lease deed show that if premises is assigned, within one calendar month, a notice was to be given to Collector giving details of persons but in case of any non observance or breach, it was lawful for Lessor to enter upon demised premises.

87. As already said that after 30th June, 1932 i.e. expiry of first term of lease, there was no renewal of term of lease at all. Land was shared by heirs of Sri Sahai as if it was owned by him or them though Sri Sahai had only lease rights. After expiry of lease on 30.06.1932, even lease rights ceased.

88. It is nobody's case that any rent or premium was paid thereafter to the State. With regard to intimation also, there is nothing on record to show as to that when part of land was equitably mortgaged to U.P.A.C. Bank or the manner in which it was subsequently dealt with by Bank or anything was communicated to Lessor. It is in these circumstances, Collector rightly rejected application for renewal of lease vide order dated 24.09.1992 whereby Mukhya Nagar Adhikari was directed to record name of State in Nazul register. The said order has attained finality.

89. In fact, the initial lease commenced on 01.07.1902, the period of 90 years lapsed on 30.6.1992. If renewal would have been allowed, even then no lease to lessees could have been granted for period subsequent to 30.6.1992 since maximum period of lease including two renewals was 90 years.

90. Thus, petitioners had no legal right whatsoever over property in dispute in any manner after 30.6.1932 and, in any case, after 30.6.1992.

91. So far as claim of petitioners that they have submitted application for freehold, it has already been held by this Court in **Anand Kumar Sharma vs. State of U.P. and others 2014(2) ADJ 742 (FB)** that mere submission of application does not give any vested right for freehold. State is the owner of property and it has already rejected application for renewal in 1992 and has re-entered the premises directing for recording name of the State in Nazul register over land in dispute. Land being Nazul, State Government is fully empowered to re-enter/resume at any point of time.

92. Moreso, when it is required in public purpose, such right of State in respect of Nazul land has been recognized in **Azim Ahmad Kazmi and Others Vs. State of U.P. and Others (supra).** Mere continuation in possession over land in dispute does not give any right to petitioners. Neither Section 116 of TP Act, 1882 gets attracted nor petitioners are entitled to a quit notice. The nature of possession of even a lessee after expiry of period of lease is that of 'Tenant at Sufference'. Here petitioner of WP-1 does not come even in that category.

93. Further, once lease period expired, whether a quit notice is necessary or not, in our view, is an issue, which need not detain us since this aspect is already covered by a recent authority in **Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664.** Therein, Court held that once it is admitted by Lessee that term of lease has expired, lease stood determined by efflux of time. Then Court said :

"Once the lease stood determined by efflux of time, *there* ***was no necessity for a notice of termination Under Section 106."***

(Emphasis added)

94. For taking above view, Court relied on its earlier decision in **R.V. Bhupal Prasad v. State of A.P. (1995) 5 SCC 698.**

95. In the above authority, Court held that after expiry of period of lease, status of Lessee becomes that of 'Tenant at sufferance'. 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time. The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title. There is little difference between him and a trespasser. Quoting from Mulla's Transfer of Property Act (7th Edn.) at page 633, Court observed that tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without consent of person entitled. A "tenancy at sufferance" does not create relationship of landlord and tenant. Court further quoted from page 769 of Mulla's transfer of Property Act (7th Edition), that act of holding over after expiration of term does not necessarily create a tenancy of any kind. If lessee remains in possession after determination of term, the common law Rule is that he is a tenant at sufferance.

96. In the present case, it is not the case of any of the petitioner that after expiry of lease on 30.06.1992, they have been permitted to remain in possession of disputed Nazul land and rent has been accepted by respondents or they have paid rent. Even if what is said by petitioners is taken to be correct, we do not find that Section 116 is applicable in the case in hand at all. Section 116 of TP Act, 1882 reads as under :

"116. Effect of holding over.- *If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."*

97. Twin conditions to attract principle of holding over vide Section 116 of TP Act, 1882, which need be satisfied, are:

(i) After determination of lease, lessor or his representative has accepted rent from lessee or under lessee or assent to his continuing in possession; and

(ii) Lessee or under-lessee has remained in possession.

98. None of the above conditions are attracted/satisfied in this case. Hence Section 116, TP Act, 1882 is not attracted. We, therefore, answer **third and fourth questions** accordingly.

99. The **fifth and last question** is "whether re-entry/resumption of land by Lessor i.e. State Government is valid?"

100. So far as validity of resumption of land for 'public purpose' is concerned, it could not be disputed that land has been sought to be required passed by this Court and continued in possession over land in dispute for the last almost more than a year, we direct petitioners to vacate disputed land within one month from the date of delivery of judgment.

(2020)1ILR 1069

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2020

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ C No. 15333 of 2019

M/S Universal Cylinders Ltd. ...Petitioner
Versus
The Presiding Officer Labour Court (2), U.P. Kanpur & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vijay Kumar Ojha

Counsel for the Respondents:
C.S.C., Sri Ranjeet Kumar Mishra

by State for 'public purpose'. Allahabad City has been selected for development as a Smart City and respondents have pleaded that demand of huge land has been made by various Government departments since various Offices, Workshops, Parks, Parking places etc. have to be constructed. The land in dispute has been found suitable for "construction of affordable houses for Weaker Section under 'Pradhan Mantri Avas Yojana (Urban)"' which are public purpose. In fact, on this aspect, no substantial argument has been made and in our view, resumption of land by State is for 'public purpose'.

101. In the result, all the writ petitions lack merit. Dismissed.

102. However, considering the facts and circumstances and also the fact that petitioners already enjoyed interim order

A. Uttar Pradesh Industrial Disputes Act, 1947 – Section 4K - Reference of disputes to Labour Court or Tribunal - Section 6-A - award becomes enforceable on the expiry of 30 days from the date of its publication – Section 23 – Power of the state government to frame rules - The Uttar Pradesh Industrial Disputes Rules, 1957 – Rule 16 - Labour Court or Tribunal or Arbitrator may proceed *ex-parte* - sufficient cause - application to be filed within 10 days from the date of passing of the order - The Labour Court/Tribunal is not *functus officio* after the award has become enforceable as far as setting aside an ex parte award is concerned - It is within its powers to entertain an application as per the scheme of the Act and in terms of the rules of natural justice. (Para 9)

The exparte award was passed on20.12.2017 and published on 19.5.2018 and as per Section 6-A, the award becomes enforceable on the expiry of 30 days from the date of its publication. The application was filed on 11.6.2018 i.e. before expiry of 30 days from the date of publication of the award or it becoming enforceable under law. The

application having been filed before the award became enforceable could not be thrown out on the ground that it was filed beyond the period prescribed under Rule 16 (2). (Para 16)

Held:- The Labour Court/Industrial Tribunal, in exercise of its ancillary and incidental powers, on the broader principles contained under Order 9 Rule 13 CPC is competent to entertain an application to set aside an exparte order/ award and the said power cannot be circumscribed by any limitation -The application filed by the petitioner for setting aside exparte award allowed. (Para 9 & 19)

Writ Petition allowed. (E-7)

List of cases cited: -

1.M.K. Prasad Vs. R. Arumugam, 2001 (3) AWC 2395

2.Haryana Suraj Malting Ltd. vs. Phool Chand, (2018) (16) SCC 567

3.Sangham Tape Company Vs. Hans Raj, (2005) 9 SCC 331

4.Radhakrishna Mani Tripathi Vs. L.H. Patel, (2009) 2 SCC 81

5.Grindlays Bank Ltd. Vs. Central Govt. Industrial Tribunal, 1980 Supp SCC 420

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

1. By means of instant petition, the petitioner has called in question the order dated 14.2.2019 passed by Presiding Officer, Labour Court II, U.P. Kanpur rejecting the application of the petitioner praying for setting aside the exparte award dated 20.12.2017 (published on the notice board on 19.5.2018) in Adjudication Case No.33 of 2015.

2. The background facts leading to the instant petition are that respondent no.2 raised an industrial dispute alleging that he was appointed on the post of Mistri/Mechanic by respondent no.3 in the month of February, 1991; that he worked till 31.10.2014; that his service was illegally terminated without passing any order in writing on 1.11.2014. The application filed in this regard by respondent no.2 dated 13.3.2015 was registered as C.P. Case No.47 of 2015. On 10.8.2015, respondent no.2 sought impleadment of the petitioner in C.P. Case No.47 of 2015. Since the conciliation proceedings did not yield any result, therefore, the dispute was referred under Section 4-K for adjudication by the Labour Court and it came to be registered as Adjudication Case No.33 of 2015. The petitioner was represented by Sri Gyaneshwar Mishra. According to the petitioner, Sri Gyaneshwar Mishra, due to his personal problems, could not attend the case on regular basis and later, abstained from appearing in the case without any information to the petitioner, resulting in an exparte award dated 20.12.2017 being passed against it. The Labour Court directed for reinstatement of respondent no.2 with continuity of service and full back wages. According to the petitioner, it came to know of the exparte award when copy of the same was received by it on 26.5.2018. On 11.6.2018, it moved an application for setting aside the exparte award alongwith affidavit of Manager (Operation). The application was opposed by respondent no.2. The Labour Court by impugned order rejected the said application holding that the explanation furnished for non-appearance is not satisfactory and also on the ground that under Rule 16 (2) of the Rules framed under the Act, an application praying for setting aside of exparte award could be filed only within ten days from the date of publication of the award. In other words, the view taken is that after expiry of the time prescribed under Rule 16 (2), the

award had become enforceable rendering the Labour Court *functus officio* to entertain or decide any application.

3. Learned counsel for the petitioner submitted that in the first place the Labour Court has committed a manifest illegality in ignoring cogent explanation offered by the petitioner entitling it to a hearing and case being decided on merits. In support of the said submission, he has placed reliance on the judgement of the Apex Court in **M.K. Prasad Vs. R. Arumugam, 2001 (3) AWC 2395.** In addition, it is urged that the law that after publication of award and expiry of the prescribed period, the award becomes enforceable rendering the Labour Court/Tribunal *functus officio* is no longer good law in view of the recent decision of the Supreme Court in **Haryana Suraj Malting Ltd. vs. Phool Chand, (2018) (16) SCC 567.**

4. On the other hand, learned counsel for the respondent workman submitted that the Labour Court has rightly discarded the explanation furnished by the petitioner for its non-appearance when the matter was taken up for hearing. He further submitted that the other reasoning given by the Labour Court that the application was not entertainable in view of Rule 16 (2), as it was filed beyond ten days from the date of passing of the award, is also perfectly legal and valid.

5. The judgement of the Supreme Court in **Haryana Suraj Malting Ltd.** is by a Larger Bench of Three Judges resolving divergent views in **Sangham Tape Company Vs. Hans Raj, (2005) 9 SCC 331** and **Radhakrishna Mani Tripathi Vs. L.H. Patel, (2009) 2 SCC 81.** The reference to the Larger Bench was made for answering the following question:-

"1. Whether the Industrial Tribunal/Labour Court becomes functus officio after 30 days of the pronouncement/publication of the award and loses all powers to recall an ex parte award on an application made by the aggrieved party after 30 days from the date of pronouncement/publication of the award is the question that once again arises for consideration in these cases."

6. It is pertinent to note paras 2 and 3 of the referring order to have an insight into the background in which two conflicting views were taken:-

"2. It may be noted that on this question two Division Bench decisions have taken apparently conflicting views. In Sangham Tape Co. v. Hans Raj a two-Judge Bench held and observed that an application for recall of an ex parte award may be entertained by the Industrial Tribunal/Labour Court only in case it is filed before the expiry of 30 days from the date of pronouncement/ publication of the award. A contrary view was taken in Radhakrishna Mani Tripathi v. L.H. Patel to which one of us (Aftab Alam, J.) was a party.

3. In both cases, that is to say, Sangham Tape Co. and Radhakrishna Mani Tripathi, the Court referred to and relied upon the earlier decisions in Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal and Anil Sood v. Labour Court but read and interpreted those two decisions completely differently."

7. The Larger Bench of the Supreme Court, while answering the reference, took into consideration virtually all previous judgements on the point and thereafter observed as follows:-

"31. Therefore, all the decisions hereinabove noted by us referred to Grindlays (supra). On a close reading of paragraph-14 of Grindlays (supra), in the background of the analysis of law under paragraphs-10 to 13, it is difficult for us to comprehend that the power to set aside an ex parte award is not available to a Labour Court/Industrial Tribunal. On the principles of natural justice, and on a purposive interpretation of the scheme of the Act and Rules, we find it difficult also to discern that the ratio of the decision in Grindlays (supra), is what is stated in paragraph-14 to the extent that an application for setting aside an ex parte award has to be filed within 30 days of publication of the award. On the contrary, the ratio in Grindlays (supra) is that the Tribunal can exercise its ancillary and incidental powers, on the broader principles contained under Order IX Rule 13 of the CPC. No doubt, the Limitation Act, 1963 is not applicable to the Labour Court/Tribunal."

8. Thereafter, the Larger Bench laid down its conclusions in paragraphs 34, 35 and 37 of the Law Report as follows:-

"34. In case a party is in a position to show sufficient cause for its absence before the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal, in exercise of its ancillary or incidental powers, is competent to entertain such an application. That power cannot be circumscribed by limitation. What is the sufficient cause and whether its jurisdiction is invoked within a reasonable time should be left to the judicious discretion of the Labour Court/Tribunal.

35. It is a matter of natural justice that any party to the judicial proceedings should get an opportunity of being heard, and if such an opportunity has been denied for want of sufficient reason, the Labour Court/Tribunal which denied such an opportunity, being satisfied of the sufficient cause and within a reasonable time, should be in a position to set right its own procedure. Otherwise, as held in Grindlays [Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal, 1980 Supp SCC 420 : 1981 SCC (L&S) 309] , an award which may be a nullity will have to be technically enforced. It is difficult to comprehend such a situation under law.

37. Merely because an award has become enforceable, does not necessarily mean that it has become binding. For an award to become binding, it should be passed in compliance with the principles of natural justice. An award passed denying an opportunity of hearing when there was a sufficient cause for non-appearance can be challenged on the ground of it being nullity. An award which is a nullity cannot be and shall not be a binding award. In case a party is able to show sufficient cause within a reasonable time for its non-appearance in the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal is bound to consider such an application and the application cannot be rejected on the ground that it was filed after the award had become enforceable. The Labour Court/Tribunal is not functus officio after the award has become enforceable as far as setting aside an ex parte award is concerned. It is within its powers to entertain an application as per the scheme

of the Act and in terms of the rules of natural justice. It needs to be restated that the Industrial Disputes Act, 1947 is a welfare legislation intended to maintain industrial peace. In that view of the matter, certain powers to do justice have to be conceded to the Labour Court/Tribunal, whether we call it ancillary, incidental or inherent."

9. It is thus well settled now that the Labour Court/Industrial Tribunal, in exercise of its ancillary and incidental powers, is competent to entertain an application to set aside an exparte order/ award and the said power cannot be circumscribed by any limitation. The ratio in **Grindlays Bank Ltd. Vs. Central Govt. Industrial Tribunal, 1980 Supp SCC 420,** as interpreted by the Larger Bench is that the Tribunal can exercise the said power on the broader principles contained under Order 9 Rule 13 CPC. The provisions of the Limitation Act, 1963 do not apply to the Labour Court/ Tribunal. In case a party is in position to show sufficient cause for its absence before the Labour Court/Tribunal, it is competent to entertain such application and exercise its judicious discretion to find out whether the party has approached within reasonable time and whether sufficient cause has been shown or not. Merely because an award has become enforceable upon expiry of 30 days from the date of its publication would not mean that it has also become binding on the party seeking recall of the exparte order/award. For an award to become binding, it should have been passed in compliance with the principles of natural justice. An award passed denying an opportunity of hearing when there was a sufficient cause for non-appearance can be challenged on the ground of it being nullity. An award which is a nullity cannot be and shall not be a binding award. In case a party is able to show sufficient cause within a reasonable time for its non-appearance in the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal is bound to consider such an application and the application cannot be rejected on the ground that it was filed after the award had become enforceable. The Labour Court/Tribunal is not *functus officio* after the award has become enforceable as far as setting aside an ex parte award is concerned. It is within its powers to entertain an application as per the scheme of the Act and in terms of the rules of natural justice. The judgment in **Suraj Malting** was rendered in context of the Central Act (Industrial Disputes Act, 1947). The instant Act applicable in U.P. contains pari materia provisions, some of which are relevant to note.

10. Section 5-C (3) invests the Labour Court/Tribunal with the same powers as are vested in a Civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of following matters, namely:-

"(a) enforcing the attendance of any person and examining him on oath or affirmation or otherwise;

(b) requiring the discovery and production of documents and material objects;

(c) issuing commissions for the examination of witnesses;

(d) inspection of any property or thing including machinery concerning any such dispute; and

(e) in respect of such other matters as may be prescribed;"

11. Section 6 of the Act lays down the manner in which award is to be given and published. Sub-section (3) provides that every award shall within a period of 30 days of its receipt by the State Government be published in such manner as the State Government thinks fit. Under sub-section (4), the State Government has been invested with power to a limited extent and upon factors mentioned thereunder, to remit the award for reconsideration. An award published as per provisions of Section 6-A has been given

finality subject to clerical or arithmetical errors being corrected, in which case, again the procedure relating to publication of award has to be followed. Section 6-A provides for commencement of the award. The relevant part of Section 6-A is as follows:-

"6-A. Commencement of the award. *- (1) An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under Section 6:"*

12. Section 6-D is also worth noticing, which reads thus:-

"6-D. Commencement and conclusion of proceeding. *- Proceedings before a Labour Court or Tribunal shall be deemed to have commenced on the date of reference of a dispute to adjudication, and such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under Section 6-A."*

13. The State Government has framed Rules in exercise of power under Section 23 of the Act. Rule 16 of the U.P. Industrial Disputes Rules, 1957 framed by the State Government, on which reliance has been placed in the impugned order, reads thus:-

"16. Labour Court or Tribunal or Arbitrator may proceed ex-parte. *- (1) If, on the date fixed or on any other date to which the hearing maybe adjourned, any party to the proceedings before the Labour Court or Tribunal or an Arbitrator is absent, though duly served with summons or having the notice of date of hearing, the Labour Court or Tribunal or the Arbitrator, as the case may be, may proceed with the case in his absence and pass such order as it may deem fit and proper.*

(2) The Labour Court, Tribunal or an Arbitrator may set aside the order passed against the party in his absence, if within ten days of such order, the party applies in writing for setting aside such order and shows sufficient cause for his absence. The Labour Court, Tribunal or an Arbitrator may require the party to file an affidavit, setting the cause of absence. As many copies of the application and affidavit, if any, shall be filed by the party concerned as there are persons on the opposite side. Notice of the application shall be given to the opposite parties before setting aside the order."

14. Again, under Rule 21, the Labour Courts/Tribunals have been invested with the power of a civil court in respect of discovery and inspection; granting of adjournment; reception of evidence taken on affidavit.

15. Rule 16 is the source of power of the Labour Court/Tribunal to proceed with the case in absence of a party duly served with summons or having notice of date of hearing. It has also been conferred power to set aside the order passed against the

party in his absence provided sufficient cause is shown for absence. The Rule provides that such application has to be filed within 10 days from the date of passing of the order. The said time limit, in my opinion, is not an embargo placed upon the Labour Court/Tribunal to entertain application even if the delay in filing such application is sufficiently explained. If the application is filed within 10 days, the party will not be asked to explain why it had not approached earlier, but it has only to show sufficient cause for its absence. However, after 10 days, the party seeking setting aside of an exparte order, apart from showing sufficient cause for non-appearance, will also have to furnish explanation for not filing application within 10 days. This is all that the provision means in prescribing a time limit for filing the application. Any other interpretation would be contrary to the broad principles laid down by the Supreme Court in **Suraj Malting** and would render the provision illegal and *ultra vires*. The above interpretation, while obviating the need to strike down the provision, would offer a practical solution and also subserve the ends of justice. Take for instance a case where a party is not duly served with summons and comes to know of the exparte award or the order to proceed exparte after expiry of 10 days. In such a case, if the time limit prescribed under Rule 16 (2) is held to be sacrosanct, the Labour Court/Tribunal would stand denuded of its power to set aside the exparte order/award. It would be against basic tenets of jurisprudence that dispute between the parties should be decided after due service of notice and opportunity of hearing to both the sides. Rule 16 (2) was thus not an impediment in the way of the Labour Court in entertaining the application filed by the petitioner for setting aside the exparte award or deciding the same on merits. The view taken to the contrary is manifestly illegal.

16. In the instant matter, it is worth noticing that the award was published on 19.5.2018 and as per Section 6-A, the award becomes enforceable on the expiry of 30 days from the date of its publication. The application was filed on 11.6.2018 i.e. before expiry of 30 days from the date of publication of the award or its becoming enforceable under law. In such view of the matter, even otherwise, the application having been filed before the award became enforceable could not be thrown out on the ground that it was filed beyond the period prescribed under Rule 16 (2).

17. Coming to the second aspect as to whether the Labour Court/Tribunal committed any error in declining to accept the explanation offered by the petitioner for its non-appearance, it is worthwhile to note the exact explanation offered by the petitioner for its non-appearance. The case taken by the petitioner in this regard was that it came to know of exparte award on 26.5.2018. Its Manager Mahendra Singh Shekhawat (who filed affidavit in support of the application) met the authorised representative Sri Gyaneshwar Mishra. At that stage, he informed the Manager that since 5th July, 2017 he had to make frequent visits to his home district Jaunpur on account of personal work and that he had deputed his junior to do pairvi in the case, but who did not discharge the responsibility properly. Thereafter, the Manager requested the authorised representative to take appropriate steps so that the matter is decided on merits, but he expressed his inability and said that he will not be able to take any step in this regard till August, 2018 as he will remain busy

with his personal work. Thereafter, the petitioner Company approached another person to act as its representative and got the application filed without any further delay on 11.6.2018. The Labour Court has observed that the petitioner has offered a confusing explanation and in case it was having knowledge that its authorised representative was visiting his home district on regular basis, it ought to have authorised another person to act on its behalf. Evidently, the Tribunal has completely misread the explanation offered by the petitioner. In **M.K. Prasad (supra)** where also explanation offered was that the counsel did not appear after a particular date to contest the case without any information to the party, the Supreme Court has observed thus:-

"10. In the instant case, the appellant tried to explain the delay in filing the application for setting aside the ex-parte decree as is evident from his application filed under Section 5 of the Limitation Act accompanied by his own affidavit. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable..."

18. In my opinion, it is a fit case where the explanation offered has to be accepted in the interest of justice. While at the same time, the inconvenience cause to the respondent workman could be compensated in terms of cost.

19. Accordingly, the application dated 11.6.2018 filed by the petitioner for setting aside exparte award is allowed. The exparte award dated 20.12.2017 is set aside subject to payment of a cost of Rs.5000/- to the respondent-workman within three weeks from today. The Tribunal shall now decide the matter afresh, after providing opportunity of hearing to both the sides.

20. The writ petition stands allowed accordingly.

(2020)1ILR 1076

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ C No. 17774 of 2013

Kul Bhushan Virmani & Ors. ...Petitioners
Versus
Rajya Krishi Utpadan Mandi Parishad U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri S.P. Singh

Counsel for the Respondents:
S.C., Sri Satish Madhyan, Sri M.C. Chaturvedi

A. Petitioner's bid for purchase of the house was accepted-allotted the house-Petitioner paid the entire sale consideration of Rs. 4,75,000/--given possession-sale deed not executed-additional amount of Rs. 1,35,607/- for getting sale deed registered -Respondent obliged to execute the sale deed in favour of the Petitioner without any additional amount.

Writ Petition allowed. (E-9)

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri S.P. Singh,learned counsel for the petitioner and Sri M.C. Chaturvedi, Senior Counsel on behalf of U.P. Rajya Krishi Utpadan Mandi Parishad (In short Mandi Parishad).

2. The Mandi Parishad had purchased 8 Higher Income Group (H.I.G.) houses, situate in Pallaupuram, Phase-II, Meerut from Meerut Development Authority (In short M.D.A.).

3. The aforesaid houses were put under use of the Officers of the Mandi Parishad as their official residences. After several years, Mandi Parishad decided to sell of the said houses and accordingly invited tenders for the sale of the same.

4. The terms and conditions of the tender/sale of the houses were contained in served him a letter dated 10.01.1999 requiring him to deposit an additional amount of Rs.1,35,607/- for getting the sale deed registered as the M.D.A. from whom the Mandi Parishad had purchased the said house was required to pay additional amount as compensation to the farmers from whom the land was acquired. Subsequently, this demand of additional amount was raised to Rs.1,90,101/- vide letter dated 03.03.2001 and to Rs.4,29,409/- vide letter dated 24.03.2009.

7. It is in the aforesaid background that the petitioner has preferred this writ petition under Article 226 of the Constitution of India seeking a writ in the nature of mandamus commanding the respondents to execute the sale deed in respect of house No.MH-14, situate in Pallaupuram, Phase-II, Meerut pursuant to the allotment letter dated 19.08.1996 as modified vide letter dated 04.09.1996 without realising any additional amount of the brochure issued with the tender forms. The petitioner after purchasing the tender form submitted his tender for the purchase of one of the houses. His bid was accepted as it was amongst the highest.

5. Accordingly, the petitioner was allotted one of the houses i.e. MH-16 for a total sale consideration of Rs.4,75,000/- vide letter dated 19.08.1996. Subsequently in place of house No.16, the petitioner was allotted house No.14 for the same consideration.

6. The petitioner deposited the entire sale consideration of Rs.4,75,000/- and was given possession of it on 25.10.1996. However, the sale deed was not executed. The petitioner repeatedly requested the respondents to execute the sale deed but instead of executing the sale deed, they sale consideration except the one mentioned in the allotment letter.

8. The respondents have filed counter affidavit in response to the writ petition to which even rejoinder affidavit has been filed. Thus, as the pleadings are complete counsel for the parties agree for the final disposal of the petition at the stage of the admission itself.

9. The submission of learned counsel for the petitioner is that in view of the allotment letter on record the petitioner is entitle to a sale deed in respect of allotted house on the sale consideration mentioned therein as that was the highest amount of the bid of the petitioner which was accepted. The respondents cannot demand any additional sale consideration for any reason much less for the reason that the previous owner of the house is required to pay some additional compensation to the farmers. The terms and conditions of the

allotment or the tenders do not provide that the bid amount or the sale consideration on which the tender of the petitioner is accepted can be revised altered or changed.

10. Sri M.C. Chaturvedi, has justified the action of the respondents in demanding the additional amount on the ground that under the terms and conditions of the tender, the Director of the Mandi Parishad had reserved right to modify the rules and conditions of the tender at any time which would be binding upon the parties.

11. He further submits that the additional demand has been made for the reason that pursuant to the judgement of the Supreme Court the compensation payable to the farmers had increased. Therefore, the M.D.A. has shifted the proportionate component of the said burden upon the Mandi Parishad in respect of the said house and accordingly, additional demand has been made from the petitioner.

12. The basic demand of additional amount is Rs.1,35,607/- as on 11.01.1999 but on account of its non-payment by applying interest it has increased from time to time. The petitioner is not entitled to any parity with the case of Ramesh Chandra Jain as on reconsideration of his matter, the demand of additional amount against him was waived vide order dated 21.03.2011 of the Mandi Parishad but subsequently after execution of the sale deed in his favour on 26.05.2011 as it transpired that the waiver is incorrect the demand has again been issued in his name of the additional amount.

13. There is no dispute to the fact that the aforesaid 8 houses including the one allotted to the petitioner were constructed by the M.D.A. after developing the acquired land. The M.D.A. has sold the said houses to the Mandi Parishad long back and the said sale deeds have become conclusive.

14. It is pertinent to mention here that once a sale deed has been executed and the entire sale consideration has been paid the vendor cannot subsequently raise demand of any additional sale consideration for any reason unless there is contrary stipulation in the sale deed.

15. The Mandi Parishad had purchased the said houses from the M.D.A. and after utilising them for a number of years had auctioned them and that in the auction the following 8 persons including the petitioner were successful and their bids were accepted.

MH-1 Smt. Naveena Chabra Rs.5.00 lacs.
MH-2 R.S. Kashyap Rs.5.00 lacs
MH-3 S.S. Lohia Rs.5.00 lacs
MH-4 Major Narendra Singh Rs.5.00 lacs
MH-13 Shri Yogendra Gupta Rs.4.75 lacs
MH-14 **Kul Bhushan Virmani** Rs.4,75 lacs
MH-15 Smt. Vijay Laxmi Rs.4.75 lacs
MH-16 **Ramesh Chandra Jain** Rs.4.75 lacs

16. The bid of the petitioner was for Rs.4,75,000/- which amount the petitioner had deposited in time. Accordingly, he was put in possession of the house on 25.10.1996. Thus, only the sale deed remain to be executed.

17. Along with the petitioner the bid of one Ramesh Chandra Jain was also accepted in respect of MH-16 again for the same amount of sale consideration of Rs.4,75,000/-. He also deposited the entire sale consideration in time but sale deed even his favour was not executed. An additional demand of similar amount was also issued against him on 28.01.2008. In fact the said demand was a common demand to all the bidders including the petitioner and the aforesaid Ramesh Chandra Jain.

18. However, the Mandi Parishad vide order dated 21.03.2011 ignored the additional demand raised against the aforesaid Ramesh Chandra Jain and executed the sale deed in his favour on 26.05.2011. It is said that after the execution of the sale deed it was realised that the additional demand was incorrectly ignored and therefore, again a fresh demand of the additional amount has been raised against him.

19. The terms and conditions of the tender have been annexed by the petitioner as annexure-1 to the petition and the same are not in dispute. The said conditions clearly provides for submission of tenders in sealed covers in respect of aforesaid 8 houses.

20. The Committee constituted for accepting the tenders was required to accept the highest tenders in respect of each of the houses whereupon 50% of the tender amount was to be deposited immediately and the balance in three months. It also provided that the possession would be delivered only after deposit of the entire amount.

21. Clause-12 of the conditions of the tender is important which provides that the Director Mandi Parishad is empowered to modify the terms and conditions of the tender and the conditions so modified would be acceptable to the parties.

22. In addition to the above, Clause 5 provides that the Committee has the right to exclude any property from the auction.

23. It is admitted that the house allotted to the petitioner has not been excluded from the auction and therefore, its auction in favour of the petitioner is final and conclusive as on date.

24. The Director Mandi Parishad has not even modified any of the terms and conditions of the tender notice.

25. The sale consideration is not part of the tender or its terms and conditions and as such could not have been modified by taking aid of Clause 12 of the terms and conditions of the tender. The said Clause permitting modification in the terms and conditions of the tender is in reference to the manner of allotment as laid down in the tender notice and is not referable to the sale consideration which was not even known to any one at the time of issuance of the tender notice. The said Clause as such do not envisages for modifying the sale consideration or the bid amount submitted by the petitioner.

26. In view of above, the submission of Sri Chaturvedi, that the respondents are entitle to modify the terms and conditions and thus have right to increase the sale consideration is bereft of merit and cannot be accepted. The modification of the terms and conditions of the tender is quite distinct and separate an issue then the

alteration or increase of sale consideration which is not part of it.

27. Secondly, as stated above, the bid amount tendered by the petitioner could not be changed by the respondents. The petitioner had never agreed or offered to purchase the house in dispute on any higher amount than that mentioned in the tender. The said tender amount is the amount offered and accepted and is not liable to change unilaterally by the respondents. At best the respondents could have refused to accept the offer by holding it to be on the lower side or cancelled the auction or have excluded the property from the auction which acts were never performed by them.

28. Thus, there is concluded contract between the parties for the sale of the said house on the consideration on which the tender was accepted i.e. Rs.4,75,000/-. The respondents as such are not justified in making any additional amount for any reason.

29. Thirdly, the burden of the M.D.A. to pay additional compensation to the farmers for the acquired land cannot be shifted upon the petitioner. The petitioner is not the purchaser of the house from the M.D.A. rather he has purchased it in auction from the Mandi Parishad. The petitioner is too remote to the liability of payment of additional compensation, if any, fastened upon the M.D.A.

30. Admittedly, Ramesh Chandra Jain was also allotted one of the houses pursuant to the same tender notice in which the petitioner was allotted the house in question. Both of them were allotted the respective houses on the same sale consideration of Rs.4,75,000/-each. In the case of Ramesh Chandra Jain, the demand of additional amount of sale consideration was waived and the sale deed was executed.

31. There is no reason to give a different treatment to the petitioner and in not executing the sale deed in his favour by ignoring the additional demand.

32. The submission that the additional demand was incorrectly waived in the case of Ramesh Chandra Jain and that after the execution of the sale deed a fresh demand has been issued against him is of no consequence as once a sale deed has been executed, the amount mentioned therein cannot be altered so as to permit the vendor to demand higher sale consideration.

33. In the last, the petitioner had admittedly deposited the entire sale consideration on or before 27.01.1997 whereas the judgement of the Supreme Court directing for payment of enhance compensation to the farmers has come on 30.04.1997. During the above period 27.01.1997 to 30.04.1997 there was no legal impediment on part of the respondents for not executing the sale deed in favour of the petitioner. Had the sale deed been executed during the above period, the transaction would have come to a close, leaving no room for demand of any additional consideration. The respondents themselves are to be blamed for the delay in executing the sale deed or in not executing the sale deed within the above period.

34. Thus, in the overall facts and circumstances of the case, we are of the opinion that there was a conscious decision on part of the Mandi Parishad to sell the house in question to the petitioner on the sale consideration of Rs.4,75,000/- and the petitioner having paid the said amount in

time, the respondents were obliged to execute the sale deed in his favour without demanding any additional sale consideration.

35. Accordingly, a writ in the nature of mandamus is issued to the respondents to execute the sale deed of house No. MH-14 situate in Pallaupuram, Phase-II, Meerut in favour of the petitioner on the terms and conditions of the allotment letter dated 19.08.1996 and 04.09.1996 without demanding any additional amount other than that mentioned in the allotment letters most expeditiously preferably within a period of two months from the date a copy of this order is produced before them.

36. The Writ Petition is **allowed** with no order as to costs.

(2020)1ILR 1080

Section 5 - Bar of accrual of forest-rights - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 131-A - Bhumidhari rights in gaon sabha or state government land in certain circumstances - Limitation Act, 1963 - Section 5 - Respondent having no evidence to establish a right to possess or to work the land as may have existed prior to 4 July 1970 when the plots in question came to be included in the proposed reserved forest - The respondent asserted a right over the land only from 1978 - Neither any evidence , nor any proof referred to by the Forest Settlement Officer in order to establish a right of cultivatory possession being exercised by the respondent from prior to the issuance of the notification under Section 4 - Barred by Section 5 of the 1927 Act. - Respondent not entitled for benefit under Section 131-A of U.P.Z.A. and Land Reforms Act, 1950. (Para 23)

The dispute relates to Plot included in a notification issued by the State under Section 4 of the Indian Forest Act, 1927 on 4 July 1970 -

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ C No. 22837 of 2002

State of U.P. ...Petitioner
Versus
The A.D.J. Sonbhadra & Ors.
...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
Sri B.K. Srivastava, Sri R.C. Srivastava, Sri R.V. Chaudhary, S.C.

A. Indian Forest Act, 1927 - Section 4 - Notification by state government -

Once the notification under Section 4 of the 1927 Act came to be issued on 4 July 1970, the statutory restraint comprised in Section 5 of that Act also applied - Section 5, it becomes important to recall, prohibits the acquisition of rights in or over land comprised in a Section 4 notification except by way of succession, grant, or contract in writing made by the Government - Section 131-A as is evident does not override or eclipse the prohibition put in place by Section 5 of the 1927 Act - to accord a harmonious construction upon Section 131-A of the 1950 Act bearing in mind Section 5 of the 1927 Act, it must be interpreted to extend at best to land held in cultivatory possession from prior to the issuance of the notification under Section 4. (Para 22 & 24)

Held: - No rights could have either accrued, stood created or been acquired after the notification under Section 4 came to be issued and the land stood included in the proposed reserved forest. The claim of the respondent barred by Section 5 of the 1927 Act. No relief was liable to be granted to the private respondent under Section 131-A of U.P.

Zamindari Abolition and Land Reforms Act, 1950. (Para 23 & 25)

Writ Petition allowed. (E-7)

List of cases cited: -

1.Banwasi Sewa Ashram Vs. State of U.P. and Others

2.Smt. Rinki Vs. State of U.P. And Others

3.State of U.P. And Another Vs. The A.D.J. Sonbhadra And Ors.

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

1. Heard Sri Sanjay Goswami, the learned Additional Chief Standing Counsel on behalf of the petitioners assisted by Sri Birendra Pratap Singh, the learned Standing Counsel and Sri B.K. Srivastava, learned Senior Counsel who appeared on behalf of the private respondents.

A. THE PRELIMINARY OBJECTION

2. The respondents take a preliminary objection to the maintainability of the instant writ petition, which is noted as under. Sri Srivastava refers to the decision rendered by the Supreme Court on 20 November 1986 in **Banwasi Sewa Ashram Vs. State of U.P. and Others** and to the following observations as entered therein to submit that the State had unambiguously conceded to accepting the decisions rendered by the Additional District Judges [ADJ] in accordance with the procedural framework evolved. Reference in this respect is made to the following observation as entered in that decision:-

"10.

(3) When the Appellate Authority finds that the claim is admissible, the State Government shall (and it is agreed before us) honour the said decision and proceed to implement the same....."

3. According to Sri Srivastava, the directions as framed clearly debar the State from assailing the orders passed by the ADJ in suo moto appeal. In view thereof, it was his contention that the instant writ petition could not be maintained. Sri Srivastava further refers to the fact that the Supreme Court had in that order itself recorded that parties were agreed that if a claim were ultimately to be established before the authorities, an appropriate title deed would be issued to the claimants. Sri Srivastava also refers to the liberty granted by the Supreme Court to parties to move it for directions as and when necessary. Referring then to the subsequent order of 18 July 1994 passed in **Banwasi Sewa Ashram**, Sri Srivastava draws the attention of the Court to the directions contained therein to the effect that the Revenue Secretary of the State was to implement the decisions rendered by the various ADJ's. In the backdrop of the observations as made and contained in the aforementioned two orders, it was submitted that the State was clearly estopped from assailing the orders passed by the ADJ's |and that consequently the writ petitions at their behest must be held to be not maintainable.

4. It was also in that backdrop submitted that the tenor of the orders passed by the Supreme Court and referred to above, amounted to a debarment and ouster of the jurisdiction of this Court under Article 226 of the Constitution and that consequently any disputes that were to arise subsequently could be subjected to challenge only before the Supreme Court.

5. Sri Srivastava then drew the attention of the Court to an application

purported to have been made by the State respondents before the Supreme Court on 15 February 2018 in which the following prayers are made:

"(a) declare null and void all such orders passed after 18.07.1994 by the Forest Settlement Officer and Additional District Judge;

(b) set aside the orders passed in favour of NTP, NCL, UPSEB and others by the Forest Settlement Officer and Additional District Judge as being illegal;

(c) set aside such orders in which the claim has already been adjudicated and fresh claims for the same land are being made by third parties;

(d) set aside the orders in which the Forest Settlement Officer and Additional District Judge have declared the land to be Jungle, Jhadi, Nadi and to be part of the proposed reserved Forest but have been illegally declared as Banjar and thereafter pattas given in favour of third parties;

(e) restrain the Forest Settlement Officer, Sonebhadra and Additional and Additional District Judge, Anpara at Obra from entertaining any fresh claims;

(f) direct the Forest Settlement Officer, Sonebhadra and Additional District Judge, Anpara at Obra to dispose of the pending claims, appeals within one week from the passing of the orders of this Hon'ble Court.

(g) Direct the Forest Settlement Officer Sonebhadra (Dy. Collector/SDM) prepare a proposal order u/s 20 to be handed over to the concerned DFO;

(h) PASS such other and further order as this Hon'ble Court may deem just and proper in the premises of this case."

6. Referring to the prayers as contained in that application, it was contended that since a general declaration with regard to the invalidity of all orders passed post 18 July 1994 has been sought, the present petition is liable to be dismissed on this score also since it is not permissible for the State to seek and pursue two parallel remedies.

7. Referring to the judgment rendered by a Full Bench of this Court in **Smt. Rinki Vs. State of U.P. And Others**, it was lastly submitted that the Constitution binds all Courts and authorities to act in aid of the Supreme Court in light of the provisions made in Articles 141 and 144 of the Constitution. Referring to the principles laid down and recognized by the Full Bench in that decision, it was submitted that no Court can ignore or fail to comply with the directions that are issued by the Supreme Court. He refers to the position in law as encapsulated in paragraphs 32, 34 and 36 of that decision which read thus:

"32. Failure to comply with the direction of Hon'ble Supreme Court has always been deprecated. In this regard, reference may be had to paragraph 9 of the judgment in the case of *Bharat Earth Movers v. Commissioner of Income Tax, Karnataka*, (2000) 6 SCC 645, which is extracted herein below:

"9. Before parting, we would like to observe that when this appeal came up for hearing on 24.3.1999 we felt some difficulty in proceeding to answer the question arising for decision because the orders of the authorities below and of the Tribunal did not indicate how the leave account was operated by the appellants and the leave salary provision was made. To appreciate the facts correctly and in that light to settle the law we had directed the Income Tax Appellate Tribunal to

frame a supplementary statement of case based on books of account and other relevant contemporaneous records of the appellant which direction was to be complied with within a period of six months. The hearing was adjourned sine die. After a lapse of sixteen months the matter was listed before the Court on 20.7.2000. The only communication received by this Court from the Tribunal was a letter dated 20th June, 2000 asking for another six months time to submit the supplementary statement of case which prayer being unreasonable, was declined. Under Section 258 of the Income Tax Act, 1961, the High Court or the Supreme Court have been empowered to call for supplementary statement of case when they find the one already before it not satisfactory. *Article 144 of the Constitution obliges all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court. Failure to comply with the directions of this court by the Tribunal has to be deplored. We expect the Tribunal to be more responsive and more sensitive to the directions of this Court. We leave this aspect in this case by making only this observation."*

34. We may also notice that Government of India Act, 1935 under Section 210 (1) also had a provision similar to Article 144 of the Constitution of India. Section 210 (1) of Government of India Act, 1935 is reproduced below:-

"210. Enforcement of decrees and orders of Federal Court and orders as to discovery, etc- (1) All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court".

36. The principle of law as embodied in Article 141 and 144 of the Constitution of India as discussed by Hon'ble Supreme Court in the aforementioned judgments does not leave any scope whatsoever for either this Court or for any authority in the State Government not to act in accordance with the directions contained in any judgment or order passed by Hon'ble Supreme Court. Any act by any authority in derogation and even in contravention of an order passed by Hon'ble Supreme Court cannot be approved of on any count or for any reason whatsoever."

8. Refuting those contentions, Sri Goswami, the learned Additional Chief Standing Counsel, submits that the directions contained in the order of 20 November 1986 itself clearly provided that the orders passed by the ADJ's would be contemplated to be orders made under the provisions of the **Indian Forest Act, 1927**. In that backdrop, it was submitted that the State was neither injuncted nor estopped from assailing the orders so passed. He further submitted that the jurisdiction of the Court under Article 226 of the Constitution was neither specifically nor by intendment excluded. It was also his submission that the power of judicial review as conferred on this Court has been recognised as part of the basic structure of the Constitution. It was submitted that the constitutional jurisdiction as conferred on the Court cannot be understood to have been intended to be excluded by any of the orders passed by the Supreme Court in **Banwasi Sewa Ashram**.

9. Sri Goswami further submits that it clearly does not lie in the mouth of the respondents to allege an infraction of the directions framed by the Supreme Court bearing in mind the fact that they themselves chose to invoke the jurisdiction of the concerned Forest Settlement Officer and ADJ in stark violation of the timeframe stipulated therein. According to

Sri Goswami, strict timelines had been stipulated by the Supreme Court which were liable to be scrupulously adhered to and as the facts of the instant case itself would evidence, a highly belated claim was entertained and allowed in clear violation of the procedure prescribed by the Supreme Court.

10. Dealing then with the ambit of the application made by the State on 15 February 2018, it was submitted that the reliefs as framed therein cannot be read without reference to the context in which they were framed. Sri Goswami submitted that the State is faced with a situation where despite closure of proceedings and the Supreme Court mandating that no further claims can be entertained or ruled upon, the Forest Settlement Officers continue to entertain claims and are doing so even now. According to Sri Goswami, even though the Supreme Court had directed that the Courts of the ADJ's be wound down, they are continuing to function and are being approached with claims which are raised and laid belatedly and in any case beyond the time frame as mandated in the orders passed in **Banwasi Sewa Ashram**. It was his submission that the application which is referred to is not intended to be an action on the part of the State to invoke the jurisdiction of the Supreme Court to go into the individual correctness of orders but to lay down as a rule whether the continued exercise of jurisdiction by the Forest Settlement Officers and the ADJ's is valid in law or not.

11. Having noticed the submissions addressed on the preliminary objection that was raised, the Court now proceeds to deal with the same as under.

12. At the very outset, it becomes pertinent to note that as this Court reads the directions issued by the Supreme Court and embodied in the first decision of **Banwasi Sewa Ashram** rendered on 20 November 1986, it fails to find any vestige of an intendment to denude this Court of its constitutional jurisdiction conferred by Article 226 of the Constitution. It would firstly be apposite to note the backdrop in which the directions as contained in the order of 20 November 1986 came to be passed. The Supreme Court was principally moved by way of a Letter Petition that sought to highlight the injustices being meted out on tribals and traditional forest dwellers residing in that region whose rights of possession over land was being violated without the due process of law being adhered to. It was principally concerned with a violation of their rights and the position in which they stood placed in light of their social and economic backwardness. It was faced with the spectre of their traditional rights to dwell in forest and to use its produce that was being overlooked and disregarded by virtue of those lands being included in a proposed reserved forest without a valid enquiry being undertaken. The Supreme Court also took into consideration the various reports submitted before it which established that their right to object to the proposed inclusion of their lands had been woefully disregarded in violation of the procedure prescribed under the 1927 Act. It was in that backdrop that they proceeded to frame directions evolving a unique process for adjudication of claims. As was observed by this Court in its decision rendered in **State of U.P. And Another Vs. The A.D.J. Sonbhadra And Ors.**, the directions as framed by the Supreme Court, evidenced a departure from the statutory procedure otherwise stipulated and contemplated under the **1927 Act**. In that sense, the directions as issued constituted the fountainhead and the sole

basis of the procedure that was liable to be followed by the Forest Settlement Officers for the purposes of disposal of claims. These directions insofar as they stand embodied in the decision rendered on 20 November 1986 set forth a time frame for submission of objections and their disposal by the Forest Settlement Officers. In a significant departure from the procedure otherwise prescribed under the 1927 Act, the orders of the Forest Settlement Officers were directed to be placed before the concerned ADJ's by way of what was described to be suo moto appeals. The said safeguard appears to have been essentially put into place to ensure that the orders and decisions as made by the Forest Settlement Officers were duly scrutinized by a trained and accomplished judicial authority before being conferred with the attributes of a valid adjudication undertaken under the 1927 Act. It was in that backdrop that it was provided that the orders of the ADJ's. would be entitled to be viewed as orders passed under the Act.

13. However, the Court finds no observation entered or made either in the order dated 20 November 1986 or of 18 July 1994, which may even remotely tend to indicate or establish the intent of the Supreme Court to oust the jurisdiction of this Court conferred by Article 226 of the Constitution. The debarment of the jurisdiction of this Court to exercise the power of judicial review cannot be lightly assumed especially since that power itself has been recognised as being part of the basic structure of our Constitution. The question whether the jurisdiction of this Court conferred by Article 226 of the Constitution stands ousted and barred and whether the State is estopped from challenging the orders passed by the ADJ's are in fact separate and distinct issues. Learned senior counsel appearing for the contesting private respondent clearly appears to incorrectly assume that they are intermingled. Bearing in mind the constitutional attributes imbued upon Article 226, the respondents were liable to discharge a heavy burden and scale a high standard in order to establish its ouster. This they have woefully failed to do. In any case, from the directions as framed in **Banwasi Sewa Ashram**, the Court finds itself unable to countenance this contention. The plea raised in this respect is consequently rejected.

14. Turning then to the issue of estoppel, the Court notes that while the Supreme Court may have observed that the officers of the State Government would be bound to implement the decisions rendered at the end of the adjudicatory process and honour the same, this Court finds itself unable to read those observations as estopping the State from assailing orders passed by the ADJ's if the peculiar facts and circumstances of particular cases so warranted and necessitated. This more so when the orders are assailed on the ground of having been made in violation of those directions themselves. The Court bears in mind the principal submission addressed on behalf of the petitioners who assert that the settlement procedure evolved was never intended to be an unending process or one which was to continue in perpetuity. According to the respondents, contrary to the unambiguous command of the Supreme Court prescribing strict time lines for conclusion of the settlement process, highly belated claims like the one presented by the private respondent were entertained thus constituting a violation of those directions itself. In the considered view of this Court, the concession as given before the Supreme Court cannot possibly

be stretched to even those cases and situations where the provisions made in **Banwasi Sewa Ashram** are themselves violated. The Court also bears in mind the orders passed in **Banwasi Sewa Ashram** on 10 May 1991, 16 February 1993 and 4 October 1993 when the Supreme Court itself permitted a reopening and reconsideration of adjudications made by ADJ'S by permitting parties to move the authorities by way of review and special review. These orders also clearly establish that finality was not accorded to the first round of adjudication which was concluded pursuant to the order of 20 November 1986. These orders in unambiguous terms conferred a right upon parties to seek review where orders were found to suffer from patent and manifest errors. The plea of estoppel is thus turned down.

15. Insofar as the liberty accorded to parties to move the Supreme Court even after the writ petition had been finally disposed of is concerned, suffice it to note that the same stood restricted to the need to move that Court ***"for directions.."***. The liberty so accorded clearly did not envisage individual adjudications being subjected to challenge before the Supreme Court only. The argument therefore that the State was estopped or that the orders passed in **Banwasi Sewa Ashram** denude it of the right to assail individual adjudications cannot be countenanced.

16. That leaves the Court to deal with the application which is stated to have been made by the State and in which a declaration is sought to the effect that all orders passed by the Forest Settlement Officers and ADJ's post 18 July 1994 be declared *null and void.* As was rightly submitted by Sri Goswami the prayer so addressed cannot be viewed or appreciated without bearing in mind the backdrop in which the application itself came to be made. The background facts which appear to have compelled and constrained the State to move the Supreme Court in 2018 in respect of a matter which had attained closure in 1994 is evident from the following pleadings as taken in that application:

"(x) In compliance of the Order of this Hon'ble Court dated 18.07.1994, the Ld. ADJ, Anpara (at Obera-Sonbhadra), was to function till 30.09.1994. However, new applications of individuals who claim to have rights to the land for which Section 4 Notification of the Indian Forest Act, 1927 has been issued, are still being decided by the Forest Settlement Officer, Sonbhadra and Appeals against the said decisions are still being admitted and adjudicated upon by the Ld. ADJ, Anpara (at Obera-Sonbhadra). Under these circumstances, the Applicant Departmentis aggrieved by the impossibility of issuing Notification under S. 20 of the Indian Forests Act, 1927.

(xi) These applications that are being filed at this belated stage are being filed by 3rd Parties that have no lineage as Tribals and the same are being filed with the motive of staking a claim to land that is not rightfully theirs. The applicant is filing once such example of Shri Ramji Mishra who admittedly is a resident of Bihar as would be evident from the letter dated 02.08.2016 which shows that Shri Ramji Mishra worked as Fuse-man in the Division since 02.04.1986 to 31.01.2003 and was a permanent resident of village and post office Bharoli Via Shahpur Pahi-Shahabad District Ara Bihar. True translated copy of the order dated

27.08.1990 passed by the Forest Settlement Officer, Sonbhadra and true translated copy of the order dated 23.02.1993 passed by the Additional District Judge and true translated copy of the letter dated 02.08.2016 are annexed and marked as **ANNEXURE: A-4** (Page 36 to 40), **ANNEXURE: A-5** (Page 41 to 43 & **ANNEXURE: A-6** (Page 44) respectively.

(xii) Similarly the Forest Settlement Officer has given propriety rights to Northern Coal Fields Ltd. (NCL), NTPC and UPSEB and others for about 450 hectares. The applicant is annexing a chart giving some of the details of land given to NCL as well as NTPC are annexed and marked as **ANNEXURE: A-7** (Page 45 to 49). The applicant is also annexing the translated copy of the order of the Forest Settlement Officer in case No.6044 NCL Vs. Forest Department dated 07.08.1990 and true translated copy of the order dated 22.04.1992 passed by the Additional District Judge Sonbhadra in Case No.2955/1990 are annexed and marked as **Annexure: A-8** (Page 50 to 51) & **ANNEXURE A-9** (Page 52 to 53) respectively.

7. With regard to 3rd Parties filing claims and the same being adjudicated in their favour by the Forest Settlement Officer and the Ld. ADJ, the Applicant Department would like to point out the example of one Ramji Mishra to whom 3.3050 hectares of forest land has been awarded in terms of various orders by the Forest Settlement Officer and confirmed by the Additional District Judge. Ramji Mishra is a resident of Bihar who worked as a Fuse man with the UP Jal Vidyut Nigam for the period 02.04.1986 to 31.01.2003. He has so far been awarded 3.3050 hectares of Forest Land in terms of various orders of the FSO and Ld. ADJ. It is also pertinent to point out that in CRL MP 16269/2009, the Applicant Department, had pointed out approximately 60 such outsiders who have been awarded various tracts of land from the Forest Land for which Section 4 Notification had been issued."

17. From the averments taken in that application, it is manifest that what has driven the State to move the Supreme Court is a continued entertainment of objections by the Forest Settlement Officers and the ADJ's much after and beyond the dates prescribed had elapsed and the time frames as stipulated in the last order of the Supreme Court. The State refers to the order dated 18 July 1994 to submit that in terms of this order the Special Courts of ADJ's were to function only till 30 September 1994 and it was assessed that all proceedings for adjudication and settlement of claims would have come to an end by then. Despite much time having elapsed even after the said date the State asserts in that application that the jurisdiction of the Forest Settlement Officers and ADJ"s is being continually invoked in respect of matters which should have been rendered finality in light of the orders passed. It has referred to various cases and instances where the jurisdiction of the Forest Settlement Officers and ADJ's was invoked as late as in 2016. On a holistic reading of the application, it is therefore clear that what has compelled the State ostensibly to move the Supreme Court is to bring a closure to the entire process of settlement which was to have concluded in light of the directions as contained in the order of 18 July 1994. The application in essence appears to call upon the Supreme Court to clarify and declare whether the settlement process was envisaged to be a

continuing and ongoing process or one which was to terminate once the deadline framed by the Supreme Court was reached. The application does not appear to call upon the Supreme Court to go into individual facts or the correctness or otherwise of individual orders passed by the Forest Settlement Officers and ADJ's

18. In view of the above and for all the reasons assigned hereinabove, the preliminary objection fails and is negatived.

B. ON MERITS

19. This petition challenges the orders dated 8 May 1997, 12 March 1999, 29 February 2000 and 11 April 2001 passed by the State respondents. The dispute itself relates to Plot Nos. 439 and 448 which were included in a notification issued by the State under Section 4 of the 1927 Act on 4 July 1970. The private respondent is stated to have filed objection to the inclusion of these plots on 30 April 1997. This objection was entertained by the Forest Settlement Officer despite the specific objection of the State that the same was not maintainable having been made beyond the timelines as fixed by the Supreme Court. It was further asserted by the State in those objections that the land had been rightly included in the proposed reserved forest since it was covered by trees and shrubs and the land was clearly not of a cultivable character. Those objections were overruled by the Forest Settlement Officer by his order of 8 May 1997 on the ground that the respondent had proved being in possession of the plots from 1385 Fasli (corresponding to the English calendar year of 1978). On this score as well as by extending the benefits of Section 131-A of the **U.P. Zamindari Abolition and Land Reforms Act, 1950** the claim of the private respondent was allowed and directions framed for exclusion of the two plots from the proposed reserved forest. The aforesaid order was affirmed by the Additional District Judge in *suo moto* appeal in terms of the judgment rendered on 12 March 1999. The State thereafter appears to have made applications for review and special review which also came to be dismissed and which orders also are assailed in the instant writ petition.

20. Before this Court, Sri Goswami, the learned Additional Chief Standing Counsel appearing for the State, contends that there was no occasion for the Forest Settlement Officer to have entertained the objections in 1997 in respect of land that had been included in a notification issued under Section 4 decades earlier in 1970. He submitted that the delay has been cursorily condoned by the Forest Settlement Officer alluding to the provisions made in Section 5 of the **Limitation Act, 1963** and by only observing that sufficient cause existed for condonation of delay. According to Sri Goswami, the manner in which delay has been condoned clearly flies in the face of the peremptory directions issued by the Supreme Court and the timeframe stipulated in the various orders passed in **Banwasi Sewa Ashram**. It was submitted that despite clear directions having been issued by the Supreme Court for closure of all settlement and adjudicatory processes by 30 September 1994, the Forest Settlement Officer proceeded to entertain objections preferred by the petitioner in clear violation of the directions of the Supreme Court. It was further submitted that neither the Forest Settlement Officer nor the Additional district Judge rely upon

any evidence, which may have established that the nature and character of the land was such that it did not merit inclusion in a proposed reserved forest. According to Sri Goswami, the entire process of adjudication was based solely upon an alleged inspection stated to have been undertaken in 1997 and in any case the Forest Settlement Officer does not place reliance on any material which may have established that in 1970 when the Section 4 Notification was issued, the land did not fall within the genre and category of land which was liable to be included under Section 4 of the 1927 Act. Sri Goswami also refers to the provisions made in Section 5 of the 1927 Act to submit that there could have been no acquisition of rights post the issuance of the Notification issued under Section 4. According to Sri Goswami, the ADJ also committed a manifest error in proceeding to affirm and endorse the decision entered by the Forest Settlement Officer.

21. The Court firstly notes that the Forest Settlement Officer appears to have proceeded under a misconception that the provisions of Section 5 of the **Limitation Act, 1963** applied. As was noticed in the earlier parts of this order as well as the detailed judgment rendered in **State of U.P.,** the procedure for adjudication of rights was governed exclusively by the provisions made by the Supreme Court in **Banwasi Sewa Ashram**. It was the procedure that was evolved by the Supreme Court there which governed the trial of claims. There was consequently no occasion for the Forest Settlement Officer to place reliance upon the provisions made in Section 5 of the 1963 Act. The Court additionally notes that the private respondent proffered no plausible explanation for having failed to invoke the jurisdiction of the Forest Settlement Officer prior to 1997 in respect of a notification that was issued in 1970. The respondent also did not participate in the settlement process which ensued pursuant to the directions issued in **Banwasi Sewa Ashram**.

22. The Court further finds that the nature and character of the land which was alluded to by the State in its objection has also not been appreciated. This principally since the Forest Settlement Officer appears to have based his decision solely on the inspection which was carried out many decades after the Notification under Section 4 had been issued. It has thus clearly erred in failing to consider this aspect which was crucial for the adjudication to be recognised as valid in law. As is further evident from a reading of the order impugned, the Forest Settlement Officer bases the grant of relief to the respondent solely on the fact that she had been in possession from 1385 Fasli. That clearly could not have been determinative since what alone would have been of relevance would be the rights which parties claimed to exist and as inhering in them on the date when the Section 4 Notification had come to be issued. Dealing with the impact of Section 5 of the 1927 Act and the bar to accrual of rights, this Court in **State of U.P.** observed thus:

"Viewed from the angle of the provisions engrafted in the 1927 Act, the Court notes that once the notification under Section 4 of the 1927 Act came to be issued on 4 July 1970, the statutory restraint comprised in Section 5 of that Act also applied. Section 5, it becomes important to recall, prohibits the acquisition of rights in or over land

comprised in a Section 4 notification except by way of succession, grant or contract in writing made by the Government. Section 131 A as is evident does not override or eclipse the prohibition put in place by Section 5 of the 1927 Act. In order, therefore, to accord a harmonious construction upon Section 131A of the 1950 Act bearing in mind Section 5 of the 1927 Act, it must be interpreted to extend at best to land held in cultivatory possession from prior to the issuance of the notification under Section 4..."

23. It is relevant to note that the respondent does not refer to any evidence to establish a right to possess or to work the land as may have existed prior to 4 July 1970 when the plots in question came to be included in the proposed reserved forest. The respondent asserted a right over the land only from 1978. No evidence appears to have been placed nor is any such proof referred to by the Forest Settlement Officer in order to establish a right of cultivatory possession being exercised by the respondent from prior to the issuance of the notification under Section 4. Even before this Court no evidence or material was either alluded or referred to which could have possibly been read as operating in favour of the respondent. No rights could have either accrued, stood created or been acquired after the notification under Section 4 came to be issued and the land stood included in the proposed reserved forest. The claim of the respondent must resultantly be held to be barred by Section 5 of the 1927 Act.

24. Insofar as the extension of benefits under Section 131-A is concerned, this Court had an occasion to deal with the scope and ambit of that provision in some detail in **State of U.P.** where after ultimately analyzing the provisions made under the 1950 Act as well as the **Forest Conservation Act, 1980** and the various orders passed by the Supreme Court, it recognized and laid down the legal position to be as under:

"That then takes the Court to deal with the submission addressed in the backdrop of Section 131-A of the 1950 Act. Section 131-A was initially promulgated by way of Ordinance No. 7 of 1987. It was ultimately introduced in the statute by virtue of U.P. Act 14 of 1987. Section 131A principally extends protection to those persons who were found to be in cultivatory possession of land in the portion of District Mirzapur South of the Kaimur Range prior to 30 June 1978 and confers on such individuals the status of a bhumidhar with non transferable rights on such land. Whether this provision would be sufficient to safeguard the asserted interest of the private respondent is the issue that consequently falls for determination. While dealing with this question it would be apposite to bear in mind the fact that by the time that this measure was introduced, the 1980 Act already stood in place. The rights which are claimed by the respondents in terms of its provisions would merit examination and evaluation from a dual perspective- firstly, on the basis of the language of the section itself and other attendant provisions of the 1950 Act and secondly, in the backdrop of the statutory regime governing forests which otherwise exists.

On a plain reading of Section 131A, it is evident that the provision is neither stated to have overriding effect over the other parts of the 1950 Act nor is it worded to be in supersession of other statutes that may operate on the subject of

forests. As is manifest, that provision is not worded so as to apply notwithstanding a prohibition or restraint contained in any other enactment which touches the field of forests and rights that may accrue on land on which forests may exist. In its barest form, Section 131A seeks to protect the possession of persons on land which may vest in a Gaon Sabha by virtue of Section 117 of that Act. Section 117 provides that the State Government may by a general or special order vest in a Gaon Sabha or other local authority land that had come to vest with it upon promulgation of the 1950 Act. It becomes relevant to recall that Section 4 of the 1950 Act envisaged the vesting of all estates situate in the State with the Government upon abolition of zamindari. Section 117 while enumerating the categories of vested land that may be transferred not just speaks of forests but also of land cultivable or otherwise, trees, fisheries, ponds, tanks, water channels, pathways and abadi sites. Consequently when Section 131A refers to land vesting in a Gaon Sabha under Section 117, it cannot be understood as being with regard to possession of persons upon forests alone. Possession of a person may be found to exist even on land cultivable or otherwise or on any other category of estates vesting in the State.

The second internal control on the benefit conferred by that provision is manifest from its opening lines itself which makes its provisions subject to Sections 132 and 133A of the 1950 Act. Section 132 of the 1950 Act essentially declares that bhumidhari rights shall not accrue upon the categories of land enumerated therein. This statutory interdict also applies to land declared or held by the Government for a public purpose in terms of Section 132 (c). It would be pertinent to recollect that the land forming subject matter of the instant writ petition formed part of the "Dudhi Forest" which was transferred by the State Government from the Department of Revenue to the Forest Department on 15/16 May 1950, a fact noted in the introductory part of this judgment. It is therefore apparent that a forest under the ownership and control of the State of U.P. existed in 1950 itself. Clearly, therefore, in 1950 the State of U.P. held land which constituted a forest. That the creation and preservation of forests is a constitutional obligation and would clearly constitute a public purpose cannot possibly be disputed. Significantly, clause (c) of Section 132 while expanding upon the categories which would constitute land held for a public purpose employs the phrase *"..in particular and without prejudice to the generality of this clause..."*. It is thus evident that clause (c), while specifying categories of lands held for a public purpose, is not exhaustive but merely illustrative. On a foundational plane, therefore, the Court finds it difficult to accept the proposition that possessory rights claimed on forests were entitled to be perfected by virtue of Section 131A. The problem, however arises on account of that provision specifically referring to land in respect of which a notification under Section 20 of the 1927 may not have been issued and thus evincing an intent to extend the coverage of Section 131A even to forests.

The Court finds that there is no explicit or straightforward expression of intent to extend the benefits of that provision to land covered under Section 4 of the 1927 Act. Assuming that was the legislative intent, it was open for the Legislature to have said so plainly. It is apposite to note that the provision was introduced in 1987 by which time the 1980

Act was already in force and Section 2 thereof applied. It also becomes apposite to note that U.P. Act 14 of 1987 was not reserved for the assent of the President. More importantly, Parliament by virtue of Act No. 69 of 1988 introduced clause (iii) in Section 2 of the 1980 Act restraining State Governments from assigning forest land to persons by way of lease or otherwise. Of equal import is the order dated 8 February 1989 passed in **Banwasi Sewa Ashram** which clarified that land covered in a notification under Section 4 of the 1927 Act would also be subject to the rigours imposed by Section 2 of the 1980 Act. If Section 131A were to be conferred the interpretation as suggested by the respondents it would clearly breach the provisions of Section 2 of the 1980 Act.

The Court also bears in mind the decision rendered by the Supreme Court in **Godavarman** which explained the does not override or eclipse the prohibition put in place by Section 5 of the 1927 Act. In order, therefore, to accord a harmonious construction upon Section 131A of the 1950 Act bearing in mind Section 5 of the 1927 Act, it must be interpreted to extend at best to land held in cultivatory possession from prior to the issuance of the notification under Section 4. The assertion of a right under Section 131A and a recognition thereof in law would also have to be tested on the anvil of Section 2 of the 1980 and the orders of the Supreme Court referred to above. The extent of protection which can be recognised cannot be viewed in the abstract and in any case cannot be adjudged without bearing in mind the provisions made in the 1927 and the 1980 Acts."

25. From the exposition of the law with respect to the applicability of Section 131-A, it is clear and manifest that no expression forest to be understood not just as defined in dictionaries but also to any land which answered the description of forest as generally understood as also land recorded as forest irrespective of ownership. The rights consequently claimed by virtue of Section 131A cannot be recognised as flowing unhindered by the restrictions imposed in that decision.

Viewed from the angle of the provisions engrafted in the 1927 Act, the Court notes that once the notification under Section 4 of the 1927 Act came to be issued on 4 July 1970, the statutory restraint comprised in Section 5 of that Act also applied. Section 5, it becomes important to recall, prohibits the acquisition of rights in or over land comprised in a Section 4 notification except by way of succession, grant, or contract in writing made by the Government. Section 131A as is evident

relief was liable to be granted to the private respondent de hors a consideration of the aforesaid factors.

26. Accordingly and for the reasons aforementioned, the instant writ petition is **allowed**. The orders dated 8 May 1997 and 12 March 1999 are quashed. Since the principal orders have been quashed, the subsequent orders dated 29 February 2000 and 11 April 2001 shall also resultantly stand set aside.

(2020)1ILR 1093

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 23926 of 2017

State of U.P. & Ors. ...Petitioners

Versus

U.P. Human Rights Commission, Lucknow & Anr. ...Respondents

Counsel for the Petitioners:

Sri Bhola Nath Yadav, Sri Suresh Singh (C.S.C.)

Counsel for the Respondents:

Sri R.P. Singh Parihar

A. Human Rights - U.P. Victim Compensation Scheme - 2014 - Protection of Human Rights Act, 1993 - Section 18 Petitioner sustained injuries in riots during procession of Makar Sankranti- on the head and the right eye-lost sight of one eye completely-Human right commission directed the District Magistrate/ Superintendent of Police to make compensation to victim-order not bad.

Held, Sub-clause (a) of Section 18 deals with the fact that where the enquiry discloses the commission of violation of human rights or abatement thereof by a public servant, he may recommend to the concern government or authority to make payment of compensation or damages to the complainant or to the victim. From perusal of the same, it is clear that the Commission has full power to recommend regarding payment of compensation or damages to the complainant, if he finds on enquiry that there is a violation of human rights or negligence in the presumption of violation of human rights. (Para 21)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. H. S. Sharma Vs. Indraprastha Apollo Hospital and another reported in 2007 (4) AWC 4.175 (NC)

2. State of U.P. and 2 others Vs. N.H.R.C. and 3 others, Writ C No.15570 of 2016

3. State of U.P. and 2 others Vs. National Human Rights Commission, Writ C No.7890 of 2014

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Suresh Singh, learned Chief Standing Counsel for the petitioners and Sri R. P. Singh Parihar, learned counsel for the respondent no.2.

2. The petitioners have preferred the present writ petition for quashing of the order dated 7.11.2016 passed by U.P. Human Rights Commission, Lucknow in Case No.1757(71)/2016-17 by which the District Magistrate, Fatehpur/Superintendent of Police, Fatehpur were directed to pay Rs. 1 lac to the Ansarul Haq/respondent no.2 and to inform the Commission.

3. The facts in brief as contained in the writ petition are that the respondent no.2 namely Ansarul Haq sustained injuries on the head and in the right eye due to the riots which occurred on 14.1.2016 during the procession on the occasion of Makar Sankranti at Jahanabad, District Fatehpur. After the aforesaid incident the respondent no.2 moved an application dated 10.5.2016 to the Chief Minister, Govt. of U.P., claiming for the compensation. In this regard a certificate was also issued in favour of the respondent no.2 on 14.6.2016 by the Chief Medical Officer, Fatehpur, stating therein that the right eye of the complainant/respondent no.2 is 100% blind and left eye is normal and as such the opinion was recorded to the effect that the disability suffered by the respondent no.2 is 30%. A scheme was introduced by the State Government namely "U.P. Victim Compensation Scheme-2014" in which it is provided that a victim shall be eligible for the grant of compensation if he is found eligible under the provisions of para 4 of the Victim Compensation Scheme-2014, which was

amended vide amendment scheme dated 7.6.2016.

4. Paragraph 4 of the U.P. Victim Compensation Scheme-2014 as has been published in the official gazette on 09.4.2014 is reproduced below :-

"4. A victim shall be eligible for the grant of compensation if:

(a) the offender is not traced or identified, but the victim is identified and where no trial takes place; such victim may also apply for grant of compensation under sub section (4) of section 357-A of the Act;

(b) the victim/claimant reports the crime to the officer-in-charge of the police station within 48 hours of the occurrence or any senior police officer or Executive Magistrate or Judicial Magistrate of the area provided that the District Legal Services Authority, if satisfied for the reasons to be recorded in writing, may condone the delay in reporting;

(c) the victim/claimant cooperates with the police and the prosecution during the investigation and trial of the case."

5. It is contended that as per the aforesaid scheme of 2014 a person is entitled for compensation when he sustained disability ranging from 40 to 80%. It is further argued that the respondent no.2 sustained injuries causing disability only upto 30%. On the application submitted by the respondent no.2 before the Chief Minister an order was passed on 2.8.2016 under the signatures of the Secretary (Account) Govt. of U.P., Lucknow by which an order was passed to pay a sum of Rs.20,000/- to the respondent no.2 under the U.P. Relief Fund Scheme. In compliance of the aforesaid order the amount of Rs.2,00,000/- (two lacs) was duly paid to the respondent no.2 by the District Magistrate, Fatehpur vide cheque dated 31.8.2016. Being not satisfied with the aforesaid amount of compensation, the respondent no.2 made an application before the Chairman/Secretary, State Human Rights Commission, Lucknow, which was registered as Case No.1757 (71)/2016-17. On the aforesaid application the State Human Rights Commission, Lucknow wrote a letter dated 18.5.2016 to the Superintendent of Police, Fatehpur for conducting the enquiry and to submit its report in respect of the aforesaid complaint. Pursuant to the same, an enquiry was got conducted and the report dated 27.7.2016 was submitted by the Circle Officer, Bindki, to the Superintendent of Police, Fatehpur, on 27.7.2016, copy of which is appended as annexure 11 to the writ petition.

6. The aforesaid report was duly forwarded by the Superintendent of Police, Fatehpur, to the Secretary, Human Rights Commission, Lucknow vide its letter dated 30.7.2016. Thereafter, the U.P. Human Rights Commission, Lucknow/respondent no.1 without considering the materials available on the record and without considering the provisions of law specially the provisions of Section 18 of the Protection of Human Rights Act, 1993 passed the order dated 07.11.2016 by which the compensation of Rs.1 lac was awarded to the complainant/respondent no.2. The District Magistrate/Superintendent of Police, Fatehpur, were directed to pay the aforesaid amount to the complainant/respondent no.2. Further directions were given to the District Magistrate, Fatehpur/Superintendent of

Police to make the aforesaid compensation to the complainant/respondent no.2 and inform the commission, copy of the order dated 7.11.2016 passed by the respondent no.1 is appended as annexure 1 to the writ petition. Aggrieved against the aforesaid decision taken by the respondent no.1 petitioners have preferred the present writ petition.

7. It is argued by Sri Suresh Singh, learned Chief Standing Counsel that the order impugned passed by the respondent no.1 is perverse and without jurisdiction and have been passed without application of judicial mind and as such the same is liable to be quashed. It is further argued that Section 18 provides that where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority to make **payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary.**

8. It is further argued that in so far as the present case is concerned, no finding whatsoever has been recorded in the order impugned that there is any violation of human rights or there is any negligence in the prevention of violation of human rights or abetment thereof by a public servant. It is further provided that commission may recommend to the concerned Government or authority to make payment of compensation or damages to the complainant or to the victim or to the members of the family but by the impugned order the respondent no.1 directed the District Magistrate/Superintendent of Police to make the payment of compensation as such the order impugned passed by the respondent no.1 is without jurisdiction. It is further argued that the complaint moved by the respondent no.2 was not maintainable since there is no allegation regarding the commission of violation of human rights or negligence in prevention of violation of human rights or abetement thereof by public servant. It is further argued that the respondent no.2 sustained injuries in one eye due to which disability sustained by him is 30% and as such the respondent no.2 was not eligible for compensation/damages under the U.P. Victim Compensation Scheme-2014 as amended in the year 2016. Inspite of the same, an order was passed to make the payment of Rs.20,000/- in favour of respondent no.2 under the scheme of Relief Fund scheme of the Chief Minister but without considering the aforesaid aspect of the matter impugned order has been passed.

9. In the counter affidavit it is stated by the learned counsel for the respondent no.2 that the order passed by the respondent no.1, which is impugned in the present writ petition is absolutely perfect and valid and does not call for any interference by this Court specially under Article 226 of the Constitution of India.

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

11. With the consent of learned counsel for the parties, the writ petition is being disposed of finally at the admission stage itself.

12. The challenge before the Court, which is addressed during the course of submissions, is that the power of

Commission under Section 18 (a) (1) of the Act, 1993. It is argued that the Commission under the aforesaid provision can only "recommend" to the concerned Government Authority to make payment of compensation or damages to the complainant or to the victim or members of his family.

13. In view of the aforesaid it is submitted that the power of the Commission being re-commendatory in nature and direction given by the Commission to the District Magistrate, Fatehpur/Superintendent of Police, Fatehpur, to furnish proof of compliance of payment of compensation to the extent of Rs.100,000/- (one lac) to the respondent no.2 is contrary in law and is liable to be set aside.

14. The National Human Rights Commission has been constituted, together with the State Human Rights Commissions, "for better protection of human rights" and for related ancillary matters. The Commission is a high powered body whose Chairperson is a person who has been the Chief Justice of the Supreme Court. Among its members is a person who is, or has been a Judge of the Supreme Court; and another who is, or has been the Chief Justice of a High Court. Two other members are to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights. The appointment of the Chairperson and Members is by a Committee chaired by the Prime Minister and which includes among other persons, the Speaker of the Lok Sabha, Union Minister of Home Affairs, the leaders of the opposition in the Lok Sabha and Rajya Sabha and the Deputy Chairperson of the Rajya Sabha. The presence of these high dignitaries on the selection committee is indicative of the importance which Parliament has ascribed to the functions of the Commission.

15. The functions of the Commission under Section 12 include among other things, the power to inquire suo motu or on a petition presented to it by a victim or any person on his behalf or on a direction of a court, into a complaint of the violation of human rights or abetment thereof or negligence in the prevention of such a violation, by a public servant.

16. Section 12 which defines the functions of the Commission is in the following terms:

"12. Functions of the Commission.--The Commission shall perform all or any of the following functions, namely:--

(a) inquire, suo-motu or on a petition presented to it by a victim or any person on his behalf [or on a direction or order of any court], into complaint of--

(i) violation of human rights or abetment thereof; or

(ii) negligence in the prevention of such violation, by a public servant;

(b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government;

(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) undertake and promote research in the field of human rights;

(h) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

(i) encourage the efforts of non-governmental organisation and institutions working in the field of human rights;

(j) such other functions as it may consider necessary for the promotion of human rights."

17. When it makes inquiries, the Commission under Section 13 has all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 and, in particular, in respect of the matters enumerated therein. The Commission for the purposes of investigation is empowered under Section 14, to utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government. The procedure before the Commission is governed by Chapter IV of which Section 17 provides an enquiry into a complaint of a violation of human rights. The Commission is empowered to call for information or a report from the Central Government or State Government or any other authority or organization subordinate to them. Section 18 deals with the steps to be taken during and after the enquiry and is in the following terms:

"18. Steps during and after inquiry.--The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:--

(a) where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority--

(i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary;

(ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons;

(iii) to take such further action as it may think fit.

(b) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(c) recommend to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;

(d) subject to the provisions of clause (e), provide a copy of the inquiry

report to the petitioner or his representative;

(e) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;

(f) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission."

18. Section 18 vests wide powers in the Commission. Under clause (a), it is empowered to recommend the payment of compensation or damages to the concerned government or authority where the enquiry has disclosed the commission of a violation of human rights or negligence in the prevention of a violation of human rights or abetment thereof. The provisions of Section 18 (a) correspond to the functions of the Commission specified in Section 12 (a). The Commission is entitled to approach the Supreme Court or the High Court for such directions, orders or writs as that Court may deem necessary. The Commission under clause (c) of Section 18 can recommend to the concerned government or authority at any stage of the enquiry to grant interim relief to the victim or the members of his family. Under clause (e), the Commission has to send a copy of its inquiry report together with its recommendations to the concerned Government or authority which shall, within a period of one month or such further time as may be allowed, forward its comments on the report, including the action taken or proposed to be taken thereon to the Commission.

19. These provisions emphasize three aspects. First, the enactment of the Protection of Human Rights Act, 1993 is an intrinsic part of the enforcement of the fundamental right to life and personal liberty under Article 21 of the Constitution. Equally, by enacting the legislation, Parliament has evinced an intention to enact legislation in compliance with India's obligations under the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations. Secondly, the Commission is a high powered body which has been vested with exhaustive powers to order an investigation, conduct enquiries and for which it is vested with all the powers of a civil court. Clauses (a) to (f) of Section 18 are not evidently an exhaustive enumeration of the powers of the Commission since the use of the expression "and in particular" would indicate that the powers which are enumerated are illustrative in nature. The Commission follows a procedure which is governed by Section 17 for the purpose of making inquiries upon which it has to take steps in conformity with Section 18.

20. The aforesaid aspect of the matter dealt with in great detailed by a Coordinate Bench of this Court in Writ C No.15570 of 2016 (State of U.P. and 2 others Vs. N.H.R.C. and 3 others). In the aforesaid case a judgement was delivered by Dr. Dhananjaya Yeshwant Chandrachud the then Chief Justice that the Commission is entitled to direct for the

payment of compensation to the victim where it finds either a violation of human rights or a negligence in the prevention of a violation of human rights. The operative portion of the aforesaid judgment is quoted below :-

"The basic question is whether the use of the expression "recommend" in Section 18 (a) can be treated by the State Government or by an authority as merely an opinion or a suggestion which can be ignored with impunity. In our view, to place such a construction on the expression "recommend" would dilute the efficacy of the Commission and defeat the statutory object underlying the constitution of such a body. An authority or a government which is aggrieved by the order of the Commission is entitled to challenge the order. Since no appeal is provided by the Act against an order of the Commission, the power of judicial review is available when an order of the Commission is questioned. Having regard to the importance of the rule of law which is but a manifestation of the guarantee of fair treatment under Article 14 and of the basic principles of equality, it would not be possible to accept the construction that the State Government can ignore the recommendations of the Commission under Section 18 at its discretion or in its wisdom. That the Commission is not merely a body which is to render opinions which will have no sanctity or efficacy in enforcement, cannot be accepted. This is evident from the provisions of clause (b) of Section 18 under which the Commission is entitled to approach the Supreme Court or the High Court for such directions, orders or writs as the Court may deem fit and necessary. Governed as we are by the rule of law and by the fundamental norms of the protection of life and liberty and human dignity under a constitutional order, it will not be open to the State Government to disregard the view of the Commission. The Commission has directed the State Government to report compliance. The State Government is at liberty to challenge the order of the Commission on merits since no appeal is provided by the Act. But it cannot in the absence of the order being set aside, modified or reviewed disregard the order at its own discretion. While a challenge to the order of the Commission is available in exercise of the power of judicial review, the State Government subject to this right, is duty bound to comply with the order. Otherwise the purpose of enacting the legislation would be defeated. The provisions of the Act which have been made to enforce the constitutional protection of life and liberty by enabling the Commission to grant compensation for violations of human rights would be rendered nugatory. A construction which will produce that result cannot be adopted and must be rejected.

The order which has been passed by the Commission has been passed on a careful appreciation of materials which were placed on the record. The deceased was an under trial prisoner who was lodged in the district jail in Muzaffarnagar. The treatment record indicated that he was provided treatment only from 15 May 2012 and he died on 21 May 2012. Though he had been admitted to jail on 9 September 2011, until 15 May 2012, no medical check up was carried out to control or treat his lung disease. He was not sent to a competent medical facility until his condition had deteriorated. Consequently, finding a case of negligence on the part of jail officials in providing medical treatment, the Commission has ordered the grant of

compensation. The Commission is entitled to do so where it finds either a violation of human rights or a negligence in the prevention of a violation of human rights.

For these reasons, we find no substance in the petition. The writ petition is, accordingly, dismissed.

There shall be no order as to costs. "

21. Even from perusal of Section 18 of the Act, 1993 it is clear that the Commission has empowered to take any of the steps as contained under Section 18 of the Act, 1993. As many as six steps were mentioned under Section 18 of the Act. Sub-clause (a) of Section 18 deals with the fact that where the enquiry discloses the commission of violation of human rights or abatement thereof by a public servant he may recommend to the concern government or authority to make payment of compensation or damages to the complainant or to the victim. From perusal of the same, it is clear that the Commission has full power to recommend regarding payment of compensation or damages to the complainant, if he finds on enquiry that there is a violation of human rights or negligence in the presumption of violation of human rights. Another Division Bench of this Court in Writ C No.7890 of 2014 (State of U.P. and 2 others Vs. National Human Rights Commission) decided on 1.2.2019 has taken the same view.

22. From perusal of the report placed before the respondent no.1 it reveals that during procession on the occasion of Makar Sankranti at Jahanabad, District Fatehpur on 14.1.2016 due to riots the complainant/respondent no.2 sustained injuries on the head and in the right eye. The complainant/respondent no.2 was referred by the local doctor for treatment at Kanpur Nagar from where he was referred to the AIIMS, New Delhi where he was diagnosed but the complainant/respondent no.2 has lost the eye sight of one of his eyes. The commission also gone through the report of the Circle Officer, Bindki, Fatehpur. From perusal of which it reveals that in the mis-happening on 14.1.2016 the complainant sustained injuries on the head and the right eye due to which he lost the eye sight of one of his eyes. The respondent Commission also taken into consideration the judgement delivered by the National Consumer Disputes Redressal Commission in the case of **H. S. Sharma Vs. Indraprastha Apollo Hospital and another** reported in **2007 (4) AWC 4.175 (NC)** where the Commission has awarded a compensation of Rs.2,00,000/- (two lacs) to a victim, who lost his eye sight due to negligence. Further findings were recorded by the Commission in the order impugned that in the matter in question it is evident from the report of the Circle Officer that the complainant has lost his sight of one of his eye during the riots, which is inevitable incident. The Chief Medical Officer has also certified that the right eye of the complainant is 100% blind. The Commission after considering the entire material on record passed the order to award compensation in favour of the petitioner and directions were given to the District Magistrate, Fatehpur/Superintendent of Police, Fatehpur to make payment of compensation to the extent of Rs.1,00,000/- (One lac only) to the complainant Ansarul Haq and informed the Commission.

23. In so far as the argument raised by the learned counsel for the petitioners that since the respondent no.2 has sustained injuries causing disability only upto 30% and the compensation could only be awarded when the disability ranging from 40% to 80% is suffered, the

aforesaid provision has been made in the U.P. Victim Compensation Scheme, 2014. The provisions of the aforesaid scheme will not apply in so far as the application submitted by the respondent no.2 before the respondent no.1 is concerned.

24. In view of the same, the aforesaid objections raised by the petitioners is no force.

25. On the basis of the aforesaid facts, the Commission has ordered for the grant of compensation.

26. In view of the facts as narrated above as well as from perusal of the judgement of two different Division Benches of this Court passed in Writ C No.15570 of 2016, State of U.P. and 2 others Vs. N.H.R.C. and 3 others, (supra) and Writ C No.7890 of 2014, State of U.P. and 2 others Vs. National Human Rights Commission (supra) it is clear that the respondent no.1 has full power and authority to direct the District Magistrate/Superintendent of Police to make the compensation to the victim as has been done in the present case.

27. In the facts and circumstances of the case, Commission is entitled to do so where it finds either a violation of human rights or negligence in the prevention of violation of human rights.

28. The order dated 7.11.2016 passed by respondent no.1/U.P. Human Rights Commission, Lucknow does not want any interference specially under Article 226 of the Constitution of India.

29. The writ petition is devoid of merits and accordingly dismissed. No order as to cost.

(2020)1ILR 1102

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2019

BEFORE
THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 25103 of 2013

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

Counsel for the Petitioners:
Sri R.P.S. Chauhan

Counsel for the Respondents:
C.S.C.

A. U.P.Z.A. & L.R. Act, 1950 - Order cancelling the lease- beyond limitation- proceeding initiated after 16 years -and without observing principles of natural justice-impugned order quashed.

Held, In the present case there is specific argument and document on record to establish that the consolidation of holdings proceedings pertaining to the land in question were never finalized and were dropped mid away and thus, it cannot be held that any bar as provided under Section 132 of the Act was triggered relating to the land in question. I am also not impressed with the arguments that in the cases which are covered by Section 132 of the Act, no limitation would apply. (Para 15)

Writ Petition allowed. (E-9)

List of cases cited: -

1. Joint Collector Ranga Reddy District and another Vs. D. Narsing Rao and others, 2015 3 SCC 695

2. Smt. Shakuntla and others Vs. State of U.P. & others, Writ C No.33761 of 2014

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

1. Heard learned counsel for the petitioners, learned standing counsel for the State and perused the material on record.

2. The petitioners have filed the present writ petition challenging the order dated 26.10.2009 passed by respondent no.3 in Case No.2/13/36/2004 (Vikram Singh and others Vs. Ratiram and others), Case No.36/2009 (State Vs. Hari Singh), Case No.37/2009 (State Vs. Mangu), Case No.52/2009 (State Vs. Hari Singh), Case No.55/2009 (State Vs. Churdi) and Case No.56/2009 (State Vs. Luxman) under Section 198(4) U.P.Z.A. & L.R. Act and against the order dated 29.3.2001 passed by respondent no.2 in Revision No.92/2010-11 under Section 333 of U.P.Z.A. & L.R. Act and order dated 10.9.2012 passed by respondent no.2 in Misc. Case No.45/2011-12.

3. The averments in brief are as under:-

4. The Plot Nos. 205, 205/1 and 110/4 situate at village Hasan Garhi Tehsil Kanth District Moradabad was Navi Prati land recorded in the revenue records under category 5(1) was allotted to the petitioners, they being landless persons and eligible for allotment of land on lease. It is stated that the Land Management Committee of Gaon Sabha passed a resolution dated 29.1.1987 and allotted land of Khata No.194 on lease in favour of the petitioners in the following manner:-

Serial Number	Name of Allottee	Plot Number and Area in Hect.	Place of Land
1	Chhedda	110/4/0.443	Hasangarhi
2	Rajpal	205/1/1.00	"
3	Churdi	205/1/0.405	"
4	Hari Singh	205/0.417	"
5	Luxman	205/1/0.417	"
6	Mangu	205/0.930	"

5. It is further stated that the resolution of the Land Management Committee dated 29.1.1987 was approved by the Sub Division Magistrate, Kanth, Moradabad vide his order dated 21.2.1987 and in pursuance to the said leases the names of the petitioners were duly mutated in the revenues records and since then the petitioners are in continuous possession over the land in question. It is further stated that vide order dated 23.8.2002 passed by Sub Divisional Officer, Kanth under Section 131 of the Land Revenue Act, the petitioners were declared Bhumidhars of the aforesaid land with transferable rights. The petitioners have also placed on record the Khatauni pertaining to the allotment of land in favour of the petitioners.

6. After about 16 years one Vikram Singh son of Chunni filed his objection under Section 198(4) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the Act) seeking the cancellation of the leases granted to the petitioners on the ground that the same were leased out to the petitioners without following the proper procedure, although the said objections were filed after about 16 years, the Sub Divisional Officer, Kanth entertained the said objections and called for a report from the Tehsildar. It is stated that Naib Tehsildar submitted some ex-parte report on 10.3.2004 (Annexuire-3 to the writ petition). The Tehsildar vide his report submitted that the land in question was entered in category 6 which is a public utility land and the allotment of the said

land was illegal, unless order was passed under Section 132 (c) of the Act converting the land from category category 6 to category 5 and there being no order to that effect on record, the allotment of the land in question in favour of the petitioners is illegal.

7. Perusal of the said report on record shows that the Tehsildar never took the views of the petitioners prior to preparing his report. The petitioners allege that in pursuance to the said ex-parte report the Sub Divisional Officer, Kanth forwarded the matter before the respondent no.3 for initiating the proceedings for cancellation of leases under Section 198(4) of the U.P. Zamindari Abolition and Land Reforms Act, 1950. The petitioners state that on 4.7.2009 a show cause notice was served on the petitioners by the respondent no.3 calling upon the petitioners to file objections as to why the cancellation of the allotment of the land in question may not be proceeded with only on the ground that allotment of the land was barred under Section 132 of the Act.

8. In response to the said show cause notice the petitioners preferred their objections highlighting the facts regarding the allotment of the land as well as the petitioners being declared as Bhumidhars way back in the year 2002. It was also highlighted that in the land revenue records of 1391 Fasli up to 1397 Fasli were being produced wherein the land in question was recorded as cultivable Navin Perti. The petitioners also challenged the issuance of show cause notice beyond the prescribed period of limitation and on the question of non-joinder of necessary parties. The respondent no.3 vide his order dated 26.10.2009 (Annexure-6 to the writ petition) recorded that the Tehsildar in his report had recorded that the allotment of the land was barred under Section 132 of the Act which was established by the report of the Tehsildar and proceeded to hold that the allotment of the land was illegal and erroneous and, thus proceeded to cancel the leases granted in favour of the petitioners. The petitioners came to know of the ex-parte report of the Tehsildar only when the order dated 26.10.2009 was passed. The petitioners challenged the order dated 26.10.2009 by filing a Revision No.92/2010-11 under Section 333 of U.P. Zamindari Abolition and Land Reforms Act, 1950 before the respondent no.2. In the said Revision specific grounds were taken that the proceedings initiated were beyond the prescribed period of limitation as also that the land in question was not affected by Section 132 (2) of the Act. The respondent no.2 vide his order dated 29.3.2011 dismissed the Revision relying upon the C.H. Form Nos.41, 45 and holding that the land in question was a public utility land specified under Section 132 of the Act and the allotment of the said land was wholly illegal.

9. The petitioners thereafter preferred a Review application under Section 47 (1) C.P.C., the said Review petition was dismissed on the question of limitation. The petitioners have alleged in the writ petition filed before this Court that an information was sought by filing R.T.I. application with regard to the consolidation proceedings relating to village Hasan Garhi, Tehsil Kanth, District Moradabad. In response to the said application it was informed that the consolidation proceedings were initiated by issuing notification under Section 4 (2) of the U.P. Consolidation of Holdings Act on 16.4.1992, published on 12.9.1992,

however, subsequently a notification was issued under Section 6 (1) of the Act dated 4.5.2000, published on 24.6.2000 whereby the consolidation proceedings were dropped (Annexure-12 to the writ petition). The petitioners have also brought on record a certified copy of the Khatauni pertaining to revenue records of 1391 Fasli to 1397 Fasli showing that the land was recorded under category 5 (1) and not under the category 6.

10. In the backdrop of the facts referred above, the counsel for the petitioners argued that the C.H. Forms 41 & 45 are forged documents in view of the fact that the consolidation proceedings had been admittedly dropped under Section 6 (1) of the U.P. Consolidation of Holdings Act. It is further argued that the proceedings initiated against the petitioners are specifically barred under Section 198 (6) of the Act. The petitioners have also challenged the orders on the ground of violation of principles of natural justice inasmuch as the ex-parte report of the Tehsildar was never provided to the petitioners. It is further submitted that even the said report of the Tehsildar, which is the sole basis for cancellation of the leases of the petitioners, does not even take into consideration the revenue records wherein the land in question was recorded under category 5 (1) and not under category 6. On 10.5.2013 this Court while entertaining the writ petition passed following order which is reproduced herein below:-

"Heard Sri R.P.S. Chauhan, learned counsel for the petitioners, learned Standing Counsel appearing for the State-respondents and Sri Vijai Bhan Singh, holding brief of Sri M.N. Singh, learned counsel for the Gaon Sabha.

The submission is that the petitioners were granted lease on 21.2.1987 and in view of section 131 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, they were declared as Bhumidhars with transferable right on 23.8.2002. The proceeding for cancellation of the lease was initiated on the instance of an individual on 26.7.2003. In view of sub section (6) of section 198 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, the proceeding was barred by time, but both the courts below have erred in cancelling the lease treating the land falling under section 132 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 on the ground that the same is recorded in the consolidation records as river.

Sri Chauhan contends that the petitioners have filed documentary evidence while filing the review application showing that the village in question was never notified for consolidation and the entire records, on which basis the Tehsildar has submitted the report, is forged.

The matter requires scrutiny.

Issue notice.

Notices on behalf of respondent nos. 1 to 4 have been accepted by the office of learned Chief Standing Counsel, whereas Sri M.N. Singh has put in appearance on behalf of respondent no. 5. Therefore, notices need not be served again to the aforesaid respondents.

Issue notice to respondent no. 6 through registered post returnable at an early date.

Steps be taken within two weeks.

In the meantime, counter affidavit, if any, may be filed by learned counsel for the respondents.

As an interim measure, without prejudice to right and contention of the

parties and subject to further orders of this Court, the eviction of the petitioners from the land in dispute shall remain stayed, provided:

(i) petitioner nos. 2 and 6 deposit Rs. 5,000/- (Rupees five thousand only) and the remaining petitioners, i.e., petitioner nos. 1, 3, 4 and 5, deposit Rs. 2,500/- (Rupees two thousand five hundred only) within a period of two months from today before the respondent no. 4;

(ii) the above amount shall be deposited every year in the same month in which the first deposit is made;

(iii) the condition of deposit will not apply in case the State Government declares the area under drought or flood;

(iv) the amount so deposited shall be kept in a separate account;

(v) in case the writ petition is allowed, the amount so deposited shall be returned to the petitioners as per the deposits of each petitioners with interest and in case the writ petition is dismissed, the amount so deposited shall go to the Gaon Sabha;

(vi) in case of default of the above conditions, the interim protection granted today shall stand vacated;

(vii) in the meantime, neither any construction shall be made over the land in dispute nor any third party right shall be created."

11. In response to the averments made in the writ petition Lekhpal has filed a counter affidavit wherein it has been repeatedly said that the land in question is recorded under category 6 and have justified the cancellation of the leases. There is no reply to the specific averments of the petitioners that the consolidation proceedings although initiated were dropped. There is no reply to the specific averments that the C.H. Form Nos. 41 & 45 are forged documents. The respondents have even failed to file any document to establish that the land in question was a public utility land. There is no reply to the specific averments with regard to the limitation.

12. In the backdrop of the submission made at the bar the following questions arise for consideration:-

i) Whether any show cause notice proposing cancellation of lease can be issued beyond the period of limitation prescribed under Section 198 (6) of the U.P. Zamindari of Abolition and Land Reforms Act, 1950 ?

ii) Whether the cancellation of lease granted to the petitioners can be termed as a valid exercise of power ?

13. The counsel for the petitioners has placed reliance upon a judgment of this Court dated 10.5.2019 passed in Writ C No.33761 of 2014 (Smt. Shakuntla and others Vs. State of U.P. & others) in support of his case. Relevant part of the said case is reproduced herein below:-

"Section 195 of the Act confers the power on the Land Management Committee to admit any person as Bhumidhar with non-transferable right with the prior approval of the Tehsildar (the word "Tehsildar" has been replaced by Assistant Collector by virtue of U.P. Act No. 11 of 2002).

Section 197 of the said Act confers the power on the Land Management Committee to admit any person as Aasami of any land, and Section 198 of the said Act provides that for admitting any person to land under Section 195 or Section 197 of the Act, the Land Management Committee shall observe the following order of preference as enumerated in the sub-section 1 of

Section 198 of the Act. Section 198(4) of the Act confers the power on the Collector, who may of his own motion, or on an application made by any person aggrieved enquire into the matter and if he is satisfied that the allotment is irregular he may cancel the allotment and the lease, if any. Sub-section 5 of Section 198 provides for issuance of a show cause notice prior to passing of any order under Section 198(4) by the Collector and Section 198(6) of the Act provides for limitation for issuance of a show cause notice.

It is thus clear from a plain reading of Section 198(6) (b) that in the cases where the allotment of the land is made on or after 10th November 1980 a show cause notice proposing to cancel the lease can be issued only within a period of five years from the date of allotment or upto 10th November 1987 whichever is later. The said limitation is prescribed for exercise of power by the Collector where the allotments are made in an irregular manner under Section 198(4) of the Act. In the present case applications were filed by the third persons alleging that huge irregularities were committed while allotting the land and a prayer was made for exercise of powers under Section 198(4) for cancellation of the lease. The said power for cancelling the lease, in the cases, where allegations are made alleging irregularity while allotment can be exercised only within the period of five years prescribed from the date of the allotment or upto 10th November 1987. In the present case, the land was allotted on 21.2.1987 and thus the show cause notice could be issued only upto 20.2.1992 and not thereafter. The action of divesting anybody of its rights in land is confiscatory in nature and thus the statutory enactment pertaining to limitation has to be strictly interpreted.

From the plain reading of Section 198(6)(b) of the Act, it is clear that the power of cancellation/issuance of show cause notice can be done only within the limitation as prescribed and not thereafter. The proceedings in the present case having been initiated after about 16 years are clearly barred by limitation thus rendering the entire proceedings as without jurisdiction."

14. It has been argued at the bar that where allotment of the land in question specifically barred as in the present case under Section 132 of the Act, no limitation will apply. Section 132 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 provides as under:-

"132. Land in which [bhumidhari] rights shall not accrue. -

Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, [bhumidhari] rights shall not accrue in -

(a) pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;

(b) such tracts of shifting or unstable cultivation as the State Government may specify by notification in the Gazette; and

(c) lands declared by the Slate Government by notification in the Official Gazette, to be intended or set apart for taungya plantation or grove lands of a [Gaon Sabha] or a Local Authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause-

(i) lands set apart for military encamping grounds;

(ii) lands included within railway or canal boundaries;

(iii) lands situate within the limits of any cantonment;

(iv) lands included in sullage farms or trenching grounds belonging as such to a local authority;

(v) lands acquired by a town improvement trust in accordance with a scheme sanctioned under Section 42 of the U.P. Town Improvement Act, 1919 (U.P. Act V11 of 1919) or by a municipality for a purpose mentioned in Clause (a) or Clause (c) of Section 8 of the U.P. Municipalities Act, 1916 (U.P. Act VII of 1916); and

(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 (U.P. Act V of 1954)."

15. The said argument does not merits acceptance for the sole reason that the land in question has to be set apart for public purposes under the U.P. Consolidation of Holdings Act. In the present case there is specific argument and document on record to establish that the consolidation of holdings proceedings pertaining to the land in question were never finalized and were dropped mid away and thus, it cannot be held that any bar as provided under Section 132 of the Act was triggered relating to the land in question. I am also not impressed with the arguments that in the cases which are covered by Section 132 of the Act, no limitation would apply. In this regard, it is relevant to mention that the Hon'ble Supreme Court has categorically held that where no limitation is prescribed action should be taken within a reasonable time, in the present case the proceedings were initiated after about 16 years which can never be termed as a reasonable period. The relevant observation of the Supreme Court in the case of **Joint Collector Ranga Reddy District and another Vs. D. Narsing Rao and others, 2015 3 SCC 695** and held as under:

"25. The legal position is fairly well-settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference in so far as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.

31. To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the

exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority.

32. In the case at hand, while the entry sought to be corrected is described as fraudulent, there is nothing in the notice impugned before the High Court as to when was the alleged fraud discovered by the State. A specific statement in that regard was essential for it was a jurisdictional fact, which ought to be clearly asserted in the notice issued to the respondents. The attempt of the appellant-State to demonstrate that the notice was issued within a reasonable period of the discovery of the alleged fraud is, therefore, futile. At any rate, when the Government allowed the land in question for housing sites to be given to Government employees in the year 1991, it must be presumed to have known about the record and the revenue entries concerning the parcel of land made in the ordinary course of official business. In as much as, the notice was issued as late as on 31st December, 2004, it was delayed by nearly 13 years. been passed without observing the principles of natural justice.

17. The writ petition merits acceptance and the orders impugned are liable to be quashed on both counts i.e. that the orders cancelling the lease has been passed beyond the prescribed period of limitation as well as on the ground that the orders passed are without observing the principles of natural justice.

18. Thus, in view of the findings recorded above, the orders dated 26.10.2009 and 29.3.2011 as well as the order dated 10.9.2012 are liable to be quashed.

19. Accordingly, the order dated 26.10.2009 passed by respondent no.3 *No explanation has been offered even for this delay assuming that the same ought to be counted only from the year 1991. Judged from any angle the notice seeking to reverse the entries made half a century ago, was clearly beyond reasonable time and was rightly quashed."*

16. The orders impugned in the present writ petition are also liable to be quashed as having been passed without the observance of principles of natural justice. It is clearly borne out from the record that the Tehsildar never gave any opportunity to the petitioners before preparing the report in question, a copy of the Tehsildar's report was never provided to the petitioners prior to the passing of the order dated 26.10.2009. The veracity of the Tehsildar's report was not even considered by the respondent no.3 before passing the order dated 26.10.2009 and, thus, the orders cancelling the lease based only upon ex-parte report, I am afraid are liable to be quashed the orders as having

Additional Collector (City) District Moradabad in Case No.2/13/36/2004, 36/2009, 37/2009, 52/2009, 55/2009 and Case No.56/2009 under Section 194(4) U.P.Z.A. & L.R. Act, 1950 and the order dated 29.3.2001 passed by respondent no.2 Additional Commissioner (Administration) Moradabad Division, Moradabad in Revision No.92/2010-11 (Chhidda and others Vs. State of U.P. and others) and the order dated 10.9.2012 passed by respondent no.2 Additional Commissioner (Administration) Moradabad Division Moradabad in Misc. Case No.45/2011-12 (Chhidda and other Vs. State of U.P. & others, Annexures-6, 8 and 11 to the writ petition), are quashed.

20. The writ petition is allowed. However, there will be no order as to costs.

(2020)1ILR 1109

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2019
BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ C No. 29335 of 2019

Jayveer ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shiv Nath Singh, Sri Surya Bhan Singh, Sri Akhilesh Kumar

Counsel for the Respondents:
C.S.C., Sri Anuj Bajpai

A. U.P. Panchayat Raj Act, 1947 - Section 12-J - Temporary arrangement in certain cases – ground of challenge - Post of Pradhan, in question, reserved for a member of the Scheduled Caste - A member of the Gram Panchayat belonging to the general category has been nominated by the District Magistrate to function as Pradhan – Order passed by District Magistrate set aside. (Para 10 & 13)

Held: - Once it is admitted that the post of Pradhan, was of a seat reserved for a member of the Scheduled Caste and members belonging to the Schedule Caste were available for being nominated to discharge the powers and functions of Pradhan under Section 12-J of the Act. They should have been preferred over a member belonging to the general category as the seat in question was one reserved for a Scheduled Caste. (Para 11)

Writ Petition allowed. (E-7)

List of cases cited: -

1. Brij Rani Singh Vs State of U.P. 2000 volume 2 AWC 1775

2. Udaiveer Vs State Election Commission of UP, 2009 (106) RD 151

3. Shyamu Vs State of U.P. and others, 2010 (8) ADJ 459

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. On the previous occasion, time had been granted to the learned Standing Counsel to obtain instructions. Today, on the matter being called out, Learned Standing Counsel has stated that despite a communication having been sent, no instructions have been received from the respondents.

3. Although no notice has been issued to respondent no:3 in the writ petition, the same is being decided finally, in view of the order proposed to be passed. In case the said respondent feels aggrieved, it shall be open for her to apply for recall of this order.

4. The writ petition seeks a writ of certiorari, quashing the order dated 24.07.2018, passed by the respondent no. 2, the District Magistrate, Shahjahanpur, under Section 12-J of the U.P. Panchayat Raj Act.

5. It appears that the elected Pradhan of Gram Panchayat Munni Khera, District Shahjahanpur, was incapable of discharging his functions, as such, on account of his incarceration. Therefore, the respondent no. 3 has

been nominated to function as Pradhan, by the order impugned.

6. The order is challenged on the ground that the post of Pradhan, in question, was reserved for a member of the Scheduled Caste. The respondent no. 3 who has been nominated to discharge the powers and functions of Pradhan, belongs to the General Category. At least three mmembers of Gram Panchayat Munni Khera belong to the Scheduled Caste. It is, therefore, contended that one of these three Gram Panchayat members, belonging to the Scheduled Caste should have been nominated by the District Magistrate under Section 12-J of the Act, to exercice the powers and duties of Pradhan.

7. It is also submitted that the impugned order is contrary to the principles laid down by the Division Bench in **Shyamu Vs State of U.P. and others, 2010 (8) ADJ 459.** The District Magistrate failed to confer with the elected members of the Gram Panchayat and has passed the impugned order on the basis of his opinion alone.

8. To defend the impugned order reliance has been placed by Learned Standing Counsel upon **Udaiveer Vs State Election Commission of UP, 2009 (106) RD 151,** which holds that the District Magistrate while exercising the powers conferred by Section 12-J of Act should necessarily ascertain the opinion of the elected members of the Gram Panchayat before passing order under Section 12-J of the said Act.

9. Learned Standing Counsel has also placed reliance on *Brij Rani Singh versus State of U.P. 2000 volume 2 AWC 1775* specially paragraph 21, relevant portion whereof, reads as follows:-

" The Legislature was fully conscious of the fact that there may be occasions and reasons for the Pradhan which may incapacitate him from discharging his duties and functions as Pradhan and in such a situation the Up-Pradhan has been permitted to exercise such powers and the exercise of such powers by Up-Pradhan is only an arrangement in temporary vacancy in the office of Pradhan which would not mean that Up-Pradhan has been elected as Pradhan."

10. In my considered opinion, the judgment in Brij Rani Singh is not applicable in the facts and circumstances of the case at hand. On a pointed query by the court, counsel for the parties concede that it is not the Up-Pradhan who has been nominated to function as Pradhan as a temporary arrangement, permissible under Section 12-J of the Panchayat Raj Act. A member of the Gram Panchayat belonging to the general category has been nominated by the District Magistrate to function as Pradhan.

11. In my considered opinion, once it is admitted that the post of Pradhan, was of a seat reserved for a member of the Scheduled Caste the contention of counsel for the petitioner has substance especially because members belonging to the Schedule Caste were available for being nominated to discharge the powers and functions of Pradhan under Section 12-J of the Act. They should have been preferred over a member belonging to the general category as the seat in question was one reserved for a Scheduled Caste. This view is supported by the observation made by the Division Bench in Shyamu (supra) in paragraph 16 of the judgment which is being extracted below with the relevant portion thereof underlined by me, for emphasis :

"16. The question is whether such opinion given by the elected members would be binding on the Presecribed authority. If such as interepretation is given, then the power exercised by the Prascriubed Authority under section 12-J of the Act will have to be read subjectect to the opinion of other members. would not be a correct interpretation of the law. There could be a possibility of violation of reservation policy, and/or a person may pressurise other members to propose his name, and or the like. ....."

12. Since the judgment in Udaiveer (supra), cited by learned Standing Counsel provides that while exercising the power under Section 12-J of the said Act, the District Magistrate should obtain the opinion of the elected members of the Gram Panchayat, which view has been affirmed in the case of Shyamu supra with the stipulation that the said opinion is not absolutely binding, and such an exercise has not been undertaken by the District Magistrate, prior to passing the impugned order, in my considered opinion, the impugned order is not liable to be sustained. At least, there is no mention of any such exercise having been resorted to, in the order impugned.

13. Accordingly and in view of the above, the writ petition is allowed. The impugned order dated 24.07.2019 is hereby set aside and the matter is remitted back to the District Magistrate respondent no. 2 to pass a fresh order under Section 12-J of the Panchayat Raj Act, keeping in mind what has been stated in the body of this judgment, above.

14. No order as to cost.

(2020)1ILR 1111

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 32482 of 2019

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

Counsel for the Petitioners:
Sri Shashi Nandan, Sri Mahendra Singh

Counsel for the Respondents:
C.S.C., Sri Purshottam Mani Tripathi, Sri Sanjeev Singh

A. District Magistrate-Statutory duty-limited power to ensure that the notice for "No confidence motion" has been presented by the members signed/supported -by at least 50 % members of the total strength of the House-30 days limited time to the District Magistrate to convene the meeting.

Held, it is quite reflective from the order of the District Magistrate now impugned in the present writ petition, that the District Magistrate virtually paraded the members of the House and gave opportunity to the respondent Pramukh to bring men in his support by submitting their notary affidavits. Such an exercise of power was totally uncalled for. Something what was done in the House through discussion and voting, got done in the office of the District Magistrate. Neither the provisions as contained under Section 15 of Adhiniyam, 1961 contemplated any such powers nor, any such intendment of the Legislature is presumable behind the incorporation of such a provision. Hence, the order passed by the District Magistrate dated 20th September, 2019 deserves to be held bad for undertaking an exercise beyond the authority vested with the District Magistrate. (Para13)

Writ Petition disposed of. (E-9)

List of cases cited: -

1. Smt. Sheela Devi and others v. State of U.P. and others, 2015 (2) ADJ 325 (FB)

2.Amit Kumar v. State of U.P. and 13 others (Writ-C No.- 3982 of 2018)

3.Kusumawati Verma v. State of U.P. and 4 others (Writ-C No.- 22702 of 2018)

4.Smt. Shashi Yadav v. State of U.P. and others (Writ- C No. 1994 of 2018 decided on 22nd February, 2018)

5. Kamal Sharma v. State of U.P. and others (Writ-C No. 9763 of 2013 decided on 5th October, 2013)

6. Anil Kumar Singh v. State of U.P. and others (Writ- C No.- 29087 of 2019 decided on 24th September, 2019)

(Delivered by Hon'ble Ramesh Sinha, J.)

1. Heard Sri Shashi Nandan, learned Senior Advocate assisted by Sri Mahendra Singh, learned counsel for the petitioners, Sri Sanjeev Singh along with Sri Purushottam Mani Tripathi, learned counsel for the respondent No.3, learned Standing Counsel for the State-respondents and perused the record.

2. By means of present writ petition under Article 226 of the Constitution, as it came to be filed, a writ of mandamus was initially sought for commanding respondent No.2, namely, the District Magistrate, Kushinagar to pass appropriate orders exercising power vested with him under Section 15(2) of the U.P. Kshettra Panchayat & Zila Panchayat Adhiniyam, 1961 (hereinafter referred to as 'Adhiniyam, 1961') *qua* the notice of "No Confidence Motion" already delivered to him on 9th September, 2019 by the members of the Kshettra Panchayat, Dudahi, District- Kushinagar.

3. The grievance raised by the petitioners is that though a statutory duty is cast upon the District Magistrate to take a decision to convene a meeting of Kshettra Panchayat for consideration of motion of no confidence moved against the Chairman/ Pramukh within 30 days of the delivery of the notice, the District Magistrate- respondent No.2 was only borrowing time by holding some roving inquiry in respect of the signatories of the notice. It had been argued initially that in view of the settled legal position emerging out from the Full Bench Judgment of this Court in the case of **Smt. Sheela Devi and others v. State of U.P. and others, 2015 (2) ADJ 325 (FB)** followed by the subsequent Division Benches of this Court, it was not open for the District Magistrate to conduct a roving inquiry calling for evidence to arrive at satisfaction regarding genuineness of the signatures of the members on the notice of no confidence motion.

4. Having found *prima facie* arguments advanced by the learned counsel for the petitioners, to be appealing, we passed an order on 1st October, 2019 to the following effect:-

"It is contended by Sri Shashi Nandan, learned Senior Advocate assisted by Sri Mahendra Singh, learned counsel for the petitioners that though the notice for no confidence motion has been moved before the District Magistrate, Kushinagar on 09.09.2019 but he has sit tight over the matter and has not passed any order till date, resultantly, the notice is getting frustrated as not only the 15 days clear time has to be given to the person concerned against whom the no confidence motion is sought to be stated,

but even the meeting has to be convened within 30 days of the notice.

In such view of the matter, he submits that it is something like frustrating the provisions contained in the U.P. Kshettra Panchayats and Zila Panchayat Adhiniyam, 1961.

Let, District Magistrate, Kushinagar file his personal affidavit on 17.10.2019 to disclose the reasons for not passing any order on the notice of no confidence motion submitted before him on 09.09.2019, failing which, the District Magistrate, Kushinagar shall appear in person before this Court.

Put up on 17.10.2019."

5. On the date so fixed above, a personal affidavit was filed by the District Magistrate, Kushinagar annexing therewith a copy of an order dated 20th September, 2019 holding that in a fact finding enquiry conducted by him since he has found signatures of 27 members to be valid out of 83 signatories to the notice and the total members of the House being 149, the notice thus being found genuinely signed only by members less than 50%, it was not lawful to convene meeting of the Kshettra Panchayat under sub-section (3) of Section 15 read with sub-section (2) of Section 15 of Adhiniyam, 1961 and thus, notice of motion was held to be incompetent.

6. In such view of the matter, learned counsel for the petitioners sought time to challenge the order of District Magistrate and for that we granted time fixing 21st October, 2019.

7. Having heard learned counsel for the respective parties, two legal questions arise for our consideration in the present matter:-

(A). Whether the District Magistrate is justified in conducting the fact finding enquiry by collecting evidence to consider the notice of no confidence motion to be genuinely signed by members which constitute at least half (50%) members of the total strength of the House and;

(B). What should be the reasonable time within which the District Magistrate should take a decision either to convene a meeting or reject the notice for that matter, so as to ensure that legislative intendment in providing 30 days time for convening a meeting from the date of notice delivered to the District Magistrate under Section 15 of Adhiniyam, 1961, is not frustrated.

8. In so far as the first question is concerned, the issue is no more *res integra*. The Full Bench of this Court in the case of **Smt. Sheela Devi** (*supra*) vide paragraphs 12, 13, 14 and 15 has observed thus:-

"12. This view which we are inclined to take finds support in an earlier judgment of a Full Bench of this Court in Mathura Prasad Tewari v. Assistant District Panchayat Officer, Faizabad, 1966 ALJ 612. The Full Bench in that case considered the provisions of Rule 33-B of the U P Panchayat Raj Rules, 1947 which, at the material time, provided as follows:

"33-B (1) A written notice of the intention to move a motion for removal of the Pradhan ... under Sec. 14 ... shall be necessary. It shall be signed by not less than one half of the total number of members of the Gaon Sabha and shall state the reasons for moving the motion and ... shall be delivered in person by at

least five members signing the notice to the prescribed authority.

(2) The prescribed authority shall, as soon as may be after the receipt of the notice convene a meeting of the Gaon Sabha... The meeting so convened shall be presided over by the prescribed authority or the person authorised by him in writing in this behalf."

13. Under Rule 33-B (2), the prescribed authority was required to convene a meeting of the Gaon Sabha as soon as may be after the receipt of a notice under sub-rule (1) signed by not less than one half of the total number of members. Chief Justice M C Desai in the judgment of the majority, held that having due regard particularly to the need to convene the meeting as soon as possible and the large number of members of the Gaon Sabha, it could never have been intention of the State Government while making the rule that issues such as whether the signatures on the notice were forged or were obtained by fraud or coercion be resolved where a long drawn enquiry would become necessary. In that context, the learned Chief Justice observed as follows:

"...If a prescribed authority finds that some signatures are not of members of the Gaon Sabha or are forged or otherwise invalid and the remaining signatures are insufficient it would be bound to desist from convening a meeting but the question before us is different, it being whether it is required by any rule to make an enquiry. There may be no provision forbidding an enquiry but that also is immaterial because the law does not require everything not forbidden to be done. The most that can be said is that the matter is at the discretion of the prescribed authority; if a complaint is made to it that a material number of signatures is invalid it may in its discretion make an enquiry or refuse to make it. If it is a small enquiry it is justified in making it and if it is likely to turn out into a long drawn enquiry or if it thinks that the complaint is not bona fide or is made with the ulterior object of delaying the convening of the meeting it is fully justified in not undertaking an enquiry..."

The Full Bench also held as follows:

"...There is nothing to suggest that he may spend days and even months in enquiring whether the signatures on the requisition are genuine or not or are obtained without resort to fraud or coercion or not. If it cannot be said that he is bound to make an enquiry it cannot be said that the prescribed authority is bound to make an enquiry on receipt of a notice under Rule 33-B. Injustice and anomalies can be imagined but what is certain is that an enquiry may take a long time and may be followed by applications for certiorari, mandamus and prohibition, in turn followed by appeals from orders on the applications. Then the prescribed authority has no power to summon witnesses and documents and it is not understood how it can hold an enquiry.

...Whether a meeting should be convened or not is a matter only between the prescribed authority and the signatories delivering the notice to it. The prescribed authority has to act on its finding that the notice has been signed by at least half the members and has been presented by at least five of the signatories. As nobody has a right to file any objection the question of his holding an enquiry simply does not arise. Whatever enquiry is made by it is made entirely at its own discretion and nobody has a right to compel it to make it. Obviously there cannot be a right in any

person to compel it to make it when he has not been given a right to file an objection."

14. The dissenting judgment, it must be noted, also observes that it was not necessary for the prescribed authority to enter upon a detailed enquiry and the authority would not go into difficult question of fraud and duress. However, in the view of the dissenting judge, the prescribed authority would have to make a general enquiry if there was a specific allegation that a particular signature of a living person is forged or is a signature of a person who is dead. The dissenting judge held that he was not in agreement with the principle of the majority that the prescribed authority is not required to make any enquiry on the receipt of a notice of intention to move a motion for the removal of a Pradhan.

15. In our view, both the decisions of the majority as well as the minority essentially follow the same line and the area of dissent is rather narrow. Both the judgments of the majority as well as the minority postulate that the Collector ought not to make a detailed enquiry where serious allegations of fraud, coercion and duress are required to be resolved particularly having regard to the fact that a meeting had to be convened as soon as possible. The area of divergence is only this that whereas the majority left it open to the Collector to determine whether and if so what enquiry should be held, the view of the dissenting judge was that the Collector should hold an enquiry so long as a detailed enquiry into serious questions of coercion or fraud was not involved. In either view of the matter and since we are bound by the judgment of the Full Bench, the law on the subject is thus clear. The Collector, in the course of exercising the power which is conferred upon him, ought not to enquire into seriously disputed questions of fact involving issues of fraud, coercion and duress. Moreover, the Collector must have the discretion in each case of determining on the basis of a summary proceeding whether the essential requirements of a valid notice of an intention to move a motion of no confidence have been fulfilled. Where in the course of the summary enquiry, it appears to the Collector that the written notice does not comply with the requirements of law, the Collector would be within his power in determining as to whether all the required conditions have been fulfilled, as enunciated in sub-section (2) of Section 15. Whether the Collector in a given case has transgressed his power is separate issue on which judicial review under Article 226 of the Constitution would be available. However, we expressly clarify that we are not laying down a detailed and exhaustive enumeration of the circumstances in which the Collector can determine the validity of a notice furnished under Section (2) or those in which he can make a limited enquiry which, as we have held, he is entitled and competent to make. Ultimately, each case depends upon its own facts and it for the Collector to determine as to whether the objections raised before him are outside the scope of the limited inquiry which he can make upon notice of an intent to move a motion of no confidence if it is submitted to him together with a notice of no confidence."

9. Further the Full Bench of this Court vide paragraphs 20, 21, 23 and 24 of the judgment (*supra*) has finally concluded thus:-

"20. The principle which we have laid down in the earlier part of this judgment is founded on the basic position

that when an authority has a power to carry out a public act on the existence of certain circumstances, it has an implied power to make an enquiry in regard to the existence of those circumstances. This is a power which flows out of the basic power which is conferred upon the authority and is incidental to or ancillary for the purpose of effectuating the purpose of the conferment of the power. This principle has been recognized in a judgment of a Division Bench of this Court in Committee of Management, Sri Gandhi Inter College Vs Deputy Director of Education, 1988 UPLBEC 1057, where it was held as follows:

"...It is a settled law that when an authority is given power to do certain act on existence of certain circumstances, there is an implied power to make an enquiry as to whether those circumstances exist or not. The enquiry in regard to the existence of those circumstances is included in the grant of power. In other words, the power of making enquiry in regard to the existence of those circumstances flows as necessary means to accomplish the end. In fact, the enquiry is some thing essential for proper and effectual performance of duty assigned..."

21. As a matter of statutory interpretation, the duty of the Court while interpreting legislation, first and foremost is to give effect to the plain and ordinary meaning of the language contained in the statute. The legislative intent is best reflected in the words used by the legislature in enacting legislation. Hence, the Court will not readily supply a casus omissus except when there is a clear necessity to do so and that too within the four corners of a statute. At the same time, where a literal construction of the words which have been used by the legislature give rise to an absurdity or a manifestly erroneous result, it is open to the Court to adopt a purposive interpretation which will give true effect to the legislative object and scheme. In Padmasundara Rao (Dead) Vs State of Tamil Nadu JT 2002 (3) SCC 1, the Supreme Court observed as follows:

"Two principles of construction one relating to casus omissus and the other in regard to reading the statute as a whole appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., in Artemiou v. Procopiou11, "is not to be imputed to a statute if there is some other construction available"."

23. The same principle has been enunciated in the judgment of a Bench of two learned Judges of the Supreme Court in Shanker Raju v. Union of India, (2011) 2 SCC 409, where it has been held that a statute is designed to be workable, and the interpretation thereof by the Court should be to secure that object unless a crucial omission or clear statutory direction makes that end unattainable.

24. For these reasons, we have come to the conclusion that where a notice

is delivered to the Collector under sub-section (2) of Section 15, the Collector has the discretion to determine whether the notice fulfills the essential requirements of a valid notice under sub-section (2). However, consistent with the stipulation of time enunciated in sub-section (3) of Section 15 of convening a meeting no later than thirty days from the date of delivery of the notice and of issuing at least a fifteen days' notice to all the elected members of the Kshettra Panchayat, it is not open to the Collector to launch a detailed evidentiary enquiry into the validity of the signatures which are appended to the notice. Where a finding in regard to the validity of the signatures can only be arrived at in an enquiry on the basis of evidence adduced in the course of an evidentiary hearing at a full-fledged trial, such an enquiry would be outside the purview of Section 15. The Collector does not exercise the powers of a court upon receipt of a notice and when he transmits the notice for consideration at a meeting of the elected members of the Kshettra Panchayat. Hence, it would not be open to the Collector to resolve or enter findings of fact on seriously disputed questions such as forgery, fraud and coercion. However, consistent with the law which has been laid down by the Full Bench in Mathura Prasad Tewari's case, it is open to the Collector, having due regard to the nature and ambit of his jurisdiction under sub-section (3) to determine as to whether the requirements of a valid notice under sub-section (2) of Section 15 have been fulfilled. The proceeding before the Collector under sub-section (2) of Section 15 of the Act of 1961 is more in the nature of a summary proceeding. The Collector for the purpose of Section 15, does not have the trappings of a court exercising jurisdiction on the basis of evidence adduced at a trial of a judicial proceeding. Whether in a given case, the Collector has transgressed the limits of his own jurisdiction is a matter which can be addressed in a challenge under Article 226 of the Constitution. We clarify that we have not provided an exhaustive enumeration or list of circumstances in which the Collector can determine the validity of the notice furnished under sub-section (2) in each case and it is for the Collector in the first instance and for the Court in the exercise of its power of judicial review, if it is moved, to determine as to whether the limits on the power of the Collector have been duly observed."

10. The aforesaid judgment has been followed by two Division Benches of this Court in the case of **Amit Kumar v. State of U.P. and 13 others** (Writ-C No.- 3982 of 2018) and **Kusumawati Verma v. State of U.P. and 4 others** (Writ-C No.- 22702 of 2018).

11. At this stage, we would also like to refer to another Division Bench judgment of this Court in the case of **Smt. Shashi Yadav v. State of U.P. and others** (Writ- C No. 1994 of 2018 decided on 22nd February, 2018) in which vide paragraphs 38, 39 and 40 the Court has held thus:-

"38. We hold the provision regarding the form of written notice of intention to make the motion required to be submitted to the Collector on behalf of the members signing the notice under Section 15(2) is to be directory in nature. A substantial compliance of the provisions would implement the requirements of law. A substantial compliance is done when the purpose of the notice is achieved. The purpose of the notice of intent to make the

motion, is to furnish to the Collector the material on which he has to found his satisfaction before convening the meeting. Such material should demonstrate full compliance of mandatory provisions of 15(2) of the Act. In particular, the notice should be in writing. It should manifest the clear intention of the members to make a motion expressing want of confidence in the Pramukh. It should be signed by at least half of the elected members. The copy of the no confidence motion should be attached thereto.

39. In fact, if a strict compliance of the said mandatory parts of Section 15(2) is done, then the substantial compliance of directory provisions of the aforesaid of Section 15(2) would be automatically deemed to have been done.

40. If such facts or material can be distilled from the notice to make a motion expressing want of confidence irrespective of its form, it substantially complies with the mandate of law. As has been held, these prerequisites are fulfilled in the instant case."

12. From the reading of the aforesaid authorities what is clearly revealed is that the *ratio* behind limiting the power of the District Magistrate is that he being an authority to take decision for calling the meeting of the House enjoys only the limited power to ensure that it has been presented by the members signed/ supported by at least half (50%) members of the total strength of the House. Even if they had not signed and their affidavit accompanies the notice, it has been held that the formalities stand complete. This ratio in the judgment is in keeping spirit of Legislative intendment in providing 30 days limited time for the District Magistrate to convene the meeting to discuss the motion. The Legislature while drafting this statutory provision seemed to be quite conscious of sensitiveness of the issue *qua* confidence of an elected leader of the House. If the confidence of an elected leader of the House is put to challenge, in democracy the horse trading phenomenon is concomitant to a situation where majority is shaking the confidence while the one affected is pulling the string the other way. The limited period, therefore, was deliberately provided by the Legislature to avoid any such unhappy situation getting created eroding faith of the people in the democratic institution. One who does not have the confidence of the House must leave in principle but as the stances are, in practice, it is quite reverse. So, in case if any enquiry is instituted to verify the signatures by the District Magistrate of individual members on the notice and then to parade the members in his office would be something like putting a caveat to the prerogative of the House to deliberate and vote for or against the motion and this is the reason why the District Magistrate is certainly not supposed to hold any roving enquiry as such.

13. Applying the aforesaid principle of law to the facts of the present case, it is quite reflective from the order of the District Magistrate now impugned in the present writ petition, that the District Magistrate virtually paraded the members of the House and gave opportunity to the respondent Pramukh to bring men in his support by submitting their notary affidavits. Such an exercise of power was totally uncalled for. Something what was done in the House through discussion and voting, got done in the office of the District Magistrate. Neither the provisions as contained under Section 15 of Adhiniyam, 1961 contemplated any such

powers nor, any such intendment of the Legislature is presumable behind the incorporation of such a provision. Hence, the order passed by the District Magistrate dated 20th September, 2019 deserves to be held bad for undertaking an exercise beyond the authority vested with the District Magistrate. However, any order by us setting aside the order passed by the District Magistrate and remitting the matter for fresh decision would not enable him to convene the meeting within 30 days of the delivery of notice. Accordingly, we consider it appropriate to hold that rejection of the present notice would not come in the way of the petitioners and other members of the Kshettra Panchayat in moving fresh notice for no confidence motion, if they so desire.

14. The necessity to frame second question (*supra*) has arisen on account of the fact that we have experienced in the past as number of writ petitions have come to be filed seeking directions to District Magistrate to take decision within limited period of time so that the notice does not get frustrated on account of mandatory 30 days limitation prescribed for, under sub-section (3) of Section 15 of Adhiniyam, 1961.

15. In order to deal with the second point, it is necessary to reproduce sub-section (3) of Section 15 of Adhiniyam, 1961:-

"15. Motion of non-confidence in Pramukh or Up-Pramukh- (1) .....

(2) .....

(3) The Collector shall thereupon:-

(i) convene a meeting of the Kshettra Panchayat for the consideration of the motion at the office of the Kshettra Panchayat on a date appointed by him, ***which shall not be later than thirty days from the date on which the notice under sub-section (2) was delivered to him,*** *and*

(ii) give to the [elected member of the Kshettra Panchayat] notice of not less than fifteen days of such meeting in such manner as may be prescribed.

Explanation *- In computing the period of thirty days specified in this sub-section, the period during which a stay order, if any, issued by a Competent Court on a petition filed against the motion made under this section is in force plus such further time as may be required in the issue of fresh notices of the meeting to the members, shall be excluded.*

(4) ....."

(emphasis supplied)

16. From the bare reading of the aforesaid provision two important and mandatory requirements appear to be:-

(1). Meeting has to be convened within 30 days from the date on which the notice under sub-section (2) of Section 15 was delivered to the District Magistrate and;

(2). There should be a notice of not less than 15 days *qua* the scheduled meeting.

17. A Division Bench of this Court in the case of **Kamal Sharma v. State of U.P. and others** (Writ-C No. 9763 of 2013 decided on 5th October, 2013) has held that in computing 15 days, the date of issuance of notice and of the meeting scheduled have to be excluded. The Division Bench vide 26 of the judgment (*supra*) has held thus:-

"26. There is no difference in the words ***"at least"*** *and* ***"not less than"****.*

Admittedly, the notice dated 13.2.2013 was dispatched to the elected members on 14.2.2013 by speed post for convening the meeting which was scheduled to be held on 1.3.2013. While computing 15 days period the two terminal dates have to be excluded. Thus 15 days clear notice was not given to the elected members."

18. In such above view of the matter, therefore, the District Magistrate is required to proceed keeping the above calculations in mind. Once he has been delivered with the notice of no confidence motion, he is bound in law to take a decision whether to convene a meeting or not to convene a meeting. And if he has to convene a meeting then he has to keep in mind that he has to provide 15 clear days notice on one hand and then the meeting scheduled has to be within 30 days prescribed for under the Statute.

19. Accordingly and in view of the sensitiveness of the issue of no confidence motion, it is always necessary to take quick decision in a reasonable period of time. In view of the ratio of the judgment of the Full Bench (*supra*) and the subsequent Division Benches, the District Magistrate is not to hold any roving and detailed fact finding enquiry. He has to only satisfy that the notice bears the signature or if does not bear, it has the requisite number of affidavits supporting it or appended to it which may make the notice competent within the meaning of sub-section (2) of Section 15 of Adhiniyam, 1961 in the light of the judgment of the Division Bench of this Court in the case of Smt. Shashi Yadav (*supra*).

20. There is a logic also behind the above; if the House is not supporting the motion, the members per majority would vote against it and resultantly it will fall. Merely because the notice has been delivered to the District Magistrate and he has convened the meeting by scheduling it, does not mean that motion has stood carried nor, does it raise presumption that the Chairman or the Pramukh has lost the confidence. The ultimate show of strength is always on the floor of the House and in any democratic institution where the elected members constitute the House, this exercise has to be done in the House itself, instead of wasting time in the office of the District Magistrate parading the members of the House for verification of the signatures etc.

21. A purposive interpretation of a statutory provision would entail an exercise to understand the intendment of Legislature first. As we have already discussed above as to how the statute in the present case limits the discretion of the District Magistrate in matters of decision making on a delivered notice so as to ensure that meeting to discuss the motion on all counts is held within 30 days, it comes out to be a case where we need to look for contextual construction of the given provisions. In ordinary sense of the words 'rule of construction' means literal interpretation of the provision. However, at times discretion is provided for, with certain riders, putting a crease of limits upon powers but the question is how within those limit an authority should exercise in a case of limited authority given under statute and the answers, in our view, is discipline in exercise of authority. If a pendulum swings 60 times ordinarily to hit the 60th second, it follows a discipline to strike a minute. So the end result is guided by the rule of discipline. The power if is vested in an authority to

draw a proceeding to its logical end, the exercise of power should be aimed at achieving the said end result flawlessly. One who has the discretion to reject a notice holding it as not competent in his wisdom based on conclusion drawn, he must not shirk away from a prompt decision. The Legislature though did not provide for definite period for taking decision but since the statute provides for maximum 30 days to direct for a meeting and that too with a 15 days' clear notice, it contextually means that District Magistrate has to take decision within a limited time to ensure that purpose of notice is not frustrated. Discipline of time in decision making process, in such circumstances is contextually a must.

22. The question now is what should be a time reasonable enough, for the District Magistrate to take a decision. As we have already discussed the provision, a meeting not only has to be convened with 15 days' clear notice but the meeting in all conditions have to be called within 30 days of the delivery of notice. This being the situation, the District Magistrate has maximum 14 days from the date of delivery of notice to consider the notice and pass an appropriate order. We may also notice at this stage that explanation appended to sub-section (1) of Section 15 saves a situation where a notice has been issued convening the meeting as per the provisions but the same has come to be stayed in a court proceeding. So the time spent in a court proceeding and time taken in issuing a fresh notice have come to be excluded. But there is no saving provision to the effect that in case if notice is returned/ rejected by the District Magistrate and the same is challenged in a court of law and if set aside, would the period of 30 days exclude the period of court proceeding and the period that may be taken by the District Magistrate in issuing a fresh order in the light of the order of the Court.

23. Equally by any rule of interpretation, we cannot apply the aforesaid saving clause given in the explanation (*supra*) to such above situation, this Court in the case of **Anil Kumar Singh v. State of U.P. and others** (Writ- C No.- 29087 of 2019 decided on 24th September, 2019) has held thus:-

"In view of the legislative intent behind the provision, this Court exercising its power under Article 226, cannot pass a direction which would not only carry out a new exception to the general law but in substance would amount to an exercise, quite legislative in nature, which is clearly not permissible. The law is very clear that a casus omissus can in no case be supplied by a Court of Law, for that would be to make laws (per Buller J. in Jones vs. Smart, 99 ER 963), except in some case of absolute necessity. The settled legal position as a rule of interpretation is that the Court cannot read anything into a statutory provision or rewrite a provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute or any statutory provision is the determinative factor of legislative intent of policy makers. [Union of India vs. Rajiv Kumar(2003) 6 SCC 516]."

24. The issue, therefore, is that a 14 days' time is permitted to the District Magistrate to take a decision and if he rejects notice or returns the notice for that matter, the litigant and supporting members who have challenged the order of the District Magistrate, are rendered remediless. In our considered opinion, this

cannot be the intention of the Legislature. The Legislative intent in not providing any saving provision in such circumstances, seems to be for simple reason that under sub-section (12) of Section 15 a fresh motion is barred only in case motion falls, however rejection of notice does not beget such a situation and so fresh motion can always be moved. The issue does not get resolved here because if the process is again led, the same procedure will be followed and again the District Magistrate shall pass an order and same will again be challenged in a court of law and then if it is quashed, the situation would turn out to be the same as in this case and so it will all lead to an endless process. This will not be a happy situation either and, therefore, in our considered opinion, it is necessary to ask the District Magistrate to take a decision upon delivery of notice to him either way i.e. to return the notice or fixe the date for the meeting to discuss the motion, within a reasonable time.

25. In such above view of the matter, therefore, we hold that 7 days' time is sufficiently reasonable time for the District Magistrate to form an opinion whether to convene a meeting or not to convene a is the head of the district civil administration and so his office must send message absolutely clear and loud *qua* righteousness. The fairness in approach should be apparent on the face of the record. The District Magistrate has been entrusted with this onerous duty on account of his position as a responsible head civil servant and, therefore, he is supposed to be conscious of his sacrosanct position while dealing with such matters.

26. Accordingly, while disposing of this writ petition, we are issuing following directions:-

meeting. However, in exceptional circumstances and for the reasons to be recorded in writing, he may take further time but in all circumstances he shall have to pass an order before the expiry of the 13th day of the delivery of the notice. We may hasten to add that this extended period from 7th day to 13th day should be resorted to in a rarest of the rare cases and should be in a very exceptional and compelling circumstance. We hold, therefore, that if he finds that the notice is supported with signatures or the affidavits of the members consisting at least half (50%) members of the total strength of the House, he is bound to convene meeting. While he may hold a preliminary enquiry only to the extent as has been held by the Full Bench (*supra*), he has to place the motion before the House scheduling the meeting as contemplated under the law. The urgency involved in such matters and in the backdrop of sensitiveness of the issue of no confidence motion, the earlier is decision taken by the District Magistrate lesser would be the chance of speculations and manipulations at the end of the office of District Magistrate. District Magistrate

(1). Once delivered with the notice of "No Confidence Motion" the District Magistrate shall only ensure that it is signed by at least half (50%) members of the total strength of the House and carries the names of those who have signed and are elected members and the enquiry will be limited to the extent as observed by us hereinabove following the Full Bench judgment and the judgment in the case of **Smt. Shashi Yadav** (*supra*).

(2). The District Magistrate in all such matters of "Notice of No Confidence Motion" once delivered to him shall take

decision either to call a meeting or return the notice on the expiry of 7th day of the delivery of the notice unless he has reasons to be recorded, to take more time but in no case he shall have to pass order by the 13th day of the delivery of notice.

(3). District Magistrate shall ensure that clear 15 days notice is published and also sent by registered post excluding the date of publication of notice and the date of the scheduled meeting.

27. Registrar General of this Court is directed to send a copy of this order forthwith to the Chief Secretary, State of U.P., Lucknow for communication and compliance to all the District Magistrates of the State of Uttar Pradesh.

(2020)1ILR 1123

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE ABHINAVA UPADHYA, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 33100 of 2019 Connected With
Writ C No. 32727 of 2019

Rakesh Mahajan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rohan Gupta, Sri Kali Azad

Counsel for the Respondents:
C.S.C., Sri Kaushalendra Nath Singh

A. Money recovery - notice for recovery issued in the name of shareholder Rakesh Mahajan and the stakeholder Nirala Developers Pvt. Ltd in the Company PAN Realtors Pvt. Ltd. - Whether the dues of PAN Realtors Pvt. Ltd. be recovered from the petitioner Rakesh Mahajan being a Director of the shareholding company Nirala Developers Pvt. Ltd and from Nirala Buildicon being a sister concern of the shareholding company Nirala Developers Pvt. Ltd.

The lease deed was executed between the New Okhla Industrial Development Authority and PAN Realtors Pvt. Ltd., a company which was incorporated as a Special Purpose Company. The PAN Realtors Pvt. Ltd comprises of Patel Engineering Limited, Advance Construction Company and Nirala Developers Pvt. Ltd. The Rakesh Mahajan is the director of Nirala Developers Pvt. Ltd. and Nirala Buildicon Pvt. Ltd is a sister concern of the Nirala Developers Pvt. Ltd. Over the period of time, the Nirala Developers Pvt. Ltd became a minority share holder in the PAN Realtor Pvt. Ltd.

The facts of the present case demonstrate that the petitioner Rakesh Mahajan was never a Director of PAN Realtors Pvt. Ltd. and is not even a shareholder of PAN Realtors Pvt. Ltd. in his personal capacity (Para 50)

Further, there is no material to suggest that the petitioner herein Rakesh or Nirala Buildcon exercised persuasive control over PAN Realtors Pvt. Ltd. The petitioners are not even a signatory to the lease deed in question and thus no case is made out for piercing the veil for recovery of alleged dues of PAN Realtors Pvt. Ltd. from the petitioners. (Para 51)

B. Corporate veil - whether the corporate veil of PAN Realtors Pvt. Ltd. and Nirala Developers Pvt. Ltd. can be pierced to hold the shareholders and the sister concern of a share holder liable for the dues of a company.

After observing catena of judgments, the Court has settled the legal position with respect to lifting of corporate veil in following circumstances: -

a. Only in exceptional circumstances by the courts with caution and circumspection and in a restrictive manner;

b. For lifting the corporate veil it is essential that the case falls within the exceptions as elaborated and crystallized by Munby J. in *Ben Hashem v Ali Shayif* and approved by the Apex Court in the case of *Balwant Rai Saluja* and *Arcelormittal India*

c. Where the Statute itself permits lifting of veil. (Para 49)

The statute in question being U.P. Urban Planning Development Act, 1973 does not have any provision for lifting the corporate veil. (Para 51)

C. Company - has a separate and distinct legal entity from its shareholders - dues of Company cannot be recovered from its shareholders/directors.

D. Article 14 - Constitution of India - Action of 'State' or an 'instrumentality of State' should be in conformity with law and should satisfy twin test - 'substantive due process of law' and 'procedural due process of law' - if not, then actions are violative of Article 14.

Writ Petitions allowed. (E-10)

List of cases cited: -

1. Dr. Subroto Roy vs. UOI and ors 2014(8) SCC 470

2. Gillete India Limited Vs. Delhi Development Authority 260 (2019) DLT 416

3. Balwant Rai Saluja and anr Vs. Air India Limited and ors (2014) 9 SCC 407

4. Bacha F. Gauzdar Vs. Commissioner of Income Tax, Bombay AIR 1855 SC 74

5. Meekin Transmission Ltd. Vs. State of U.P. 2008 4 All LJ 789 (DB)

6. The Tata Engineering and Locomotive Co. Ltd. And anr vs. State of Bihar and ors AIR 1965 SC 40

7. Arcelormittal India Private Limited vs. Satish Kumar Gupta and ors (2019) 2 SCC 1

8. Vodafone International Holdings B.V Vs. UOI (2012) 6 SCC 613

9. Ashish Gupta Vs State of U.P. and 5 ors Writ C No.25554 of 2019

10. Jagbir Singh Vs. State of U.P. and ors Writ Tax No. 1464 of 2005 *(distinguished)*

11. Salomon Vs. Salomon and Co. 1897 AC 22

12. Ben Hashem Vs. Ali Shayif [2008] EWHC 2380

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

1. Heard Sri Rohan Gupta, learned counsel for the petitioner in Writ Petition No. 33100 of 2019 and Shri Gagan Mehta learned counsel for the Petitioners in Writ Petition No. 32727 of 2019, learned Standing Counsel for the State-respondent and Sri Kaushalendra Nath Singh, learned counsel, on behalf of Noida Authority.

2. The above two petitions are filed challenging same recovery certificate and on similar grounds and as such are being decided by this common judgment

3. The Petition No. 33100 of 2019 has been filed challenging the acts of the respondent authorities in trying to recover the amounts in default against PAN Realtors Pvt. Limited from the petitioner being a Director in the Company known as Nirala Developers Pvt. Limited which is a shareholder in Pan Realtors Pvt Ltd.

4. The Petition No. 32727 of 2019 has been filed challenging the acts of the respondent authorities in trying to recover the amounts in default against PAN Realtors Pvt. Limited from the petitioner company being a sister concern of the Company known as Nirala Developers

Pvt. Limited which is a shareholder in Pan Realtors Pvt Ltd.

5. The brief facts leading to the filing of the present petitions are as under:

6. The respondent no. 2, New Okhla Industrial Development Authority (hereinafter referred to 'Authority') floated a Scheme of allotment of plots for Group Housing at Noida for interested developers. In pursuance of the said Scheme/announcement made by respondent-Authority, one Consortium of Companies in the name of style of Pan Ventures filed an application showing interest in allotment of the land for Group Housing at Noida. In pursuance of the said application, a letter of allotment dated 21.7.2009 was issued by the respondent no. 2-Authority proposing to allot Group Housing Plot No. GH-01, Sector 70, Noida under the Group Housing Scheme GH2009(ii). The said allotment letter is on record as Annexure-1 and was issued in the name of Consortium known as PAN Venture.

7. A perusal of the allotment letter dated 21.7.2009 shows that the said allotment letter was issued to PAN Venture, a Consortium comprising of Patel Engineering Limited (leading member), Advance Construction Company (relevant member), Nirala Developers Pvt. Limited (relevant members) at their office situate at H-13, First Floor, Main Market, Vijay Chowk, Lakshmi Nagar, Delhi.

8. The said allotment letter envisaged the allotment of a plot for Group Housing Rights and manner of payment specified in the letter of allotment itself. Peculiar feature of the said allotment letter as under:

"You are also requested to form the SPC duly registered in ROC and also submit the Memorandum of Article of Association of SPC, List of Directors and Shareholders duly certified by CA and Board of director's Resolution of Constituted Special Purpose Company."

9. It was further specified that the Special Purpose Company to be created would be comprised of following Company:

10. It was further provided that in the event of default in payment the allotment

S. No.	Name of Member	Share holding	Status
1	Patel Engineering Ltd.	51%	Lead Member
2	Advance Construction Co. Pvt. Ltd.	24%	Relevant Member
3	Nirala Developers Pvt. Ltd.	25%	Relevant Member

offer would be considered as cancelled and the registration money shall be forfeited and no interest shall be paid to the proposed allottee.

11. It was further specified that the proposed allottee shall issue an indemnity bond indemnifying the Authority against all disputes arising out of non-completion of project, quality of construction and any dispute arising out of allotment/lease to the final purchaser. The other conditions relevant for the purposes of the present case, as contained in the allotment letter, were as under:

"In case the Lessee does not construct building within the time provided including extension granted, if any, for above, the allotment/lease deed as the case may be, shall be liable to be cancelled. Leasee shall lose all rights to

the allotted land and buildings appurtenant thereto.

The Authority's right to the recovery of the unearned increase and the preemptive right to purchase the property as mentioned herein before shall apply equally to involuntary sale or transfer, be it bid or through execution of decree of insolvency/court.

The Lessee will not make, any alteration of additions to the said building or other erections for the time being on the demised premises, erect or permit to erect any new building on the demised premises without the prior written consent of the Lessor and in case of any deviation from such terms of plan, shall immediately upon receipt of notice from the Lessor requiring him to do so, correct such deviation as aforesaid.

If the Lessee fails to correct such deviation within a specified period of time after the receipt of such notice, then it will be lawful for the Lessor to cause such deviation to be corrected at the expense of Lessee who hereby agrees to reimburse by paying to the lessor such amounts as may be fixed in that behalf.

In case of non-compliance of terms and directions of Authority, the Authority shall have the right to impose such penalty as the Chief Executive Officer may consider just and expedient."

Cancellation of lease deed

"In addition to the other specific clauses relating to cancellation, the Authority/Lessor, as the case may be, will be free to exercise its right of cancellation of lease/allotment in the case of:

1. Allotment being obtained through misrepresentation/suppression of material facts, mis-statement and/or fraud.

2. Any violation of directions issued or rules and regulation framed by any Authority or by any other statutory body.

3. Default on the part of the Allottee/allottee for breach/violation of terms and conditions of registration/allotment/lease and/or non-deposit of allotment amount.

4. If at the same time of cancellation, the plot is occupied by the Lessee thereon, the amount equivalent to 25% of the total premium of the plot shall be forfeited and possession of the plot will be resumed by the Authority with structure thereon, if any, and the Lessee will have no right to claim compensation thereof. The balance, if any shall be refunded without any interest. The forfeited amount shall not exceed the deposited amount with the Authority and no separate notice shall be given in this regard.

5. If the allotment is cancelled on the ground mentioned in para S.1 above, the entire amount deposited by the Lessee, till the date of cancellation shall be forfeited by the Authority and no claim whatsoever shall be entertained in this regard."

Other Clauses

"The Authority/Lessor reserves the right to make such additions/alternations or modifications in the terms and conditions of allotment/lease deed from time to time, as may be considered just and expedient.

Any dispute between the Authority and Lessee/Sub-Lessee shall be subject to the territorial jurisdiction of the Civil Courts having jurisdiction over District Gautam Budh Nagar or the Courts designated by the Hon'ble High Court of Judicature at Allahabad.

The Lease agreement/allotment will be governed by the provisions of the U.P. Industrial Area Development Act, 1976 (U.P. Act No. 6 of 1976) and by the rules and/or regulations made or directions issued, under this act."

12. In terms of the said allotment letter, a Company was incorporated in the name and style of 'PAN Realtors Pvt. Limited' on 26.8.2009, as a Special Purpose Company. The first Directors in the said Company i.e. PAN Realtors Pvt. Limited were Shri Danish Mohd. Ali Merchant, Shri Bhimsen Prabhudayal Batra, Shri Shitul Dhirajlal Patel, Sri Suresh Kumar Garg and Sri Anil Kumar Sharma.

13. In terms of the allotment letter and on incorporation of the Special Purpose Company, a lease deed was executed on 12.10.2009 in between New Okhla Industrial Development Authority and PAN Realtors Pvt. Limited in respect of Plot No. GH-01, Sector-70, Noida for a total consideration of Rs. 155,06,27,787/-. The said lease deed detailed the entire installment plan for payment of the consideration.

14. A perusal of the lease deed filed on record as Annexure-3 reveals that the lease was to abide by the regulations bye-laws, direction and guidelines of the lessor, framed under Sections 8, 9 and 10 or any other provision of U.P. Industrial Area Development Act, 1976. It further provides:

"In case of non-compliance of terms and directions of Lessor, the Lessor shall have the right to impose such penalty as the Chief Executive Officer may consider just and expedient."

15. The lease deed also provides for the eventuality in which the lease deed should be cancelled and are as under:

Cancellation of lease deed

"In addition to the other specific clauses relating to cancellation, the Lessor, as the case may be, will be free to exercise its right of cancellation of lease in the case of:-

1. Allotment being obtained through misrepresentation/suppression of materials facts, mis-statement and for fraud.

2. Any violation of directions issued or rules and regulation framed by Lessor or by any other statutory body.

3. Default on the part of the lessee for breach/violation of terms and conditions of registration/allotment/lease and/or non-deposit of allotment amount.

4. If at the same time of cancellation, the plot is occupied by the Lessee thereon, the amount equivalent to 25% of the total premium of the plot shall be fortified and possession of the plot will be resumed by the Lessor with structure thereon, if any, and, the lessee will have no right to claim compensation thereof. The balance, if any shall be refunded without any interest. The forfeited amount shall not exceed the deposited amount with the Lessor no separate notice shall be given in this regard.

5. If the allotment is cancelled on the ground mentioned in sub-clause 1 above, then the entire amount deposited by the lessee, till the date of cancellation shall be forfeited by the Lessor and no claim whatsoever shall be entertained in this regard;.

In all cases of cancellation a proper show cause notice to the lessee will be sent by the lessor."

16. It has been submitted by learned counsel for the petitioner that subsequently the share holding pattern was mutually shuffled and Nirala Developers Pvt. Limited became a minority shareholder, subsequently, a few of the Directors resigned from the Company, a chart showing change of shareholding pattern of PAN Realtors Pvt. Limited over the years as under:

Company Name	**2015**	**2016**	**2017**	**2018**
Patel Engineering Ltd.	36%	38 %	37.57%	37.57%
Advance Cont. Co.	39%	37 %	37.43%	37.43%
Nirala Developers Pvt. Ltd.	25%	25 %	25%	25%

17. It is also stated that on 31.3.2007 the Directors of PAN Realtors Pvt. Limited were Shri Pravin Arjunbhai Patel and Sri Dhirajlal Nathalal Patel and no Director of Nirala Developers Pvt. Limited were on board.

18. On 28.9.2019, a recovery certificate dated 12.9.2019 was affixed on the rented premises of the petitioner Rakesh Mahajan i.e. House No. H-121, Sector 63, Noida, Uttar Pradesh, a copy whereof has been filed as Annexure-9 to the Writ Petition No. 33100/2019.

19. A perusal of the recovery certificate shows that the same was issued in the name of "PAN Realtors Pvt. Limited, shareholder, Rakesh Mahajan".

20. The petitioner Rakesh Mahajan claims that on coming to know of the said recovery certificate petitioner moved a detailed representation on 4.10.2019 before the respondents no. 2, 3 and 4 seeking withdrawal of the recovery certificate as against the petitioner, however, nothing was done and no orders have been passed on the said representation.

21. The petitioner claims that in terms of the recovery certificate the respondents no. 3 and 4 are threatening to adopt coercive measures against the petitioner for the alleged dues of PAN Realtors Pvt. Limited and thus approached this Court by filing the present petition seeking the following reliefs:

"(i) To issue a suitable writ, order or direction nature of certiorari quashing the impugned recovery certificate dated 12.9.2019 (served on the petitioner on 28.9.2019) (Anneure-7) issued by the Tehsildar Dadri, Gautam Budh Nagar.

(ii) To issue a suitable writ, order or direction nature of mandamus restraining the respondents no. 3 and 4 from taking any coercive action against the petitioner in pursuance of recovery certificate dated 12.9.2019 (Annexure-7)."

22. Similarly the said Recovery certificate was also pasted at the Leased Registered office of Nirala Buildcon Pvt. Ltd. at H-121, sector 63, Noida.

23. The said Nirala Buildcon Pvt. Limited have filed Petition No 32727 of 2019 for following reliefs;

"(i) To issue appropriate writ, order or direction nature of certiorari quashing the Recovery/Demand Notice dated 12.9.2019 (Annex-2) issued by Tehsildar, Dadari, District Gautam Budh Nagar."

"(ii) To issue appropriate writ, order or direction nature of certiorari directing the respondents authorities not to seal the premises of M/s Nirala Buildcon Private Limited, Office-H-121, Sector-63, Noida".

24. Sri Rohan Gupta and Shri Gagan Mehta, learned counsels appearing for the petitioners, submit as under:

25. The dues of the Company PAN Realtors Pvt. Limited cannot be recovered from the petitioner as the petitioners are neither a shareholders nor stakeholders in the Company PAN Realtors Pvt. Limited.

26. No recovery can be initiated against the petitioners for the dues of PAN Realtors Pvt. Limited as the petitioner Rakesh mahajan is only a minority shareholder in the Company Nirala Developers Private Limited which in turn is a minority shareholder of PAN Realtors Pvt. Limited. He submits that PAN Realtors Pvt. Limited is a separate and distinct entity in the eyes of law, distinct from its shareholders and it is well settled that the amounts due against a Company cannot be recovered against its shareholders/Directors and in the present case, the petitioner being neither a shareholder nor a Director of PAN Realtors Pvt. Limited cannot be proceeded against for the recovery of alleged dues against the PAN Realtors Pvt. Limited.

27. No notice/opportunity was accorded to the petitioner in his personal capacity prior to initiating the recovery proceedings against the petitioner in his personal capacity and as such on that count also the steps being taken against the petitioner are wholly arbitrary and illegal.

28. Counsel appearing for Nirala Buildcon Pvt Lts adds to the submissions and argues that Nirala Buildcon is neither a share holder nor a member of Pan Realtors Private Limited and is a seperate and distinct legal entity even from Nirala Developers Pvt. Limited as such cannot be proceeded against.

29. Sri Kaushalendra Nath Singh, learned counsel appearing on behalf of Noida Authority has filed a counter affidavit bringing on record the fact that the Noida Authority had executed a lease deed in favour of PAN Realtors Pvt. Limited. He further states that in terms of the lease deed an amount of Rs. 15,50,62,778.78 being 10% of the total amounts was paid by the Special Purpose Company PAN Realtors Pvt. Limited at the time of execution of the lease deed and the remaining amount was to be paid in installments along with interest at the rate of 11% per annum, compounded half yearly, with a further provision for default penal interest and as PAN Realtors Pvt. Limited defaulted in making the payments of the installments on time, several letters were issued, which have been collectively filed and marked as (CA1) to the counter affidavit.

30. A perusal of the said show cause notices (CA-1)reveals that all the notices were sent to PAN Realtors Pvt. Limited, S-406 (LG), Greater Kailash-II, New Delhi. None of the said notices filed as CA-1 have been sent to both the petitioners.

31. Sri Kaushalendra Nath Singh, learned counsel for Noida Authority, further states that as the amounts were not paid by PAN Realtors Pvt. Limited, a letter was written to the Collector, Gautam

Budh Nagar for collecting the amounts as arrears of land revenue from the shareholders and Directors of the lessee Company PAN Realtors Pvt. Limited. The said letter dated 26.8.2009 is on record as CA-2, along with the said letter details of the Directors of the lessee Company were disclosed which included the names of the Directors of PAN Realtors Pvt. Limited, Directors of Patel Engineering Pvt. Limited, Directors of Nirala Developers Pvt. Limited (including the name of the petitioner) and the names of the Directors of Advance Constructions Limited.The said letter made no mention of Nirala Buildcon Pvt. Ltd.

32. Sri Kaushalendra Nath Singh also submits that all the companies, who are the shareholders, have the entire share holding of PAN Realtors Pvt. Limited and as such all are liable for payment of dues. He further tried to justify as to how recovery was being processed against the petitioner Rakesh Mahajan and Nirala Buildcon Pvt. Limited, a sister concern of Nirala Developers Pvt. Limited.Justifying the steps being taken for recovery against Nirala Buildcon, Mr. Singh argued that the two companies are one and the same and have similar shareholding and are in control of Mr Rakesh Mahajan and his family.

33. Counter affidavit filed also states that the shareholding of Nirala Developers Pvt. Limited and Nirala Buildcon Pvt. Limited show that they are basically run/managed by similar set of people including the petitioner Rakesh Mahajan. He further relied upon the orders of the Hon'ble Supreme Court in the case of **Dr. Subroto Roy vs. Union Of India & Ors, 2014 (8) SCC 470** and in case of **Amarpali** and states that in view of the said amounts can be recovered from the shareholders and Directors. Thus, in sum and substance, the submission of Kaushalendra Nath Singh is that the petitioner Rakesh mahajan being a Director in one of the shareholding Company i.e. Nirala Developers Private Limtied is liable to pay the outstanding dues of the Company PAN Developers (Pvt.) Ltd and Nirala Buildcon being a sister concern of Nirala developers is also liable for payment of dues of Pan Realtors Pvt. Ltd.

34. It is also admitted at the bar that the Lease granted to the lessee Pan Realtors has not been determined and further that the Authority had granted part completion certificate on the strength of which the lessee company has sold certain plots and created third party rights.

35. In view of the submissions made at the bar, what is to be considered is that :

a) Whether the dues of PAN Realtors Pvt. Limited can be recovered against the petitioner Rakesh Mahajan being a Director of the shareholding company Nirala Developers Private Limited and from Nirala Buildcon being a sister concern of the shareholding company Nirala Developers Private Limited,

And:

b) Whether in the facts of the case corporate veil of Pan Realtors Pvt Ltd and Nirala Developers Pvt Ltd can be pierced to hold the shareholders and sister concern of a share holder liable for the dues of a company.

36. Both the counsels for the Petitioners have extensively relied upon the following judgements:

1.Gillete India Limited vs. Delhi Development Authority, 260 (2019) DLT 416

2. Balwant Rai Saluja and another vs. Air India Limited and others, (2014) 9 SCC 407

3. Bacha F. Gauzdar vs. Commissioner of Income Tax, Bombay, Air 1855 SC 74

4. Meekin Transmission Ltd. vs. State of Uttar Pradesh, 2008 4 All LJ 789 (DB)

5. The Tata Engineering and Locomotive Co. Ltd. And another vs. State of Bihar and others, AIR 1965 SC 40

6. Arcelormittal India Private Limited vs. Satish Kumar Gupta and others, (2019) 2 SCC 1

7. Vodafone International Holdings B.V vs Union of India (2012) 6 SCC 613

37. Sri Kaushalendra Nath Singh, learned counsel for the Noida Authority, on the other hand, has relied upon an order of this Court dated 7.8.2019, passed in **Writ C No. 25554 of 2019 (Ashish Gupta vs. State of U.P. and 5 others)** and the judgement of this Court in **Writ Tax No. 1464 of 2005 (Jagbir Singh vs. State of U.P. and others)** to argue that the recovery against the petitioners is justified.

38. Coming to the judgements cited by the petitioners, the Delhi High Court in the case of **Gillete India Limited vs. Delhi Development Authority (supra)** was called upon to consider the question of demand of unearned increase and the consequential refund. The petitioner company came into possession of certain lands in terms of the Scheme sanctioned by BIFR and were called upon to pay the dues of a Company which was declared as a sick Company by the Board of Industrial Financial Reconstruction. The Delhi High Court observed as under:

39. *It is trite law that an incorporated company is an entity separate from its shareholders. In Bacha F. Guzdar v. Commissioner of Income Tax: AIR 1955 SC 74, the Constitution Bench of the Supreme Court had held that the nature of income in the hands of a company was not the nature of income in the hands of its shareholders. It held that dividends in the hands of the shareholders of a company declared from agricultural income received by that company could not be considered as agricultural income. The said decision rested on the fundamental principle that a company is a separate juristic entity distinct from its shareholders.*

40. *In the aforementioned case, the Supreme Court referred to the Halsbury"s Laws of England, Vol. 6 (3rdEdn.), p. 234 and set forth the following passage regarding the attributes of shares:-*

"A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate."

41. *It is well settled that shares of a company are a separate asset wholly distinct from the assets held by the company.*

42. *In the present case, there was dilution of the share capital of TGC*

as well as transfer of shares held by the TGC in the petitioner company. The transfer of shares of the petitioner company cannot be construed as transfer of the assets of the petitioner company.

43. *In Rustom Cavasjee Cooper vs. Union of India: (1970) 1 SCC 248, the constitution bench of the Supreme Court reiterated the above settled principle in the following words:*

"11. A company registered under the Companies Act is a legal person, separate, and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the distributed profit. Again a director of a Company is merely its agent for the purpose of management. The holder of a deposit account in a Company is its creditor: he is not the owner of any specific fund lying with the Company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the Company, unless by the action impugned by him, his rights are also infringed."

44. *In a recent decision of the Supreme Court in Vodafone International Holdings B.V. v. Union of India and Anr.: (2012) 6 SCC 613, the Supreme Court rejected the contention that a transfer of shares of an overseas holding company would amount to transfer of assets held by the subsidiary in India. In the said case, the Supreme Court applied the "look at" test to view the transaction relating to transfer of shares by overseas holding companies. The transaction must be viewed as it looks and a dissecting approach is not warranted.*

39. The next judgment cited by Sri Rohan Gupta is the case of **Balwant Rai Saluja and another vs. Air India Limited and others (supra),** wherein the Apex Court was considering whether the workman engaged in statutory canteens through a Contractor should be treated as employees of the principal establishment. The Supreme Court made the following observations in para nos. 67 to 74 which is as under:

"67. *The Companies Act in India and all over the world have statutorily recognized subsidiary company as a separate legal entity. Section 2(47) of the Companies Act, 1956 (for short "the Act, 1956") defines "subsidiary company' or "subsidiary', to mean a subsidiary company within the meaning of Section 4 of the Act, 1956. For the purpose of the Act, 1956, a company shall be, subject to the provisions of sub-section (3) of Section 4, of the Act, 1956, deemed to be subsidiary of another. Clause (1) of Section 4 of the Act, 1956 further imposes certain preconditions for a company to be a subsidiary of another. The other such company must exercise control over the composition of the Board of Directors of the subsidiary company, and have a controlling interest of over 50% of the equity shares and voting rights of the given subsidiary company.*

68. *In a concurring judgment by K.S.P. Radhakrishnan, J., in the case of Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613, the following was observed:*

"Holding company and subsidiary company ....

257. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the

assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. ...

258. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any Director if it so desires by a resolution in the general [pic]body meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary is allowed decentralized management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries."

69. *The Vodafone case (supra), further made reference to a decision of the US Supreme Court in United States v. Bestfoods [141 L Ed 2d 43: 524 US 51 (1998)]. In that case, the US Supreme Court explained that as a general principle of corporate law a parent corporation is not liable for the acts of its subsidiary. The US Supreme Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, only if it is shown that the corporal form is misused to accomplish certain wrongful purposes, and further that the parent company is directly a participant in the wrong complained of. Mere ownership, parental control, management, etc. of a subsidiary was held not to be sufficient to pierce the status of their relationship and, to hold parent company liable.*

70. *The doctrine of "piercing the corporate veil' stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. A Salomon & Co Ltd., [1897] AC 22. Lord Halsbury LC (paragraphs 31-33), negating the applicability of this doctrine to the facts of the case, stated that:*

"...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself ..., whatever may have been the ideas or schemes of those who brought it into existence."

Most of the cases subsequent to the Salomon case (supra), attributed the doctrine of piercing the veil to the fact that the company was a "sham' or a "façade'. However, there was yet to be any clarity on applicability of the said doctrine.

71. *In recent times, the law has been crystallized around the six principles formulated by Munby J. in Ben Hashem v. Ali Shayif, [2008] EWHC 2380 (Fam).* ***The six principles, as found at paragraphs 159- 164 of the case are as follows- (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the Court cannot pierce the corporate veil, even in the absence of third party interests in the***

company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must be linked to the use of the company structure to avoid or conceal liability; (v) to justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and (vi) the company may be a ''façade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The Court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

The principles laid down by the Ben Hashem case (supra) have been reiterated by UK Supreme Court by Lord Neuberger in Prest v. Petrodel Resources Limited and others, [2013] UKSC 34, at paragraph 64. Lord Sumption, in the Prest case (supra), finally observed as follows:

"35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The Court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in Life Insurance Corporation of India v. Escorts Ltd. & Ors., (1986) 1 SCC 264, while discussing the doctrine of corporate veil, held that:

"90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."

74. *Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil*

must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case."

40. The next judgement relied upon by Sri Rohan Gupta is the case of **Bacha F. Gauzdar vs. Commissioner of Income Tax, Bombay (supra),** wherein the Apex Court was called upon to decide the question of exemption under section 4 (3)(viii) of the Income Tax Act *the Constitution Bench of the Supreme Court held that the nature of income in the hands of a company was not the nature of income in the hands of its shareholders. It held that dividends in the hands of the shareholders of a company declared from agricultural income received by that company could not be considered as agricultural income. The said decision rested on the fundamental principle that a company is a separate juristic entity distinct from its shareholders.*

41. Referring to the leading pronouncement of the Constitution Bench of the Apex court in the case of **Tata Engineering and Locomotive Co. Ltd. And another vs. State of Bihar and others (supra).** The Apex court following the cherished judgement of **Salomon vs. Salomon & Co., 1897 AC 22** observed held as under:

*"**24.** The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well-established ever since the decision in the case of Salomon v. Salomon & Co., 1897 AC 22 was pronounced in 1897; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.*

***26.** It is unnecessary to refer to the facts in these two cases and the principles enunciated by them, because it is not disputed by the respondents that some exceptions have been recognised to the rule that a corporation or a company has a juristic or legal separate entity. The doctrine of the lifting of the veil has been*

applied in the words of Palmer in five categories of cases : where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control; and in the law relating to trading with the enemy where the test of control is adopted (1). In some of these cases, judicial decisions have no doubt lifted the veil and considered the substance of the matter.

27. *Gower has similarly summarised this position with the observation that in a number of important respects, the legislature has rent the veil woven by the Salomon case. Particularly is this so, 'says Gower, in the sphere of taxation and in the steps which have been taken towards the recognition of enterprise-entity rather than corporate-entity. It is significant, however, that according to Gower, the courts have only construed statutes as "cracking open the corporate shell" when compelled to do so by the clear words of the statute; indeed they have gone' out of their way to avoid this construction whenever possible. Thus, at present, the judicial approach in cracking open the corporate shell is somewhat cautious and circumspect. It is only where the legislative provision justifies the adoption of such a course that the veil has been lifted. In exceptional cases where courts have felt "themselves able to ignore the corporate entity and to treat the individual shareholders as liable for its acts", (2) the same course has been adopted. Summarising his conclusions, Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation."*

42. The Apex Court very recently in the case of **Arcelormittal India Private Limited vs. Satish Kumar Gupta and others (supra)** while deciding the validity of Section 29-A(c) of the IBC observed as under:

*"**35.** Similarly in Balwant Rai Saluja & Anr. etc. etc. v. Air India Ltd. & Ors., (2014) 9 SCC 407, this Court in following Escorts Ltd. (supra.), held:*

"70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. Salomon & Co. Ltd. [1897 AC 22] Lord Halsbury LC, negating the applicability of this doctrine to the facts of the case, stated that: (AC pp. 30 & 31)

"[a company] must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself ... whatever may have been the ideas or schemes of those who brought it into existence."

Most of the cases subsequent to Salomon case [1897 AC 22], attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "façade". However, there was yet to be any clarity on applicability of the said doctrine.

71. In recent times, the law has been crystallised around the six principles formulated by Munby, J. in Ben Hashem v. Ali Shayif [Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)]. The six principles, as found at paras 159-64 of the case are as follows:

(i) Ownership and control of a company were not enough to justify piercing the corporate veil;

(ii) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;

(iii) The corporate veil can be pierced only if there is some impropriety;

(iv) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;

(v) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

(vi) The company may be a "façade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

72. The principles laid down by Ben Hashem case [Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)] have been reiterated by the UK Supreme Court by Lord Neuberger in Prest v. Petrodel Resources Ltd. [(2013) 2 AC 415], UKSC at para 64. Lord Sumption, in Prest case [(2013) 2 AC 415], finally observed as follows: (AC p. 488, para 35)

"35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in LIC v. Escorts Ltd. [(1986) 1 SCC 264], while discussing the doctrine of corporate veil, held that: (SCC pp. 335-36, para 90)

"90. ... Generally and broadly speaking, we may say that the

corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc.""

36. Similarly in Delhi Development Authority v. Skipper Construction Company (P) Ltd. & Another, (1996) 4 SCC 622, this Court held:

"24. In Salomon v. Salomon & Co. Ltd. [1897 AC 22] the House of Lords had observed,

"the company is at law a different person altogether from the subscribers ...; and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by that Act."

Since then, however, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is "when the corporate personality is being blatantly used as a cloak for fraud or improper conduct". [Gower: Modern Company Law -- 4th Edn. (1979) at p. 137.] Pennington (Company Law -- 5th Edn. 1985 at p. 53) also states that "where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the court will disregard the corporate veil. A Professor of Law, S. Ottolenghi in his article "From peeping behind the Corporate Veil, to ignoring it completely" says

"the concept of "piercing the veil' in the United States is much more developed than in the UK. The motto, which was laid down by Sanborn, J.and cited since then as the law, is that "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons'. The same can be seen in various European jurisdictions."

Indeed, as far back as 1912, another American Professor L. Maurice Wormser examined the American decisions on the subject in a brilliantly written article "Piercing the veil of corporate entity" [published in (1912) XII Columbia Law Review 496] and summarised their central holding in the following words:

"The various classes of cases where the concept of corporate entity should be ignored and the veil drawn aside have now been briefly reviewed. What general rule, if any, can be laid down? The nearest approximation to generalisation which the present state of the authorities would warrant is this: When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company

as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."

25. In Palmer's Company Law, this topic is discussed in Part II of Vol. I. Several situations where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception. It runs:

"The courts have further shown themselves willing to "lifting the veil' where the device of incorporation is used for some illegal or improper purpose.... Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere "sham' and made an order for specific performance against both the vendor and the company."

Similar views have been expressed by all the commentators on the Company Law which we do not think necessary to refer to.

26. The law as stated by Palmer and Gower has been approved by this Court in TELCO v. State of Bihar [(1964) 6 SCR 885]. The following passage from the decision is apposite:

"27... Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But, it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation."

27. In DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [(1976) 3 All ER 462] the court of appeal dealt with a group of companies. Lord Denning quoted with approval the statement in Gower's Company Law that

"there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group".

The learned Master of Rolls observed that "this group is virtually the same as a partnership in which all the three companies are partners". He called it a case of "three in one" -- and, alternatively, as "one in three".

28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people." (emphasis supplied)

37. It is thus clear that, where a statute itself lifts the corporate veil, or where protection of public interest is of

paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole."

43. Now coming to the next judgment of this Court in the case of **Meekin Transmission Ltd. vs. State of Uttar Pradesh and others (supra),** this Court was considering the notice for recovery sent to the Director of a Company for arrears of trade tax against the Company. This Court considered the entire concept of Companies, the status of the Directors and its shareholders and relying upon the cherished judgement of Salomon vs. Salomon and Co., 1897 AC 22 held as under:

*"**71.** The cardinal principle which has been laid down in the aforesaid cases and expressly stated and reiterated in Purshottam Das Beriwal (Supra) is as under:*

"The cardinal principle of law is that when there is a liability against a company, no recovery can be made from personal assets of its Director, unless it is specifically provided in the Statute or warranted by law. It is not brought to brought to our notice that there is any specific provision in the U.P. Sales Tax Act, whereunder recovery of the liability outstanding against a company can be made against the personal assets of its Director."

***72.** The legal position as discerned from the above is that in a case where the corporate personality has been obtained by certain individuals as a cloak or a mask to prevent tax liability or to divert the public funds or to defraud public at large or for some illegal purposes etc., to find out as to who are those beneficiaries who have proceeded to prevent such liability or to achieve an impermissible objective by taking recourse to corporate personality, the veil of the corporate personality shall be lifted so that those persons who are so identified are made responsible. However, this doctrine is not to be applied as a matter of course, in a routine manner and as a day to day affair so as to recover the dues of a company, whenever and for whatever reason they are unrecoverable, from the personal assets of the Directors. If such a course is permitted, it would lead to not only disastrous results but would also destroy completely the concept of juristic personality conferred by various statutes like the Act in the present case and would make several enactments and their effect to be redundant and illusory. Moreover, the shallowness of arguments in favour of making Directors personally responsible can be considered from another angle. In every case the Director may not be a shareholder of the company. He may have been appointed as Director for taking advantage of his expertise in his field of vocation or profession, and for achieving goals for which the company is incorporated. Such Director is paid remuneration, if any, for the services he rendered. Otherwise he is not at all a beneficiary of the business or trade etc., as the case may be, in which the company is engaged. Such benefit would be available only to the shareholders as they would only be entitled to share the profits earned by the company in the form of dividend as decided by the Board of Directors. In such case such Director, though is an agent of the company but he is more in the nature of an officer of the company and not in the capacity of limited ownership by way of shareholding. Such a Director, in our view, unless is guilty*

of misfeasance, fraud or acting ultra vires, we are not able to understand as to how he can be made responsible personally for the dues of the company even if we apply the doctrine of piercing the veil. If in such a case the veil is to be lifted, the persons behind the veil, at the best, would be the promoters of the company or those who have sought to obtain corporate personality as a sham or bogus transaction. Similarly, in some of the companies the financial institutions, who advances funds as loan etc., nominate their Director/s to keep some kind of monitoring over the functions of the company so that it may not go on liquidation on account of negligent and careless function of the Board of Directors. Such Directors also, in our view, cannot be included in the category of the persons who would be responsible personally for the dues of the company.

73. *In order to find out as to who are the persons responsible personally when the veil is lifted it would be wholly irrelevant as to whether such person is a Director or a promoter shareholder or otherwise of the company since the purpose of lifting the veil is to find out the person/s who is operating behind the corporate personality for his personal gain. Such person may be individual or group of persons belonging to a family or relatives or otherwise a small group collected with a common objective of achieving some illegal, immoral or improper purpose etc. So long as no investigation is made into various aspects, we are not able to understand as to how and what manner a Director of a company can straightway be proceeded personally for recovering dues of a company unless it is so provided by some provision of the statute.*

74. *Recently considering a similar controversy with reference to the provisions of Payment of Wages Act, the Apex Court in P.C. Agarwala Vs. Payment of Wages Inspector, M.P. and others, AIR 2006 SC 3576 has held as under:*

"17. It is trite law that liability of a person is dependent upon the Statutory prescriptions governing such liability. Sections 5 and 291 of the Companies Act, 1956 (in short 'Companies Act') are to be noted in this regard. Section 5 refers to officer who is in default. Section 291 on the other hand relates to general powers of the Board of Directors. In order to attract the liability under the Act, it has to be seen as to on whom the Act fixes the liability. Section 3 speaks of the responsibility for payment of wages. It speaks of the "employer" which expression is defined in Section 2(ia). Section 15 refers to the claims arising out of deductions from wages or delaying payment of wages and penalty for malicious or vexatious claims. Statutorily no liability has been fixed on the Directors.

75. *Further in para 24 of the judgement also the Court held as under:*

"Therefore, on a plain reading of the language of the governing statute, it cannot be held that the Directors had any personal liability....."

76. *In the said judgement with respect to applicability of doctrine of lifting of veil, after referring to the learned authors like Palmer and Gower, the Court has clearly said that at present judicial approach in cracking upon the corporate shell is somewhat cautious and circumspect. It is only when the statute justifies adoption of such a course or in exceptional cases, where Courts have felt themselves satisfied to ignore the corporate entity and to treat the individual shareholder(s) liable for its acts, such a course has been adopted. Broadly, where fraud is intended to be prevented, or*

trading with enemy is sought to be defeated, the veil of corporation is lifted by judicial decision and the shareholders are held to be "persons who actually work for corporation".

77. *This judgement also goes to show that normally when the veil is lifted it is the promoters, shareholders or the shareholders who are found to be working behind the veil, responsible, and the Directors as such would not be taking to be responsible for meeting the liabilities of the company unless the statute so provides or it is found that the act of the Directors is ultra vires resulting in extinction of assets and funds of company making recovery from the company impossible.*

78. *In brief, we can categories the cases in which the corporate personality of the incorporate body can be ignored and it would be better to refer the renowned author Palmer's Company Law 23rd Edition where he has categorised the cases, in which the principle of separate entity of the Company has been discarded by adopting the doctrine of lifting the veil, in 15 categories and some of which are as under:*

*"(1) where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies; (2) where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; (3) in certain matters pertaining to the law of taxes; death duty and stamps, particularly where the question of the "controlling interest" is in issue; (4) in the law relating to exchange control; (5) in the law relating to trading with the enemy where the test of control is adopted; (6) where a holding company or a subsidiary company were not working in an autonomous manner and thus were treated as forming an economic unit; (7) where the new company was formed by the members of an existing company holding 9/10 shares in the existing company and only with an object of expropriating the shares of minority share holders of the existing company; (8) where the device of incorporation is used for some illegal or improper purpose; (9) where several companies promoted by the same controlling share holders for defeating or misusing the loss pertaining to labour welfare; (10) where the facts or equitable considerati*ons justify an exemption from the strict rule in Salomon Vs. Salomon and Co. Ltd."

79. *Another learned author L.C.B. Gower in his "Principles of Modern Company Law" 4th Edition, has also given such illustration where the veil of a corporate body has been pierced and has enumerated the same as fraudulent trading, misdescription of company, and taxation mattes where the statute require etc.*

80. *In the nutshell, the doctrine of lifting of veil or piercing the veil is now a well established principle which has been applied from time to time by the Courts in India also. There is no doubt about the proposition that whenever the circumstances so warrant, the corporate veil of the company can be lifted to look into the fact as to whose face is behind the corporate veil who is trying to play fraud or taking advantage of the corporate personality for immoral, illegal or other purpose which are against public policy. Such lifting of veil is also has to implemented whenever a statute so provided. However, it is not a matter of routine affair. It needs a detailed*

investigation into the facts and affairs of the company to find out as to whether the veil of the corporate personality needs to be lifted in a particular case. After lifting the veil, in a case where it is so required, it is not always that the Directors would automatically be responsible but again it is a matter of investigation as to who is/are the person/s responsible and liable who had occasioned for application of said doctrine.

Initial burden for application of the doctrine of "Piercing of Veil":

81. *Whether in respect to tax dues or other public revenue or in other cases, if one has to discard the corporate personality, then the initial burden would lie upon it to place on record relevant material and facts to justify invocation of doctrine of lifting of veil and to plead that the corporate shell be not made a ground of defence. A personality conferred by the statute cannot be overlooked or ignored lightly and in a routine manner or on a mere asking. In fact whenever the veil is to be pierced, it would mean that somebody, individual or group of individuals, have obtained the shell of corporate personality as a pretext or mask to cover up a transaction or intention of those individual/individuals is neither legal nor otherwise in public interest. In effect the attempt of those individuals have to be shown akin to fraud or misrepresentation. The legal personality of the corporate body thus can be ignored in such cases since it is well settled that fraud vitiates everything and, therefore, the benefit of legal personality obtained by someone for purposes other than those which are lawful or even if lawful but not otherwise permissible, the corporate personality being the result of such fraudulent activity would have to be discarded but not otherwise. These are the things based on positive factual material and cannot be presumed in the absence of proper pleadings and material to be placed by the person who is pleading to invoke the doctrine of piercing the veil and to ignore the juristic personality of the corporate body. Once relevant material is made available by the authority or person concerned, thereafter it would be the responsibility of the other side to place material to meet the aforesaid facts but the mere fact that the company has failed to pay the Government dues or pubic revenue, that by itself would not invite the doctrine of piercing the veil and is not sufficient to ignore the statutory corporate personality conferred upon a company and make its Directors or shareholders responsible personally."*

44. In the next judgment cited at the Bar the Apex Court in the case of **Vodafone International Holdings B.V vs Union of India (2012) 6 SCC 613** extensively dealt with the liability of the parent company for the dues of its holding subsidiary company held:

*"**78.** Holding structures are recognised in corporate as well as tax laws. Special purpose vehicles (SPVs) and holding companies have a place in legal structures in India, be it in company law, the Takeover Code under SEBI [Ed.: Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011] or even under the income tax law.*

79. *When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a*

judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. However, this has to be done at the threshold.

80. *In this connection, we may reiterate the "look at" principle enunciated in Ramsay [1982 AC 300 : (1981) 2 WLR 449 : (1981) 1 All ER 865 (HL)] in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature [see Craven v.White (Stephen) [1989 AC 398 : (1988) 3 WLR 423 : (1988) 3 All ER 495 (HL)] which further observed that genuine strategic tax planning has not been abandoned by any decision of the English Courts till date].*

81. *Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the holding structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit.*

82. *In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device."*

45. Now reverting to the judgement cited by Sri Kaushalendra Nath Singh, the interim order dated 07.08.2019 passed in Writ - C No. 25554 of 2019 (Ashish Gupta vs. State of U.P. and 5 others), this Court while considering the case of the petitioner proceeded to pass an interim order with the following conditions:

"List for admission/final disposal for adjudication of the above question of law raised immediately after one month.

In the meantime, the petitioner who is under civil imprisonment shall be released forthwith with the following conditions-:

(i) that on release from civil imprisonment, he shall not move out of the country without the leave of the Court;

(ii) that he will not deal with his shares which he is having in the company Cloud Nine Project Pvt. Ltd. And any

company that is a member of the consortium;

(iii) his two residential houses situate in Meerut and the land which he possesses in Panipat (particulars of which shall be supplied by the counsel for the petitioner) shall be under attachment and;

(iv) he is restrained with dealing with those properties in any manner and would not transfer them.

The Sub-Registrar, Meerut and Panipat are directed not to register any deed of transfer of any property in respect of the above referred properties of the petitioner.

The Sub-Registrar, Gautam Buddh Nagar/Ghaziabad is directed not to register any deed of transfer of any flat constructed by the respondent No.6 company on the property leased out by the NOIDA in connection with which the present dues are being claimed.

A copy of this order may be sent to all the above Sub-Registrars with the request to ensure strict compliance of the same."

46. We are afraid that no question of law has been considered or decided in the said interim order. It is well settled that an interim order cannot be a precedent as no question of law or fact is decided at the interim stage. Further, a copy of the order itself reveals that the Court had listed the matter for adjudication on the question of law as raised by the parties.

47. Coming to the second judgement dated 20.9.2017 in case of **Jagbir Singh vs. State of U.P. and others (supra),** this Court has refused to interfere with the recovery against the Director as the Court was of the view that the Directors of the Company had persuaded the BIFR for permission with fresh infusion of funds and the BIFR was used as subterfuge to avoid the payment of taxes.

48. We are afraid that the said judgement also has no applicability to the facts of the present case for two reasons: one that the said case related to a Director of a Company which is not the present case and secondly the matter arose out of proceedings from BIFR and related to default in payment of taxes which again is not a case in the present case.

49. Thus, the legal position that can broadly culled out from the above judgments are:

a) That a Company is a separate and distinct entity from its shareholders and directors.

b) Corporate veil can be pierced

(i) only in exceptional circumstances by the courts with caution and circumspection and in a restrictive manner.

(ii) For lifting of corporate veil it is essential that the case falls within the exceptions as elaborated and crstalised by Munby J. in Ben Hashem v Ali Shayif,[2008] EWHC 2380 and approved by the Apex Court in Balwant Rai Saluja (supra) and Arcelormittal India (supra)

(iii) Where the statute itself permits lifting of veil.

50. The facts of the present case demonstrate that the petitioner Rakesh Mahajan was never a Director of PAN Realtors Pvt. Limited and is not even a shareholder of PAN Realtors Pvt. Limited in his personal capacity. Further, there is nothing on record to even suggest that PAN Realtors Pvt. Limited was

incorporated as a 'sham' or a 'facade' for execution of the lease in question, in fact the Company was incorporated at the insistence of Noida Authority which is clear from the allotment letter. The lease deed executed in between Noida and PAN Realtors Pvt. Limited still subsists and has not even been determined.

51. Further, there is no material to suggest that the petitioners herein Rakesh Mahajan or Nirala Buildcon exercised pervasive control over Pan Developers (Pvt.) Limited. The statute in question being U.P. Urban Planning Development Act, 1973 does not have any provision for lifting the corporate veil. The petitioners are not even a signatory to the lease deed in question and thus no case is made out for piercing the veil for recovery of alleged dues of PAN Realtors Pvt. Limited from the petitioners.

52. It is well settled that any action of the "State" or "an instrumentality of State" has to be in conformity with law and has to satisfy the twin tests of having followed "substantive due process of law" and "procedural due process of law" and failure on any of the twin tests renders the action violative of Article 14 of the Constitution of India.

53. We have no hesitation in holding that the actions of the authority against both the petitioner falls miserably short of the twin tests and are thus violative of Article 14 of the Constitution of India.

54. Accordingly, the Recovery Certificate dated 26.8.2019, issued by the respondent no. 2 and the Citation dated 12.9.2019, issued by the respondent no. 4, insofar it relates to the petitioners, are hereby quashed.

55. We clarify that the question of non-grant of opportunity of hearing prior to issuance of a recovery certificate has not been gone into in the present case as we are satisfied that the recovery against the petitioners for the alleged dues of PAN Realtors Pvt. Limited, is wholly illegal.

56. We clarify that the present case is confined only in respect of Petitioners herein and the Authority is at liberty to take steps for recovery of its dues against the persons liable to pay them.

57. The writ petitions are allowed.

(2020)1ILR 1147

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 33121 of 2017

Smt. Bedo ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishnu Sahai, Sri Bhupeshwar Dayal

Counsel for the Respondents:
C.S.C.

A. The Urban Land (Ceiling and Regulation) Act, 1976 - Section 6(1) - Persons holding vacant land in excess of ceiling limit to file statement - section 10(1) - Acquisition of vacant land in excess

of ceiling limit - section 10(3) - notification - Section 10(5) - notice calling upon the land owner to hand over possession of the land declared surplus - Section 10(6) - power upon the competent authority to take forceful possession - The Urban Land (Ceiling and Regulation) Repeal Act, 1999 - section 3 - saving clause - section 4 - Abatement of legal proceedings - The kind of possession contemplated u/s 3 & 4 of the Repeal Act, 1999, is actual possession and not a mere paper possession and if the possession of the petitioner's land which was declared surplus land stood vested in the State Government u/s 10 (3) of the principal Act was not taken and no proceedings u/s 11, 12, 13 and 14 of the principal Act were pending on the date of coming into force of the Repeal Act, 1999 - the petitioner is entitled to the benefit of the Repeal Act, 1999. (Para 27)

There is a dispute about the fact that the possession of the surplus land was delivered by the petitioner to the State Government upon issuance of notice u/s 10 (5) of the principal Act – no notice under section 10(5) or section 10(6) of the principal Act was ever issued before possession of the surplus land of the disputed plot - the petitioner was still in possession of the surplus area although the name of State had been mutated in the revenue record - moved an application before the competent authority for deleting the entry made in favour of the State of Uttar Pradesh and for restoring her name in the revenue record claiming the benefit of the Repeal Act, 1999.(Para 4 & 32)

Held:- Actual physical possession of the petitioner's surplus land was never taken by the State Government from the petitioner and the petitioner stood in possession of the surplus land on the date of the coming into force of the Repeal Act, 1999 - the respondents directed to expunge the respondent-State from the revenue record and to restore that of the petitioner who is the owner of the land in dispute. (Para 38 & 40)

Writ Petition allowed. (E-7)

List of cases cited: -

1. M/s. A.B.P. Design Sonakpur Versus Moradabad Development Authority and others, 2018 (8) ADJ 747 (DB)

2. State of U.P. v. Hari Ram, (2013) 4 SCC 280

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

1. Heard Sri Bhupeshwar Dayal, learned counsel for the petitioner and learned Standing Counsel for the respondent nos. 1 to 3.

2. The instant writ petition has been filed by the petitioner with the following prayer to :-

(i) a writ, order or direction in the nature of certiorari calling for the record and to quash the impugned order dated 18.05.2017 passed by the respondent no. 3 (Annexure No. 3 to the writ petition);

(ii) a writ, order or direction in the nature of mandamus commanding the respondents not to interfere with the possession of the petitioner over Plot No. 1346 area 3-19-13 situate in village-Maliyana, Pargana, Tehsil and District-Meerut;

(iii) a writ, order or direction in the nature of mandamus commanding the respondents to delete the name of the respondent State from the revenue record and to mutate the name of the petitioner who is owner of the land in dispute;

(iv) any other writ, order or direction which this Hon'ble Court deems fit and proper in the facts and circumstances of the case;

(v) award cost of writ petition to the petitioner throughout.

3. The facts of this case are as hereunder :-

4. The petitioner claims herself to be the owner of Plot No. 1346 area 3-19-13 situate in village- Maliyana, Pargana, Tehsil, District- Meerut, hereinafter referred to as the 'disputed plot'. Proceedings under The Urban Land (Ceiling and Regulation) Act, 1976, hereinafter referred to as the 'principal Act', were initiated against the petitioner on the basis of the return submitted by her u/s 6 (1) of the principal Act, whereupon 8656.53 sq. m. of her land was declared surplus vide ex-parte order dated 27.06.1979 passed by the respondent no. 3. The order dated 27.06.1979 was assailed by the petitioner by filing an appeal before the District Judge, Meerut which was registered as Appeal No. 73/1984 and allowed by him by judgement and order dated 05.01.1988. In the interregnum pursuant to the ex-parte order dated 27.06.1979 passed by the respondent no. 3, notifications u/s 10 (1) and 10 (3) of the principal Act were issued which were followed by a notice issued u/s 10 (5) of the principal Act requiring the petitioner to deliver possession of the land declared surplus. The petitioner claims that no notice was served on her u/s 10 (6) of the principal Act as the possession was resisted by her and hence, the same could not have been taken without serving of notice u/s 10 (6) of the principal Act on her and the petitioner continued to remain in actual physical possession of the surplus land of the disputed plot despite the passing of the ex-parte order dated 27.06.1979 till the same was set-aside by the order dated 05.01.1988 passed by the appellate court. The appellate court by its order dated 05.01.1988 after setting aside the ex-parte order dated 27.06.1979 of the respondent no. 3, remanded the matter back to the respondent no. 3 who after remand, again declared an area of 8656.53 sq. m. of disputed plot as surplus by his order dated 30.01.1992. Against the order dated 30.01.1992, the petitioner filed an Appeal No. 9 of 1992 before the District Judge, Meerut. However, the said appeal stood abated by order dated 14.12.1999 passed by the appellate court upon coming into force of The Urban Land (Ceiling and Regulation) Repeal Act, 1999, hereinafter referred to as the 'Repeal Act, 1999'. Since the petitioner was still in possession of the surplus area although the name of State had been mutated in the revenue record, she moved an application before the respondent no. 3 for deleting the entry made in favour of the State of Uttar Pradesh and for restoring her name in the revenue record claiming the benefit of the Repeal Act, 1999. Copy of the aforesaid application has been brought on record as Annexure No. 1 to the writ petition. However, when no order was passed on the petitioner's aforesaid application, she filed Civil Misc. Writ Petition No. 18199/2011 which was finally disposed of by another coordinate Bench of this Court by order dated 22.02.2017 which has been reproduced hereinbelow :-

Learned Standing Counsel states that he has filed counter affidavit on 13.9.2013, that is not on the record. Sri Ashish Kumar Singh, learned counsel for the petitioner states that he has filed rejoinder affidavit in the year 2015 itself, that is also not on the record.

Both the counsel have provided true copy of the counter affidavit and rejoinder affidavit,which are taken on record.

We have heard Sri Ashish Kumar Singh, learned counsel for the

petitioner and learned Standing Counsel for the State respondents.

By means of this writ petition, following prayer has been made :-

(A) To issue a writ, order or direction in the nature of mandamus commanding the respondents-authorities mainly respondent no. 3 to mutate the petitioner's name over Plot No. 1346 area 3 bighas 19 biswas 13 biswansis, village Maliyana Pargana Tehsil and District Meerut.

(B) To issue a writ, order or direction in the nature of mandamus commanding the respondents-authorities mainly respondent no. 3 to dispose of the petitioner's application for mutation of her name over the land in question pursuant to Urban Land Ceiling Repeal Act, 1999.

(C) To issue any other writ order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(D) Award cost of the writ petition in favour of the petitioner.

Considering the petitioner's prayer, this Court, on 29.3.2011, has granted time to the learned standing counsel to file counter affidavit. Again on 10.5.2013, learned standing counsel was granted one month and no more time to file counter affidavit. Pursuant thereto, counter affidavit has been filed.

In paragraph 6 of the counter affidavit, following averments have been made :-

6. That the contents of paragraph 3 of the writ petition are not admitted and in reply it is submitted that an appropriate reply of the petitioner's representation dated 20.3.2011 for mutating her name over khasra No. 1346 by deleting the name of the petitioner, has already been sent to the petitioner by office letter dated 18.4.2011.

The reply of paragraph 6 of the counter affidavit has been given in paragraph 5 of the rejoinder affidavit, which is reproduced herein under :-

5. That the averments made in para 6 of the counter affidavit are not admitted, as stated, hence denied. In reply, it is submitted that till date petitioner has not received any reply vide alleged office letter dated 18.4.2011. The alleged letter dated 18.4.2011 has never been served upon the petitioner prior to filing of the present writ petition which was filed in the month of March, 2011. The Respondent Authority for the reasons best known has not filed the office letter dated 18.4.2011 which according to petition is nothing but an eye wash. It has also come to know that in the aforesaid letter, it has been asserted that the application would be disposed of only after disposal of the present writ petition.

From the perusal of para 6 of the counter affidavit and para 5 of the rejoinder affidavit, it appears that the stand taken by the learned Standing Counsel, that an order for mutating the petitioner's name has already been passed, has been denied by the petitioner.

Considering the same, it is directed that the petitioner may file an application along with certified copy of this order before the respondent no. 3 demanding the copy of the order passed on the mutation application. In case, such an application is filed, copy of the order be provided to the petitioner within a period of two weeks from the date of filing of the application.

In case, the order has yet not been passed, the same shall be passed on the petitioner's application within a period of ten weeks after hearing all concerned.

It may be clarified that we have not addressed ourselves on the merit of the

matter and it is in the sole domain of the respondent no. 3 to do the needful in accordance with law.

5. Thereafter, it appears that the respondent no. 3 by the impugned order dated 18.05.2017 rejected the petitioner's application holding that since the Tehsildar- Meerut had obtained possession of the area of 8656.53 sq. m. of petitioner's plot which was declared surplus on 19.07.1981 and handed over its possession to the State Government, much before coming into force of the Repeal Act, 1999, the petitioner was not entitled to any benefit of the Repeal Act, 1999.

6. In paragraphs 18 and 20 of the counter affidavit which has been filed on behalf of the respondent nos. 2 and 3 in this writ petition, it has been contended that possession of the surplus land was taken and was handed over to the State Government on 29.07.1981, and hence, there was no requirement of issuing any notice further u/s 10 (6) of the principal Act. In paragraph 4, it was stated that the possession of the petitioner's land which was declared surplus by the order dated 27.06.1979 passed by the respondent no. 3 was taken on 29.07.1981 after giving due notice to the petitioner on 30.05.1981 u/s 10 (5) of the principal Act which was preceded by following the provisions of Section 9, 10 (1) and 10 (3) of the principal Act. Copies of notice dated 30.05.1981 and possession memo dated 29.07.1981 have been brought on record as Annexure Nos. C.A.-1 & 2 respectively to the counter affidavit filed in the writ petition.

7. That reply to the paragraph nos. 18 and 20 of the counter affidavit has been given by the learned counsel for the petitioner in paragraph 14 of the rejoinder affidavit filed in this writ petition. In the said paragraph, apart from denying the allegations made in paragraph nos. 16 to 21 of the counter affidavit filed on behalf of the respondent nos. 2 and 3, it has been stated that proceedings u/s 9, 10 (1) and 10 (3) of the principal Act stood set-aside by the judgement and order dated 05.01.1988 passed by the District Judge, Meerut and the matter was remanded back for decision afresh and no possession was ever delivered to the ceiling authorities and since no proceedings for taking possession after passing of the aforesaid order after remand was initiated by the ceiling authorities, there is no question of possession of the surplus land having ever been taken by the ceiling authorities. It was also stated that even where ex-parte proceedings are taken, issuance of notice u/s 10 (6) of the principal Act is required and since the prescribed procedure was not followed, the possession memo, copy whereof has been brought on record as Annexure No. C.A.-2 to the counter affidavit filed in the writ petition, was a paper transaction.

8. The petitioner in paragraph 4 of the rejoinder affidavit, apart from denying the allegations made in paragraph 4 of the counter affidavit further stated that the ex-parte order dated 27.06.1979 passed u/s 8 (4) of the principal Act and the subsequent proceedings taken in pursuance thereof were wholly illegal and the order dated 27.06.1979 was set-aside by the appellate court by allowing the appeal filed by the petitioner against the ex-parte order and the matter was remanded back for deciding the case afresh. It was further stated in the same paragraph that the possession memo dated 30.05.1981 was a mere paper transaction as no possession was delivered

by the petitioner and further no notice u/s 10 (6) of the principal Act was ever issued to her.

9. In paragraph 5 of the counter affidavit, it has further been observed that after the appeal preferred by the petitioner against the judgement and order dated 27.06.1979 of the respondent no. 3 was allowed by the District Judge, Meerut, the matter was remanded back to the respondent no. 3 who by his order dated 30.01.1992 again declared an area of 8656.53 sq. m. of the disputed plot as surplus. Copy of the order dated 30.01.1992 has been brought on record as Annexure No. C.A.-4 to the counter affidavit filed in the writ petition.

10. Sri Bhupeshwar Dayal, learned counsel for the petitioner has submitted that the finding recorded by the respondent no. 3 in the impugned order dated 27.06.1979 that the possession of the surplus area of the disputed plot stood with the State Government on the date of the coming into force of the Repeal Act, 1999, is per se illegal and not warranted by any material on record. He next submitted that even if it is assumed for the sake of arguments that the possession of the surplus land of the petitioner was taken by Tehsildar- Meerut on 29.07.1981 and delivered to the State Government after the passing of the ex-parte order dated 27.06.1979 by the respondent no. 3, even then the so-called possession memo dated 29.07.1981 does not indicate that the possession was taken by the Tehsilder-Meerut from the petitioner. There being absolutely no material on record even prima facie indicating that when after the passing of the order dated 30.01.1992 by the respondent no. 3 after remand by which again an area of 8656.53 sq. m. of the disputed plot was declared surplus, any proceedings u/s 10 (1), 10 (3), 10 (5) and 10 (6) of the principal Act were taken by the ceiling authorities as after the setting-aside of the order of the respondent no. 3 dated 27.06.1979 on appeal preferred by the petitioner, all subsequent proceedings taken pursuant thereto became a nullity because the legal consequence which followed was that there existed no order declaring any land of the petitioner surplus and land continued to remain in possession of the petitioner. He next contended that there being no material on record that any fresh proceedings u/s 10 (1), 10 (3), 10 (5) and 10 (6) of the principal Act were taken by the respondent no. 3 after the passing of the order dated 30.01.1992 by the respondent no. 3 on remand, it could not be held that the State Government was in possession of the surplus land on the date of the coming into force of the Repeal Act, 1999 and hence, the petitioner was not entitled to any benefit thereof, the view taken to the contrary by the respondent no. 3 in the impugned order dated 18.05.2017, cannot be sustained and the impugned order is liable to be set-aside.

11. Per contra learned Standing Counsel appearing for the respondent nos. 1 to 3 supported the impugned order by relying upon the proceedings which were taken u/s 10 (1), 10 (3) and 10 (5) of the principal Act which were taken pursuant to the order passed by the respondent no. 3 on 27.06.1979 u/s 8 (4) of the principal Act and the possession memo dated 29.07.1981 submitted that it is an admitted factual position that after the order dated 27.06.1979 was set-aside on appeal preferred by the petitioner, the petitioner had not moved any application before the ceiling authorities for restoration of possession of the surplus land to her which was taken from her by the

Tehsildar- Meerut and handed over to the State Government on 29.07.1981. He next submitted that argument advanced by the learned counsel for the petitioner that once the order dated 27.06.1979 was set-aside, the entire proceedings taken pursuant thereto become a nullity and the petitioner continued to remain in possession of the surplus land despite her having not taken any steps for restitution of the possession, is not only misconceived but also preposterous. The respondent no. 3 did not commit any illegality or legal infirmity in denying to the petitioner the benefit of the Repeal Act, 1999. This writ petition which lacks merit is liable to be dismissed.

12. We have heard learned counsel for the parties and perused the pleadings as well as the original record which was produced before us by the learned Standing Counsel.

13. The twin questions which arise for our consideration in this writ petition inter-alia are that whether on the date of the coming into force of the Repeal Act, 1999, actual physical possession of the disputed land was with the petitioner or the same stood delivered to the State and; whether the petitioner is entitled to the benefit of the Repeal Act ?

14. In order to examine the aforesaid questions, it would be useful to reproduce the provisions of The Urban Land (Ceiling and Regulation) Act, 1976 and The Urban Land (Ceiling and Regulation) Repeal Act, 1999 which are relevant for our purpose :-

6. Persons holding vacant land in excess of ceiling limit to file statement-

(1) Every person holding vacant land in excess of the ceiling limit at the commencement of this Act shall, within such period as may be prescribed, file a statement before the competent authority having Jurisdiction specifying the location, extent, value and such other particulars as may be prescribed of all vacant land and of any other land on which there is a building, whether or not with a dwelling unit therein, held by him (including the nature of his right, title or interest therein) and also specifying the vacant land within the ceiling limit which he desires to retain: Provided that in relation to any State to which this Act applies in the first instance, the provisions of this sub-section shall have effect as if for the words "Every person holding vacant land in excess of the ceiling limit and the commencement of this Act", the words, figures and letters "Every person who held vacant land in excess of the ceiling limit on or after the 17th day of February, 1975 and before the commencement of this Act and every person holding vacant land in excess of the ceiling limit at such commencement" had been substituted. Explanation.--In this section, "commencement of this Act" means,--

(i) the date on which this Act comes into force in any State;

(ii) where any land, not being vacant land, situated in a State in which this Act is in force has become vacant land by any reason whatsoever, the date on which such land becomes vacant land;

(iii) where any notification has been issued under clause (n) of section 2 in respect of any area in a State in which this Act is in force, the date of publication of such notification.

(2) If the competent authority is of opinion that--

(a) in any State to which this Act applies in the first instance, any person held on or after the 17th day of February, 1975 and before the commencement of

this Act or holds at such commencement; or

(b) in any State which adopts this Act under clause (1) of article 252 of the Constitution, any person holds at the commencement of this Act, vacant land in excess of the ceiling limit, then, notwithstanding anything contained in sub-section (1), it may serve a notice upon such person requiring him to file, within such period as may be specified in the notice, the statement referred to in sub-section (1).

(3) The competent authority may, if it is satisfied that it is necessary so to do, extend the date for filing the statement under this section by such further period or periods as it may think fit; so, however, that the period or the aggregate of the periods of such extension shall not exceed three months.

(4) The statement under this section shall be filed,--

(a) in the case of an individual, by the individual himself; where the individual is absent from India, by the individual concerned or by some person duly authorised by him in this behalf; and where the individual is mentally incapacitated from attending to his affairs, by his guardian or any other person competent to act on his behalf;

(b) in the case of a family, by the husband or wife and where the husband or wife is absent from India or is mentally incapacitated from attending to his or her affairs, by the husband or wife who is not so absent or mentally incapacitated and where both the husband and the wife are absent from India or are mentally incapacitated from attending to their affairs, by any other person competent to act on behalf on the husband or wife or both;

(c) in the case of a company, by the principal officer thereof;

(d) in the case of a firm, by any partner thereof;

(e) in the case of any other association, by any member of the association or the principal officer thereof; and

(f) in the case of any other person, by that person or by a person competent to act on his behalf. Explanation.--For the purposes of this sub-section, "principal officer"--

(i) in relation to a company, means the secretary, manager or managing- director of the company;

(ii) in relation to any association, means the secretary, treasurer, manager or agent of the association, and includes any person connected with the management of the affairs of the company or the association, as the case may be, upon whom the competent authority has served a notice of his intention of treating his as the principal officer thereof.

7. Filing of statement in cases where vacant land held by a person is situated within the jurisdiction of two or more competent authorities.--

(1) Where a person holds vacant land situated within the jurisdiction of two or more competent authorities, whether in the same State or in two or more States to which this Act applies, then, he shall file his statement under sub-section (1) of section 6 before the competent authority within the jurisdiction of which the major part thereof is situated and thereafter all subsequent proceedings shall be taken before that competent authority to the exclusion of the other competent authority or authorities concerned and the competent authority, before which the statement is filed, shall send intimation thereof to the

other competent authority or authorities concerned.

(2) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities within the same State to which this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the State Government and thereupon, the State Government shall, by order, determine the competent authority before which all subsequent proceedings under this Act shall be taken to the exclusion of the other competent authority or authorities and communicate that order to such person and the competent authorities concerned.

(3) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities in two or more States to which this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the Central Government and thereupon, the Central Government shall, by order, determine the competent authority before which all subsequent proceedings shall betaken to the exclusion of the other competent authority or authorities and communicate that order to such person, the State Governments and the competent authorities concerned.

8. Preparation of draft statement as regards vacant land held in excess of ceiling limit-

(1) On the basis of the statement filed under section 6 and after such inquiry as the competent authority may deem fit to make the competent authority shall prepare a draft statement in respect of the person who has filed the statement under section 6.

(2) Every statement prepared under sub-section (1) shall contain the following particulars, namely:--

(i) the name and address of the person;

(ii) the particulars of all vacant land and of any other land on which there is a building, whether or not with a dwelling unit therein, held by such person;

(iii) the particulars of the vacant lands which such person desires to retain within the ceiling limit;

(iv) the particulars of the right, title or interest of the person in the vacant land; and

(v) such other particulars as may be prescribed.

(3) The draft statement shall be served in such manner as may be prescribed on the person concerned together with a notice stating that any objection to the draft statement shall be preferred within thirty days of the service thereof.

(4) The competent authority shall duly consider any objection received, within the period specified in the notice referred to in sub-section (3) or within such further period as may be specified by the competent authority for any good and sufficient reason, from the person whom a copy of the draft statement has been served under that sub-section and the competent authority shall, after giving the objector a reasonable opportunity of being heard, pass such orders as it deems fit.

9. Final Statement.--After the disposal of the objections, if any, received under sub-section (4) of section 8, the competent authority shall make the necessary alterations in the draft statement in accordance with the orders passed on

the objections aforesaid and shall determine the vacant land held by the person concerned in excess of the ceiling limit and cause a copy of the draft statement as so altered to be served in the manner referred to in sub-section (3) of section 8 on the person concerned and where such vacant land is held under a lease, or a mortgage, or a hire-purchase agreement, or an irrevocable power of attorney, also on the owner of such vacant land.

10. Acquisition of vacant land in excess of ceiling limit-

(1) As soon as may be after the service of the statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that--

(i) such vacant land is to be acquired by the concerned State Government; and

(ii) the claims of all person interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their interests in such land, to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1) the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)--

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land.

(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly

authorised by such State Government in this behalf and may for that purpose use such force as may be necessary. Explanation.--In this section, in sub-section (1) of section 11 and in sections 14 and 23, "State Government", in relation to--

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government.

15. Section 3 and 4 of the Repeal Act, 1999 are as hereunder :-

3. Saving.--

(1) The repeal of the principal Act shall not affect--

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. Abatement of legal proceedings.--All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate: Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority.

16. Upon perusal of the aforesaid provisions of the principal Act, it transpires that Section 6 provides that every person holding vacant land in excess of the ceiling limit was required to file a statement before the competent authority having jurisdiction specifying the location, extent, value and such other prescribed particulars of the vacant land and of any other land on which there was a building, whether or not with a dwelling unit therein, held by him.

17. Section 7 provides the procedure for filing of statement in cases where vacant land held by a person was situated within the jurisdiction of two or more competent authorities.

18. Section 8 provides that on the basis of the statement filed u/s 6 and after

such inquiry as the competent authority may deem fit to make, the competent authority shall prepare the draft statement.

19. Section 8 (3) stipulates that the draft statement prepared u/s 8 shall be served on the person concerned together with a notice stating that any objection to the draft statement shall be prepared within 30 days of the service thereof.

20. Section 9 provides that after disposal of the objections, if any, received under sub-section (4) of Section 8, the competent authority shall prepare the final statement.

21. Section 10 (1) provides that after the service of the statement u/s 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit to be published in the Official Gazette of the State concerned for the information of the general public.

22. Section 10 (2) empowers the competent authority to decide the claims of the persons interested in the vacant land filed in pursuance of the notification published under sub-section (1).

23. Section 10 (3) provides that the competent authority concerned may, by notification published in the Official Gazette of the State concerned, anytime after the publication of the notification under sub-section (1) declare that excess vacant land referred to in the notification published under sub-section (1) with effect from such date as may be specified in the declaration, be deemed to be have been acquired by the State Government. Such land shall be deemed to have vested absolutely in the State Government free from all encumbrances.

24. Section 10 (4) prohibits transfer by way of sale, mortgage, gift, lease or otherwise by any person any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void and no person shall alter or cause to be altered the use of such excess vacant land.

25. Section 10 (5) empowers the competent authority to order any person by notice in writing who is in possession of any vacant land vested in the State Government under sub-section (3) to surrender or deliver possession thereof to State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

26. Section 10 (6) states where any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorized by such State Government in this behalf and may for that purpose use such force as may be necessary.

27. The kind of possession contemplated u/s 3 & 4 of the Repeal Act, 1999, in our opinion, is actual possession and not a mere paper possession and if the possession of the petitioner's land which was declared surplus land stood vested in the State Government u/s 10 (3) of the principal Act was not taken and no proceedings u/s 11, 12, 13 and 14 of the principal Act were pending on the date of coming into force of the Repeal Act, 1999,

the petitioner is entitled to the benefit of the Repeal Act, 1999.

28. In the instant case, there is no dispute about the fact that after the order dated 30.01.1992 passed by the competent authority on remand, no proceedings u/s 10 of the principal Act were taken.

29. Learned Standing Counsel has placed reliance in support of his contention that the State Government had taken actual physical possession of the disputed land from the petitioner pursuant to the proceedings taken u/s 10 (1) to 10 (6) of the principal Act after the passing of the order dated 27.06.1979 by the respondent no. 3 which was eventually set-aside by the District Judge, Meerut by his order dated 05.01.1988 passed in Appeal No. 73/1984 preferred by the appellant against order dated 27.06.1979.

30. Now, the question which arises before us is that whether, even if it is assumed for the sake of arguments that the possession of the petitioner's surplus land was taken from him and delivered to the State Government u/s 10 (1) to 10 (6) of the principal Act as argued by the learned Standing Counsel pursuant to the order dated 27.06.1979, a fact which has been seriously disputed by Sri Bhupeshwar Dayal, learned counsel for the petitioner, the same shall enure to the benefit of the State Government, even after setting-aside of the order pursuant to which the aforesaid proceedings were taken ?

31. Before examining the aforesaid aspect of the matter, we first propose to delve into the issue whether the possession of the petitioner's land was taken and delivered to the State Government pursuant to the order dated 27.06.1979 passed by the competent authority ?

32. There is dispute about the fact that the possession of the surplus land was delivered by the petitioner to the State Government upon issuance of notice u/s 10 (5) of the principal Act as there is nothing on record which may indicate that the notice u/s 10 (5) of the principal Act was ever served upon the petitioner. We could not find any endorsement of the service of notice upon the petitioner after going through the record. There is also no material on record indicating that any notice was issued to the petitioner u/s 10 (6) of the principal Act before possession of the surplus land of the disputed plot was allegedly taken.

33. In **State of U.P. v. Hari Ram,** reported in **(2013) 4 SCC 280,** the Apex Court observed that what is required for a land to come out from the purview of Repeal Act is that it should be a case of forceful dispossession in the event of there being no peaceful dispossession. The peaceful dispossession is related to proceedings u/s 10 (5) of the principal Act, whereas, the forceful dispossession is related to proceedings u/s 10 (6) of the principal Act vide paragraph 39 of **Hari Ram (supra),** the Court concluded thus :-

"39. Above-mentioned directives make it clear that sub-section (3) takes in only de jure possession and not de facto possession, therefore, it the land owner is not surrendering possession voluntarily under sub-section (3) of Section 10, or surrendering or delivering possession after notice, u/s 10 (5) or dispossession by use of force, it cannot be said that the State Government has taken possession of the vacant land."

(emphasis added)

34. Now, coming back to the instant case, we find that there is nothing on record indicating that forceful possession of the surplus land of the petitioner u/s 10 (6) of the principal Act was taken from the petitioner.

35. Reliance has been placed by the learned Standing Counsel on possession memo dated 29.07.1981, copy whereof has been brought on record as Annexure Nos. C.A.- 2 to the counter affidavit filed in the writ petition. There is nothing in the possession memo even remotely suggesting that it was prepared in proceedings purported to have been taken in Section 10 (6) of the principal Act. The possession memo neither gives the details nor the area of the land of which the possession was allegedly taken. The possession memo, in our opinion, is nothing but a mere paper transaction and it is not safe to hold on the basis thereof that the surplus land of the disputed plot of the petitioner was in the possession of the State Government on the date of the coming into force of the Repeal Act, 1999.

36. Even otherwise, if for the sake of arguments, it is assumed that the State Government had dispossessed the petitioner in proceedings taken pursuant to the order dated 27.06.1979 passed by the competent authority but once the said order was set-aside on appeal and the matter was remitted back to the competent authority, all consequential action taken pursuant to that order also stood annulled.

37. Paragraph nos. 16 and 17 of the order passed by another coordinate Bench of this Court in the case of **M/s. A.B.P. Design Sonakpur Versus Moradabad Development Authority and others** reported in **2018 (8) ADJ 747 (DB),** which are relevant for our purpose, are being reproduced hereinbelow :-

16. Against order dated 16.03.1988, Zahid Hussain preferred Revenue Appeal No. 23 of 1988. This appeal was allowed by District Judge, Moradabad vide judgement dated 6.1.1993 and Competent Authority was directed to decide the matter afresh after taking into consideration amended master plan. In the meantime, Competent Authority issued notification dated 27.09.1988 under Section 10 (1) of Act, 1976, vesting surplus land in the State and therein disputed land of Plot No. 200, area 1295.04 sq. mts., was mentioned.

17. Whether any subsequent proceedings were undertaken thereafter or not, no material has come on record in this regard. It is also not clear when possession was taken by Competent Authority from landowner under the provisions of Act, 1976. A copy of letter dated 31.7.1992 has been placed on record which is addressed to Competent Authority, Urban Land Ceiling, Moradabad and states that possession of land, detailed therein, is being handed over by Naib Tehsildar, Urban Ceiling Moradabad to Naib Tehsildar, MDA on 31.7.1992. Apparently this letter is only to show a "paper possession" and not "actual physical possession" of land, declared surplus by Competent Authority vide order dated 16.3.1988. The appeal against order dated 16.3.1988 having been allowed vide judgement dated 6.1.1993 and matter was remanded to Competent Authority, consequence thereof, in our view, would be as if no order of Competent Authority declaring any land of Zahid Hussain 'surplus' remained in existence and if that be so, no question of any valid vesting of land in State or taking possession thereof would arise."

38. Since, we have found that actual physical possession of the petitioner's surplus land was never taken by the State Government from the petitioner and the petitioner stood in possession of the surplus land on the date of the coming into force of the Repeal Act, 1999, this writ petition deserves to be allowed.

39. Accordingly, the writ petition is **allowed.**

40. The impugned order dated 18.05.2017 is hereby quashed. A further direction is issued to the respondents to expunge the respondent-State from the revenue record and to restore that of the petitioner who is the owner of the land in dispute.

(2020)1ILR 1161

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2019

BEFORE
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 36251 of 2019

State of U.P. & Anr. ...Petitioners
Versus
Controlling Authority/Dy. Labour Commissioner, Lucknow & Ors. . ...Respondents

Counsel for the Petitioners:

seeking extension of time beyond the statutory time period of 60 days, extensible by further period of 60 days by the competent authority, being satisfied that the aggrieved person was prevented by sufficient cause from preferring the appeal within the prescribed period. (Para 28)

Writ Petition dismissed. (E-7)

List of cases cited: -

Sri Shreeprakash Singh

Counsel for the Respondents:

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A. Payment of Gratuity Act, 1972 - Section 7(4) - appeal within 60 days - Section 7(7) – further appeal within 60 days against an order passed under Section 7(4) - The Limitation Act - Section 5 - an appeal is to be filed in a manner within such time as provided i.e. 60 days - in the event there was sufficient cause for not filing the appeal within same period, the said period can be extended by further period of 60 days only - where a specific period has been provided in the statute then further period of limitation cannot be extended beyond what has been provided under the statute - The Act, 1972 is a special Act, which contained the specific period in which an appeal can be preferred - an appeal filed beyond the period of 120 days (60 days + 60 days) cannot be condoned. (Para 25, 26 & 27)

In the present case, admittedly, the appeal has been preferred on 15.11.2018 after the rejection of recall application on 29.11.2017, much beyond the period of 120 days as per Section 7(7) of the Act, 1972. Therefore, no further extension could be provided or contemplated. The appellate authority could not have extended the period of limitation; therefore, the appellate authority was right in coming to the conclusion that the appeal has been filed beyond the period of limitation. (Para 31)

Held: - The purpose and scheme of the Act and provisions contained under the Limitation Act, would therefore, not be applicable for

1.Commissioner of Sales Tax, UP Lucknow Vs. M/s Parson Tools and Plants, Kanpur, (1975) 4 SCC 22

2.Commissioner of Customs & Central Excise Vs. M/s Hongo India (P) Ltd. & Anr.(2009) 5 SCC, 791

3.Patel Brothers Vs. State of Assam and others, (2017) 2 SCC 350

4.Bengal Chemists and Druggists Association Vs. Kalyan Chowdhury, (2018) 3 SCC 41

5.State Road Transport Corporation Vs. Dy. Labour Commissioner and others, 2014 (143) FLR 392

6.State of Gujrat and another Vs Appellate Authority under Payment of Gratuity Act, and others, 2015(147) FLR 564

7.Deepak Transport Agency Pvt. Ltd. Vs. Appellate Authority, Gratuity Act-cum Dy. Commissioner of Labour, 2018 (159) FLR 885

8.Senior Regional Manager, TN. Civil Supplies Corporation, Vs. Joint Commissioner of Labour and others, 2019 (161) 392

9.Ali Hossain Vs. Budge Budge Co. Ltd. And others, 2018 (159) FLR 68

10.Netram Sahu Vs. State of Chhattisgarh and another, 2018 (157) FLR 477

(Delivered by Hon'ble Piyush Agrawal, J.)

1. By means of the present writ petition, the petitioner is challenging the order dated 17.6.2019 passed by the controlling authority, respondent no.1 under Payment of Gratuity Act, 1972 (hereinafter referred to as 'the Act, 1972') in P.G. Appeal No. 1/2019 as well as the impugned order dated 6.7.2019 and 29.11.2017 passed by respondent-2 in P.G. Case No. 09 of 2016.

2. Brief case are that respondent no. 3 (herein after referred to as 'the workman') was initially engaged on 1.2.1998 as Beldar in Work Charge Establishment by the petitioners and continuously worked till 12.10.2011 in the office of petitioner no. 2 in the same status. Thereafter by the order of Executive Engineer, Tone Pump Canal, Prayagraj, the workman was relieved on 13.10.2011 and directed to join in regular establishment. In pursuance thereof the workman joined in regular establishment on 14.10.2011, on the pay Scale of Rs. 5200-20200/- Grade Pay Rs. 1800/-.

3. Subsequently, on 31.1.2015, the workman was made permanent and after completion of age of 60 years, he was superannuated on 29.2.2016. The workman had worked 13 years 08 months and 13 days as work charge employee and thereafter regularized and had discharged total 04 years, 04 months and 16 days of service as permanent employee. Accordingly at the time of superannuation, the workman had not completed 05 years service as regular/permanent employee as such he was paid gratuity of Rs. 1,11,663/- against the service of work charge employee.

4. On 24.12.2016, the workman set up his claim before the concerned authority under Section 4 of the Act, 1972, claiming gratuity of Rs. 4,56,600/- along with 12% interest for a period of 1.6.1975 to 29.2.2016, for about 40 years of his service. The petitioners filed objection in which it was stated that the workman was employee on work charge in the establishment on 1.2.1998 to 13.10.2011. Moreover, there was no case of payment of gratuity. The gratuity which was admitted by the petitioners, had been paid of Rs. 1,11,663/- to the workman. The stand was taken that the workman has not completed minimum 05 years of service as regular employee as per sub Rule 4 of the Rules, 1972, therefore, there was no question of payment of gratuity under the Act, 1972.

5. Thereafter the order dated 16.7.2017 was passed accepting the claim

of the workman and direction was issued for payment of gratuity of sum of Rs. 3,44,937/- along with interest at the rate of 8% after deducting Rs. 1,11,663/-. The petitioners moved recall application on 26.8.2017, which was rejected on 29.11.2017 on the ground that the petitioners have alternative remedy of filing of statutory appeal which could be preferred under the Act, 1972 as per sub-section 7 of Section 7.

6. Thereafter, the petitioners preferred an appeal on 15.11.2018 before the appellate authority under sub Section 7 of Section 7 of the Act, 1972. The said appeal was filed along with the application under Section 5 of the Limitation Act, which was supported by the affidavit. The appeal was filed for payment of requisite amount as prescribed under the Act,1972. The workman filed his objection opposing the maintainability of the appeal as has been filed beyond the period of limitation provided under sub Section 7 of Section 7 of the Act, 1972. The workman has submitted that the appeal was highly belated and should be rejected on this ground alone. The appellate authority by the impugned order dated 17.6.2018 had dismissed the appeal of the petitioner holding that the appeal is beyond the period prescribed under sub Section 7 of Section 7 of the Act. Against the order dated 17.6.2018, the petitioners preferred the present writ petition.

7. Heard learned counsel for the parties and perused the records.

8. The contention of the petitioners' counsel is that the appeal has been rejected solely on the ground that it has been filed beyond the period of limitation prescribed under sub section 7 of section 7 of the Act, 1972, and in the interest of justice, same ought to have been condoned. The question of law which falls for determination in the present writ petition is with regard to whether in filing the appeal under sub section 7 of section 7 of the Act 1972, the provisions of Section 5 of Limitation Act, would be applicable so that period beyond the limitation can be extended or not ?

9. The only ground and question raised in the present writ petition is whether the time granted in terms of statutory provisions under the Act, 1972 to file an appeal, can be extended beyond the period prescribed under the Act by granting benefit of the provisions of Section 5 of Limitation Act.

10. Before adverting to the contention of the petitioner, it is necessary to extract the relevant part sub-section 7 of Section 7 of the Act, 1972 as under:

7. Determination of the amount of gratuity -*(7) Any person aggrieved by an order under sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:*

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

[Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that

the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under subsection (4), or deposits with the appellate authority such amount.]

11. On bare perusal of the aforesaid sub-section, it is very clear that any person aggrieved by the order passed under sub-section 4 of section 7 may file an appeal within 60 days from the date of receipt of the order as may be specified therein. In case the aggrieved person was prevented by sufficient cause from preferring the appeal within the said period then the same period can be extended by further period of 60 days. In other words an appeal can be preferred within 60 days which can be extended for another period of 60 days only when there is sufficient cause and not otherwise.

12. The case in hand, the petitioner against the order dated 6.7.2017 moved a recall application which was rejected on 29.11.2017 and thereafter the petitioner preferred an appeal under sub-section 7 of Section 7 of the Act, 1972 on 15.11.2018, almost after a year.

13. The issue came before the Supreme Court as to whether period of limitation can be extended in the case of **Commissioner of Sales Tax, UP Lucknow Vs. M/s Parson Tools and Plants, Kanpur, (1975) 4 SCC 22.** Relevant part of the judgement is extracted below:

12. ..... The third is that the Revising Authority has no discretion to extend this period beyond a further period of six months, even on sufficient cause shown. As rightly pointed out in the minority judgment of the High Court, pendency of proceedings of the nature contemplated by s. 14(2) of the Limitation Act, may amount to a sufficient cause for condoning the delay and extending the limitation for filing a revision application, but s. 10 (3-B) of the Sales-tax Act, gives no jurisdiction to the Revising Authority to extend the limitation, even in such a case, for a further period of more than six months.

13. The three star features of the scheme and language of the above provision, unmistakably show that the legislature has deliberately excluded the application of the principles underlying ss. 5 and. 14 of the Limitation Act, except to the extent and in the truncated form embodied in sub-s. (3- B) of Section 10 of the Sales-tax Act. Delay in disposal of revenue matters adversely affects the steady inflow of reve- nues and the financial stability of the State. Section 10 is therefore designed to, ensure speedy and final determination of fiscal matters within a reasonably certain time-schedule.

14. It cannot be said that-by excluding the unrestricted application of the principles of ss. 5 and 14 of the Limitation Act, the Legislature has made. the provisions of s. 10, unduly oppressive. In most cases, the discretion to extend limitation, on sufficient cause being shown for a further period of six months only, given by sub-s. (3_B) would be enough to afford relief. Cases are no doubt conceivable where an aggrieved party, despite sufficient cause, is unable to make an application for revision within this maximum period of 18 months. Such harsh cases would be rare. Even, in such exceptional cases of extreme hardship, the Revising Authoritly may, on its own motion, entertain revision and grant relief.

15. Be that as it may, from the scheme and language of Section 10, the intention of the Legislature to exclude the unrestricted application of the principles of

Sections 5 and 10 of the Limitation Act is manifestly clear. These provisions of the Limitation Act which the Legislature did not, after due application of mind, incorporate in the Sales-tax Act, cannot be imported into it by analogy. An enactment being the will of the legislature, the paramount rule of interpretation, which overrides all others,- is that a statute is to be expounded "according to the intent of them that made it". "The will of 'the legislature is the supreme law of the land, and demands perfect obdience".(1) "Judicial power is never exercised" said Marshall C. J. of the United States, "for the purpose of giving effect to the will of the Judges; always for the purpose of giving effect to the will of the Legislature; or in other words, to the will of the law".

16. If the legislature wilfully omits to incorporate something of an 'analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so would be entrenching upon the preserves of Legislatures, 'The primary function of a court of law being jus dicere and not jus dare.'

17. In the light of what has been said above, we are of the opinion that the High Court was in error in importing whole hog the principle of Section 14(2) of the Limitation Act into Section. 10 (3-B) of the Sales-tax Act.

18. The ratio of the Privy Council decision in Ramdutt Ramkissen Dass v. E. D. Sasson & Co. (Supra) relied upon by the High Court is not on speaking terms with the clear language of s. 10 (3-B) of the Sales-tax Act. That decision was rendered long before the passage of the Indian Arbitration Act, 1940. It lost its efficacy after the enactment of the Arbitration Act which contained a specific provision in regard to exclusion of time from computation of limitation.

19. The case in point is Purshottam Dass Hussaram v. Index (India) Ltd. (supra). In this Bombay case, the question was, whether the suit was barred by limitation. It was not disputed that Article 115 of the Limitation Act governed the limitation and if no other factor was to be taken into consideration, the suit was filed beyond time. But what was relied upon by the plaintiff for the purpose of saving limitation was the fact that there were certain infructuous arbitration,, Proceedings and if the time taken in prosecuting those proceedings was eXcluded under Section 14, the suit would be within limitation. It was held that if Section 14 were to be construed strictly, the plaintiff would not be entitled to exclude the period in question.

20. On the authority of Ramdutt Ramkissen's case (supra), it was then contended that. the time taken in arbitration proceedings should be excluded on the analogy of s. 14. This contention was also negatived on the ground that since the decision of the Privy Council, the legislature had in s. 37(5) of the Arbitration Act, 1940, provided as to what extent the provisions of the Limitation Act would be applicable to the proceedings before the arbitrator. Section 37(5) was as follows :

"Where the cow orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the

commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred."

The reasons advanced, the observations made and the rule enunciated by Chagla C.J., who spoke for the Bench in that case, are opposite and may be extracted with advantage:

....we have now a statutory provision for exclusion of time taken up in arbitration Pr when a suit Is filed, and the question arises of computing the period of limitation with regard to that suit, and the time that has got to be excluded is only that time which is taken up as provided in s. 37(5). There must be an order of the Court setting aside an award or there must be an order of the Court declaring that the arbitration agreement shall cease to have effect, and the period between the commencement of the arbitration and the date of this order is the period that has got to be excluded.

It is therefore no longer open to the Court to rely on s. 14 Limitation Act as applying by analogy to arbitration proceedings. If the Legislature intended that s. 14 should apply and. that all the time taken up in arbitration proceedings should be excluded, then there was no reason to enact s. 37(5)., The very fact that s. 37(5) has been enacted clearly shows- that the whole period referred to in...a, 49 Limitation Act is not to be excluded but the limited'.. indicated in s. 37(5).

* * * * * *

"it may seem rather curious-and it may also in certain cases result in hardship-as to why the legislature should not have excluded all time taken up in good faith before an arbitrator just as the time taken up in prosecuting a suit or an appeal in good faith is excluded. But obviously the Legislature did no t intend that parties should waste time infructuous proceedings before arbitrators. The Iegisla- ture has clearly indicated that limitation having once begun to run, no time could be excluded merely because parties chose to go before an arbitrator without getting an award or without coming to Court to get the necessary order indicated in s. 37(5)."

21. What the learned Chief Justice said about the inapplicability of s. 14, Limitation Act, in the context of s. 37(5) of the Arbitration Act, holds good with added force with reference to s. 10 (3-B) of the Sales-tax Act.

22. Thus the principle that emerges is that if the legislature in a special statute prescribes a certain period of limitation for filing a particular application thereunder and provides in clear terms that such period on sufficient cause being shown, may be extended, in the maximum, only upto a specified time-limit and no further, than the tribunal concerned has no jurisdiction to treat within limitation, an application filed before it beyond such maximum time-limk specified in the statute, by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of s. 14(2) of the Limitation Act.

23. We have said enough and we may say it again that where the legislature clearly declares its intent in the scheme and language of a statute, it is the duty of the court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not congenial to or consistent with such expressed intent of

the law-giver; more so if the statute is a taxing statute. We will close the discussion by recalling what Lord Hailsham (1) has said recently, in regard to importation of the principles of natural justice into a statute which is a clear and complete Code, by itself :

"It is true of course that the courts will lean heavily ,against any construction of a statute which would be manifestly fair. But they have no power to amend or supplement the language of a statute merely because in one view (1)At P. 11 in Pearl Berg v. Varty [1972] 2 All E. R. 6, of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than a statute accords him. Still less is it the functioning of the courts to form first a judgment on the fairness of an Act of Parliament and theft to amend or supplement it with new provisions so as to make it conform to that judgment."

24. For all the reasons aforesaid, we are of the opinion that the object, the scheme and language of s.10 of the Sales-tax Act do not permit the invocation of s.14(2) of the Limitation Act, either, in terms, or, in principle, for excluding the time spent in prosecuting proceedings for setting aside the dismissal of appeals in default, from com- putation of the period of limitation prescribed for filing a revision under the Sales-tax. Accordingly, we answer the question referred, in the negative.

The Apex Court has observed that where the special statute prescribes a certain period, the limitation for filing an appeal, may be extended only upto a specified time limit.

14. A similar view has been reiterated by Supreme Court in the case of **Commissioner of Customs & Central Excise Vs. M/s Hongo India (P) Ltd. & Anr.(2009) 5 SCC, 791,** in which the Apex Court has held herein below:-

14. Article 214 of the Constitution of India makes it clear that there shall be a High Court for each State and Article 215 states that every High Court shall be a court of record and shall have all the powers including the power to punish for contempt of itself. Though we have adverted to Section 35 H in the earlier part of our order, it is better to extract sub- section (1) which is relevant and we are concerned with in these appeals :

"35H. *Application to High Court - (1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under section 35C passed before the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal."*

Except providing a period of 180 days for filing reference application to the High Court, there is no other clause for condoning the delay if reference is made beyond the said prescribed period.

15. We have already pointed out that in the case of appeal to the Commissioner, Section 35 provides 60 days time and in addition to the same, Commissioner has power to condone the

delay up to 30 days, if sufficient cause is shown. Likewise, Section 35B provides 90 days time for filing appeal to the Appellate Tribunal and sub-section (5) therein enables the Appellate Tribunal to condone the delay irrespective of the number of days, if sufficient cause is shown. Likewise, Section 35EE which provides 90 days time for filing revision by the Central Government and, proviso to the same enables the revisional authority to condone the delay for a further period of 90 days, if sufficient cause is shown, whereas in the case of appeal to the High Court under Section 35G and reference to the High Court under Section 35H of the Act, total period of 180 days has been provided for availing the remedy of appeal and the reference. However, there is no further clause empowering the High Court to condone the delay after the period of 180 days. ...

27. The other decision relied on by the counsel for the appellant is M.V. Elisabeth and Others vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, 1993 Supp (2) SCC

The learned ASG heavily relied on the following observations:

"66. The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers....."

Here again, there is no dispute about the above proposition. The High Courts in India are having inherent and plenary powers and as a Court of Record the High Courts have unlimited jurisdiction including the jurisdiction to determine their own powers. However, the said principle has to be decided with the specific provisions in the enactment and in the light of the scheme of the Act, particularly in this case, Sections 35, 35B, 35EE, 35G and 35H of the unamended Central Excise Act, it would not be possible to hold that in spite of the above-mentioned statutory provisions, the High Court is free to entertain reference application even after expiry of the prescribed period of 180 days.

30. In the earlier part of our order, we have adverted to Chapter VIA of the Act which provides appeals and revisions to various authorities. Though the Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to Appellate Tribunal. Also an additional period of 90 days in the case of revision by Central Government has been provided. However, in the case of an appeal to the High Court under Section 35G and reference application to the High Court under Section 35H, the Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.

31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd., Noida (supra). Commissioner of Customs, Central Excise, Noida is the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference under Section 35H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises vs.

Commissioner of Central Excise, Jamshedpur and Others, (2008) 3 SCC 70 concluded that "the High Court was justified in holding that there was no power for condonation of delay in filing reference application."

32. As pointed out earlier, the language used in Sections 35, 35B, 35EE, 35G and 35H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to High Court.

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law here in this case is Central Excise Act. The nature of the remedy provided therein are such that the legislature intended it to be a complete Code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

36. The scheme of the Central Excise Act, 1944 support the conclusion that the time limit prescribed under Section 35H(1) to make a reference to High Court is absolute and unextendable

by court under Section 5 of the Limitation Act. It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Act.

37. In the light of the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under unamended Section 35H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation.

15. Similar observations were made by the Supreme Court in the case of **Patel Brothers Vs. State of Assam and others, (2017) 2 SCC 350** in which the Apex Court has held as follows:-

6. In the first instance, he referred to Section 79 of the VAT Act which is a provision relating to appeals to the Appellate Authority. As per Section 79(1) of the VAT Act, appeal against the order of the taxing authority can be filed with the appellate authority within 60 days from the date of receipt of such order of the taxing authority. Sub- section (2) of Section 79 of the VAT Act empowers the appellate authority to entertain the appeal even beyond 60 days, provided it is presented within a further period of 180 days, if the appellate authority is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the stipulated period of 60 days[1].

7. The learned counsel next referred to Section 80 of the VAT Act[2] which deals with appeals to the Appellate Tribunal inter alia against the orders of the Appellate Authority. Here also, period of 60 days for preferring such an appeal is provided under sub-section (3) of Section 80 of the VAT Act and proviso to sub-section (3) empowers the Appellate Tribunal to condone the delay, if the appeal is preferred within a further period of 120 days, on sufficient cause being shown for not filing the appeal within 60 days of limitation prescribed. The learned counsel contrasted the aforesaid provisions of Sections 79 and 80 with Section 81[3] of the VAT Act and pointed out that whereas there was specific provision for condonation of delay in filing appeals under Sections 79 and 80 of the VAT Act, no such equivalent provision was made in Section 81 of the VAT Act. As per Section 81 of the VAT Act, revision can be preferred to the High Court against the order of the Appellate Tribunal within 60 days. However, there is no provision giving specific power to the High Court to condone the delay if the revision is preferred beyond 60 days. As per the learned counsel, the reason for not providing such a provision was that provisions of Limitation Act, 1963 including Section 5 thereof were applicable.

8. Insofar as Section 84 of the VAT Act[4] is concerned, it was submitted that Sections 4 and 12 of the Limitation Act, 1963 were made applicable for specific purpose of computing the period of limitation under the said Chapter and High Court committed a grave error while holding that because of the aforesaid provision only Sections 4 and 12 of the Limitation Act, 1963 were made applicable to the VAT Act thereby excluding other provisions of the Act.

9. For this purpose, the learned counsel relied upon Section 29(2) of the Limitation Act, 1963[5] which makes provisions contained in Sections 4 to 24 (inclusive) of the Limitation Act, 1963

applicable in case of suit, appeal or application under any special or local law, where these provisions are not expressly excluded by such special or local law.

10. It was argued that in the absence of any provision expressly excluding the applicability of Sections 4 to 24 of the Limitation Act, 1963, those Sections were applicable qua revision petitions filed under Section 81 of the VAT Act and, therefore, Section 5 of the Limitation Act, 1963 was also applicable to such proceedings. To placate his aforesaid submissions, the learned counsel relied upon the judgment of this Court in the case of Mangu Ram v. Municipal Corporation of Delhi & Anr.[6]. In that case, special leave petitions were filed against the condonation of delay to the application for grant of special leave under Section 417, Cr.P.C., 1898 against acquittal of the petitioners by the trial court, in spite of the mandatory period of limitation provided in sub-section (4) of Section 417. Question arose whether in the case of Kaushalya Rani v. Gopal Singh[7], which held Section 417, Cr.P.C., 1898 a special law and excluded application of Section 5 on a construction of Section 29(2)(b) of the old Act of 1908 applied under the corresponding provision of Limitation Act, 1963 which governed the case. The Court held that since the case was governed by Limitation Act, 1963, judgment in Kaushalya Rani case did not apply. For applicability of the Limitation Act, 1963 to such proceedings, the Court referred to Section 29(2) of the Limitation Act, 1963 holding that there is an important departure made by the Limitation Act, 1963 insofar as the provision contained in Section 29, sub-section (2), is concerned. Under the Indian Limitation Act, 1908, clause (b) to sub-section (2) of Section 29 provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the application of Section 5 was in clear and specific terms excluded. But under Section 29(2) of Act, the provisions of Section 5 shall apply in case of special or local law to the extent to which they are not expressly excluded by such special or local law. Since under the Limitation Act, 1963, Section 5 is specifically made applicable by Section 29 (2), it is only if the special or local law expressly excludes the applicability of Section 5 that it would stand displaced. The Court held that there is nothing in Section 417(4), Cr.P.C., which excludes the application of Section 5 of Limitation Act, 1963.

11. Learned counsel for the appellant also referred to the case of State of Madhya Pradesh & Anr. v. Anshuman Shukla[8]. In that case, question of applicability of Section 5 of the Limitation Act arose in relation to revision petition that can be preferred under Section 19 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (as it stood prior to its amendment in 2005). The Court held that since unamended Section 19 did not contain any express rider on power of the High Court to entertain applications for revision after expiry of prescribed limitation thereunder, provisions of Limitation Act, 1963 would become applicable vide Section 29(2) thereof. It further held that as the High Court was conferred with suo moto power under Section 19 of Adhiniyam, 1983 to call for record of an award at any time, there was no legislative intent to exclude the applicability of Section 5 of the Limitation Act, 1963.

12. Mr. Nalin Kohli, learned senior counsel appearing for the respondents, on the other hand, submitted

that the High Court had exhaustively dealt with the issue and rightly found that since Section 84 of the VAT Act confined the applicability of Limitation Act only in respect of Sections 4 and 12 thereof to the proceedings under the said Chapter, by necessary implication the other provisions of the Limitation Act, 1963 including Section 5 thereof stood excluded. He submitted that for the purpose of finding whether other provisions are excluded or not, the focus should be on the scheme of the special law as laid down in Hukumdev Narain Yadav v. Lalit Narain Mishra[9] wherein it was held that even if there exists no express exclusion in the special law, the Court has right to examine the provisions of the special law to arrive at a conclusion as to whether the legislative intent was to exclude the operation of the Limitation Act. According to him, Section 84 of the VAT Act clearly depicted such a legislative intent.

13. After examining the matter in the light of law laid down in various judgments cited by both the parties, we are of the view that the High Court has given correct interpretation to the provisions of Section 81 of the VAT Act, when this provision is read along with Section 84 thereof.

14. In the case of Commissioner of Customs and Central Excise v. Hongo India Private Limited & Anr.[10], the question that fell for determination was that as to whether the High Court had power to condone the delay in presentation of the reference application under unamended Section 35-H(1) of the Central Excise Act, 1994 beyond the period prescribed by applying Section 5 of the Limitation Act. Unamended Section 35-H dealt with reference application to the High Court. Under sub-section (1) thereof, such reference application could be preferred within a period of 180 days of the date upon which the aggrieved party is served with notice of an order under Section 35-C of the Central Excise Act. There was no provision to extend the period of limitation for filing the application to the High Court beyond the said period and to condone the delay. Pertinently, under the scheme of the Central Excise Act as well, in case of appeal to the Commissioner under Section 35 of the Act, which should be filed within 60 days, there was a specific provision for condonation of delay upto 30 days if sufficient cause is shown. Likewise, appeal to the Appellate Tribunal could be filed within 90 days under Section 35-B thereof and sub-section (5) of Section 35-B gave power to the Appellate Tribunal to condone the delay irrespective of the number of days, if sufficient cause is shown. Further, Section 35-EE provided 90 days time for filing revision by the Central Government and proviso thereto empowers the revisional authority to condone the delay for a further period of 90 days. However, when it came to making reference to the High Court under Section 35-G of the Act, the provision only prescribed the limitation period of 180 days with no further clause empowering the High Court to condone the delay beyond the said period of 180 days. It was, thus, in almost similar circumstances, the judgment was rendered by this Court.

15. The categorical opinion of the Court in Hongo India (P) Ltd. Case, was that in the absence of any such power, the High Court did not have power to condone the delay. In that case also, provisions of Section 29(2) of the Limitation Act, 1963 were pressed into service. But this argument was rejected in the following manner:

30. In the earlier part of our order, we have adverted to Chapter VI- A of the Act which provides for appeals and revisions to various authorities. Though Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to the Appellate Tribunal. Also an additional period of 90 days in the case of revision by the Central Government has been provided. However, in the case of an appeal to the High Court under Section 35-G and reference application to the High Court under Section 35-H, Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.

31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd. [(2008) 3 SCC 73] The Commissioner of Customs, Central Excise, Noida was the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference under Section 35-H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises v. CCE [(2008) 3 SCC 70] concluded that: (Punjab Fibres Ltd. case [(2008) 3 SCC 73] , SCC p. 75, para 8)

"8. ... the High Court was justified in holding that there was no power for condonation of delay in filing reference application."

32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision."

16. In the process, the Court also explained the expression 'expressly excluded' appearing in Section 29(2) of the Limitation Act, 1963 in the following manner:

"34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted, what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to the High Court.

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court."

17. The aforesaid judgment is a complete answer to the arguments of the appellant.

18. It may be relevant to mention here that after the judgment in Hongo India Private Limited & Anr., Section 35-H of the Central Excise Act, 1994 was amended by the Parliament by Act 32 of 2003 with effect from 14.05.2003 giving power to the High Court to condone the delay by inserting sub- section (2A). It is, therefore, for the legislature to set right the deficiency, if it intends to give power to the High Court to condone the delay in filing revision petition under Section 81 of the VAT Act.

19. The argument predicated on 'no express exclusion' loses its force having regard to the principle of law enshrined in Hukumdev Narain Yadav. Therein, the Court made following observations while examining whether the Limitation Act would be applicable to the provisions of the Representation of the People Act or not:

"17. ... but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

20. Thus, the approach which is to be adopted by the Court in such cases is to examine the provisions of special law to arrive at a conclusion as to whether there was legislative intent to exclude the operation of Limitation Act. In the instant case, we find that Section 84 of the VAT Act made only Sections 4 and 12 of the Limitation Act applicable to the

proceedings under the VAT Act. The apparent legislative intent, which can be clearly evinced, is to exclude other provisions, including Section 5 of the Limitation Act. Section 29(2) stipulates that in the absence of any express provision in a special law, provisions of Sections 4 to 24 of the Limitation Act would apply. If the intention of the legislature was to make Section 5, or for that matter, other provisions of the Limitation Act applicable to the proceedings under the VAT Act, there was no necessity to make specific provision like Section 84 thereby making only Sections 4 and 12 of the Limitation Act applicable to such proceedings, inasmuch as these two Sections would also have become applicable by virtue of Section 29(2) of the Limitation Act. It is, thus, clear that the Legislature intended only Sections 4 and 12 of the Limitation Act, out of Sections 4 to 24 of the said Act, applicable under the VAT Act thereby excluding the applicability of the other provisions.

21. Judgment in the case of Mangu Ram would not come to the aid of the appellant as the Court found that there was no provision under the Cr.P.C. from which legislative intent to exclude Section 5 of the Limitation Act could be discerned and, therefore, Section 29(2) of the Limitation Act was taken aid of. Similar situation prevailed in Anshuman Shukla's case. On the contrary, in the instant case, a scrutiny of the scheme of VAT Act goes to show that it is a complete code not only laying down the forum but also prescribing the time limit within which each forum would be competent to entertain the appeal or revision. The underlying object of the Act appears to be not only to shorten the length of the proceedings initiated under the different provisions contained therein, but also to ensure finality of the decision made there under. The fact that the period of limitation described therein has been equally made applicable to the assessee as well as the revenue lends ample credence to such a conclusion. We, therefore, unhesitantly hold that the application of Section 5 of the Limitation Act, 1963 to a proceeding under Section 81(1) of the VAT Act stands excluded by necessary implication, by virtue of the language employed in section 84.

22. The High Court has rightly pointed out the well settled principle of law that:

"19.....the court cannot interpret the statute the way they have developed the common law "which in a constitutional sense means judicially developed equity'. In abrogating or modifying a rule of the common law the court exercises the same power of creation that built up the common law through its existence by the judges of the past. The court can exercise no such power in respect of statue, therefore, in the task of interpreting and applying a statue, Judges have to be conscious that in the end the statue is the master not the servant of the judgment and no judge has a choice between implementing it and disobeying it."

What, therefore, follows is that the court cannot interpret the law in such a manner so as to read into the Act an inherent power of condoning the delay by invoking Section 5 of the Limitation Act, 1963 so as to supplement the provisions of the VAT Act which excludes the operation of Section 5 by necessary implications.

16. The Apex Court held in the above judgement that under Central Excise Act, the time limit prescribed for making a reference thereunder is absolute as it is a

special law and a complete code by itself, and limitation cannot be extended by the Court taken aid of Limitation Act.

17. Similar view has been taken by the Supreme Court in the case of **Bengal Chemists and Druggists Association Vs. Kalyan Chowdhury, (2018) 3 SCC 41,** in which the Apex Court has held as follows:

4. A cursory reading of Section 421(3) makes it clear that the proviso provides a period of limitation different from that provided in the Limitation Act, and also provides a further period not exceeding 45 days only if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period. Section 433 obviously cannot come to the aid of the appellant because the provisions of the Limitation Act only apply "as far as may be". In a case like the present, where there is a special provision contained in Section 421(3) proviso, Section 5 of the Limitation Act obviously cannot apply.

5. Another very important aspect of the case is that 45 days is the period of limitation, and a further period not exceeding 45 days is provided only if sufficient cause is made out for filing the appeal within the extended period. According to us, this is a peremptory provision, which will otherwise be rendered completely ineffective, if we were to accept the argument of learned counsel for the appellant. If we were to accept such argument, it would mean that notwithstanding that the further period of 45 days had elapsed, the Appellate Tribunal may, if the facts so warrant, condone the delay. This would be to render otiose the second time limit of 45 days, which, as has been pointed out by us above, is peremptory in nature.

6. We are fortified in this conclusion by the judgment of this Court in Chhattisgarh SEB v. Central Electricity Regulatory Commission, 2010 (5) SCC 23. The language of Section 125 of the Electricity Act, 2003, which is similar to the language contained in Section 421 (3) of the Companies Act, 2013, came up for consideration in the aforesaid decision. The issue that arose before this Court was whether Section 5 of the Limitation Act can be invoked for allowing the aggrieved person to file an appeal beyond 60 days plus the further grace period of 60 days. This Court held that Section 5 cannot apply to Section 125 of the Electricity Act in the following terms:

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

The aforesaid judgment was reiterated and followed in ONGC v. Gujarat Energy Transmission Corporation Limited, 2017 (5) SCC 42 at Para 5.

7. It now remains to deal with the decisions cited by learned counsel appearing on behalf of the appellant. The first is the judgment in Guda Vijayalakshmi vs. Guda Ramachandra Sekhara Sastry, (1981) 2 SCC 646. In that case, a Transfer Petition was filed under Section 25, CPC, 1908 in this Court. A preliminary objection was taken stating that in view of Sections 21 and 21A of the Hindu Marriage Act, 1955, Section 25 would not be applicable. This was turned down by this Court stating that Section 21 would not apply to substantive provisions of the Code as apart from procedural provisions. Equally, Section 21A of the Hindu Marriage Act, 1955 only dealt with transfers "in certain cases". This being so, the wide and plenary power conferred on this Court to transfer any suit, appeal or other proceedings from one High Court to another High Court or from one Civil Court in one State to another Civil Court in any other State was held not be entrenched upon by Sections 21 and 21A of the Hindu Marriage Act. We fail to see how this judgment, in any manner, furthers the proposition sought to be canvassed on behalf of the appellant, which is that Section 5 of the Limitation Act would continue to apply even after a second period of 45 days is peremptorily laid down. This judgment, therefore, does not carry the matter any further.

8. Reliance placed on Dr. Partap Singh and Another vs. Director of Enforcement, Foreign Exchange Regulation Act and Others, (1985) 3 SCC 72 is equally misplaced. In this case, Section 37 of the Foreign Exchange Regulation Act, 1973 was involved. Section 37(2) provides that the provisions of the Code relating to searches shall, so far as may be, apply to searches directed under Section 37(1). This Court held that the expression "so far as may be" has always been construed to mean that those provisions may generally be followed to the extent possible. In the fact scenario of that case, it was held that to give full meaning to the expression 'so far as may be', sub-section (2) of Section 37 should be interpreted to mean that broadly the procedure relating to search as enacted in Section 165 shall be followed.

9. This case again does not take the matter any further. In fact, the ratio of the judgment as far as this case is concerned is that the expression "so far as may be" only means to the extent possible. If not possible, obviously the Limitation Act would not apply. We have already held that it is not possible for Section 5 of the Limitation Act to apply given the peremptory language of Section 421(3).

10. The third judgment is Mangu Ram vs. Municipal Corporation of Delhi, (1976) 1 SCC 392. In this judgment, Section 417 of the Code of Criminal Procedure, 1898 provided for special leave to appeal from an order of acquittal. Section 417 (4) required that the application for special leave should be made before the expiry period of 60 days from the date of the order of acquittal. Applying Section 29(2) of the Limitation Act, this Court held that Section 5 of the Limitation would not be impliedly excluded in such case despite the mandatory and peremptory language contained in Section 417(4) of the Cr.P.C. This Court held that all periods of limitation are cast in such mandatory and peremptory language and, therefore, Section 5 could not be said to be impliedly excluded.

11. This case again is wholly distinguishable. It applies only to a period of limitation which is given beyond which nothing further is stated as to whether

delay may be condoned beyond such period. In the present case, the Section 417(3) does not merely contain the initial period of 45 days, in which case the aforesaid judgment would have applied. Section 417(3) goes on to state that another period of 45 days, being a grace period given by the legislature which cannot be exceeded, alone would apply, provided sufficient cause is made out within the aforesaid grace period. As has been held by us above, it is the second period, which is a special inbuilt kind of Section 5 of the Limitation Act in the special statute, which lays down that beyond the second period of 45 days, there can be no further condonation of delay. On this ground therefore, the aforesaid judgment also stands distinguished.

12. One further thing remains - and that is that learned counsel for the appellant pointed out the difference between the expression used in the Arbitration Act as construed by Popular Construction (supra) and its absence in the proviso in Section 421(3). For the reasons given above, we are of the view that this would also make no difference in view of the language of the proviso to Section 421(3) which contains mandatory or peremptory negative language and speaks of a second period not exceeding 45 days, which would have the same effect as the expression "but not thereafter" used in Section 34(3) proviso of the Arbitration Act, 1996.

18. The Apex Court in the above case has an occasion to consider the provisions of Companies Act and held that period of limitation cannot be extended beyond prescribed period i.e. 45 days as provided in Section 421 (3) of Companies Act.

19. The issue came up before different High Courts for consideration as to whether appeal filed beyond the period of limitation under sub Section 7 of Section 7 of the Act, 1972, can be entertained and period of limitation can be condoned. In this regard, reference may be made to the judgements of different High Courts.

20. Karnataka High Court in the case of Karnataka **State Road Transport Corporation Vs. Dy. Labour Commissioner and others, 2014 (143) FLR 392** has held as follows:

4. Section 7 of the Act provides for determination of the amount of gratuity. Sub-section (4)(c) of section 7 of the Act states that the Controlling Authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if as a result of such inquiry any amount is found to be payable to the employee, the Controlling Authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

5. Sub-section (7) of section 7 states any person aggrieved by an order under sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government on this behalf. The proviso to this provision authorises the Appropriate Government of the Appellate Authority, as the case may be, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the

said period of sixty days, extend the said period by a further period of sixty days.

6. Rules have been framed under section 15 of the Act to effectuate the purposes of the Act. Sub-rule (4) of Rule 11 states that after completion of hearing on the date fixed under sub-rule (1), or after such further evidence, examination of documents, witnesses, hearing and enquiry, as may be deemed necessary, the Controlling Authority shall record his finding as to whether any amount is payable to the applicant under the Act. A copy of the finding shall be given to each of the parties.

7. From the aforesaid provisions, it is clear that the Controlling Authority after holding an enquiry has to pass order and the copy of the order has to be furnished to the contesting parties. If a party is aggrieved by the said order, he has to prefer an appeal within sixty days from the date of receipt of the order before the competent authority. However, the appellate authority has the power to condone the delay of 60 days if it is satisfied that the petitioner was prevented by sufficient cause in preferring the appeal within a period of 60 days.

8. In the instant case, the contention of the petitioner is that it has filed a review petition before the Controlling authority seeking review of the order at Annexure-D. There is no provision for filing of review petition before the competent authority. Therefore, an endorsement was rightly issued by the competent authority staring that it has no jurisdiction to entertain the review.

9. Admittedly, the appeal was filed beyond the period of 120 days from the date of receipt of the order of the Controlling, Authority. In Hongo India P. Ltd.'s case (supra), the Hon'ble Supreme Court has held that the provision of Limitation Act is not applicable when the special statute provides for the period of limitation. It was further held that section 5 of the Limitation Act has no application having regard to section 29(2) of the Limitation Act.

10. A Division Bench of this Court in Writ Appeal No. 2055/2008 (referred to above) has considered an identical question. It has been held that the Appellate Authority has no power to entertain an appeal beyond a period of 120 days.

21. Gujrat High Court in the case of **State of Gujrat and another Vs Appellate Authority under Payment of Gratuity Act, and others, 2015(147) FLR 564** has held as follows:-

9. In view of the aforesaid statutory provision, the Appellate Authority is not empowered to condone the delay if the appeal is preferred after a period of 120 days. This Court has considered the provisions contained in section 7(7) of the Payment of Gratuity Act. In the case of Bhavnagar Municipal Corporation v. Sunderben Chhanabhai Baraiya, MANU/GJ/1296/2011 : 2011 (131) FLR 870 (Guj.) has considered the provisions contained in sub-section (7) of section 7 of the Payment of Gratuity Act. This Court held that the Appellate Authority had rightly dismissed the appeal which was filed after eleven months, and the Appellate Authority had no power to condone the delay. It was further held that if the extraordinary power conferred to this Court under Article 226 of the Constitution of India is invoked and exercised, in such type of cases, it will be nothing but amounting to miscarriage of justice, and therefore, the petition was dismissed by this Court.

10. Even thereafter, Full Bench of this Court has considered the provision contained in section 35 of the Central Excise Act of 1944. The provision contained in section 35 of the Central Excise Act are pari-materia with the provision contained in section 7(7) of the Payment of Gratuity Act. The Full Bench of this Court in the case of Panoli Intermediate (India) Pvt. Ltd. v. Union of India and others MANU/GJ/0371/2015 : AIR 2015 Guj. 97, has held in paragraph 31 as under:

"31. We may now proceed to answer the question.

(1) Question No. 1 is answered in negative by observing that the limitation provided under section 35 of the Act cannot be condoned in filing the appeal beyond the period of 30 days as provided by the proviso nor the appeal can be filed beyond the period of 90 days.

(2) The second question is answered in negative to the extent that the petition under Article 226 of the Constitution would not lie for the purpose of condonation of delay in filing the appeal.

(3) On the third question, the answer is in affirmative, but with the clarification that-

(A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that:

(A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or

(A.2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or

(A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.

(B) Resultantly, there is a failure of justice or it has resulted into gross injustice.

We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the Judge."

11. In view of the aforesaid Full Bench decision, it is clear that the Appellate Authority is not empowered to condone the delay if the appeal is filed after a period of 120 days from the date of receipt of the order by the aggrieved party. In the present case, it is admitted that the petitioners preferred the appeal after a period of limitation and, therefore, the said appeal was rightly rejected by the Appellate Authority.

12. It is also observed by the Appellate Authority that the petitioners had not deposited the amount as per the order passed by the Controlling Authority and, therefore, the said appeal is not maintainable. Further, proviso of section 7(7) provides that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the Controlling Authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposits with the Appellate Authority such amount. Thus, it is mandatory that the employer has to deposit the amount as per the further proviso of section 7(7) of the Payment of Gratuity Act. If such amount is not deposited, the

appeal is liable to be dismissed which is rightly dismissed by the authority.

22. Hyderabad High Court in the case of **Deepak Transport Agency Pvt. Ltd. Vs. Appellate Authority, Gratuity Act-cum Dy. Commissioner of Labour, 2018 (159) FLR 885** has held as under:-

8. Record discloses that Mr. M. Ashok worked as Assistant Commissioner of Labour-III and in that capacity as Controlling Authority he decided the issue on the original side. By the time appeal was preferred, the same person became Deputy Commissioner of Labour-II and was designated as the Appellate Authority under the Act. Thus, the same officer could not have entertained the appeal, consider and pass orders sitting over his own decision made in the capacity as the original authority. No doubt, a quasi-judicial authority cannot sit and decide the validity of his own decision after he became appellate authority.

9. One of the facets of fair hearing in quasi-judicial proceedings also that same authority who heard original application cannot sit and decide the appeal. Ordinarily, on this aspect order of Appellate Authority is not sustainable and liable to be set aside and matter be remitted to the appellate authority for reconsideration of the issue by the officer other than the officer who decided the original complaint. Whenever, such issue comes up before writ court, writ court would not hesitate to hold such action as illegal and direct fresh consideration of appeal by a different authority. However, in the case on hand matter does not rest there. In this case the petitioner/appellant did not comply with twin conditions to prefer appeal under Section 7(7) of the Act and unless those conditions are fulfilled appeal is not maintainable. As noted above, the appellate authority has not decided the appeal on merits but only highlighted the requirements to prefer appeal and held that appellant has not fulfilled those requirements. This is an incurable defect. Thus, no useful purpose would be served by such remittance. It is a futile exercise. A breach of procedure cannot give rise to remedy unless there is something of substance which is lost by such failure. In the facts of this case it cannot be said that prejudice is caused to petitioner as his appeal suffers from incurable defect.

10. The writ remedy is an equitable remedy. Grant of relief to an aggrieved person is discretionary in the hands of writ Court. Merely because the party makes out a case to grant relief, the Court need not grant the relief prayed if granting of relief prayed is futile.

11. In Sangram Singh Vs. Election Tribunal : MANU/SC/0044/1955 : AIR 1955 SC 423, Supreme Court delineated scope of exercise of power of judicial review under Article 226 of the Constitution of India. Supreme Court held:

"14. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors

of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case."

12. Having regard to the history of litigation briefly noted above and the fact that gratuity payable as determined by the original authority was only Rs. 90,045/- and as appellant failed to comply two mandatory requirements to prefer appeal, therefore suffers from incurable defect, this Court is not inclined to relegate the matter to the appellate authority at this stage on the ground that same authority sat in appeal against his own decision.

23. Madras High Court in the case of **Senior Regional Manager, TN. Civil Supplies Corporation, Vs. Joint Commissioner of Labour and others, 2019 (161) 392** has held as under:

4. The Payment of Gratuity Act, 1972, is a beneficial legislation to protect the interest of employees engaged in factories, mines, oil-fields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. It is a special enactment and a social welfare legislation to prevent unfair labour practice. Always the Courts while interpreting social welfare legislation, a beneficent construction is given on the relevant provisions which furthers the purpose for which such legislation was enacted. It is settled law that the special law overrides the general law when a specific provision is available under the special law and this principle finds its origin in the latin maxim "Generalia Specialibus Non Derogant", which means general law yields to special law, should they operate in the same field on the same subject. In the instant case, section 7(7) of the Act specifically stipulates that an appeal will have to be filed as against an order passed under section 7(4) of the Act within 60 days from the date of receipt of the order. Under the first proviso to section 7(7) of the Act, the appropriate Government or the Appellate Authority, as the case may be, may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of 60 days. Therefore, the maximum period available to challenge an order passed by the Assistant Commissioner of Labour (Gratuity), under section 7(4) of the Act is 120 days from the date of receipt of the order.

5. As per section 14 of the Act, it overrides other enactments. Section 14 of the Act reads as follows:

"14. Act to override other enactments, etc.-The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

6. The applicability of the Limitation Act, 1963, including section 5 of the Limitation Act, is no where mentioned in any of the provisions under the Payment of Gratuity Act, 1972. As seen from section 14 of the Act, the Payment of Gratuity Act is a self-contained code by itself. Therefore, the intention of the legislature to prescribe a

maximum period for filing an appeal is only to protect the interest of the employees as the Act itself is a beneficent legislation protecting the interest of employees and to prevent unfair labour practice.

7. The Andhra Pradesh High Court in a similar matter, while dealing with section 7(7) of the Payment of Gratuity Act, 1972, in its judgment in Deepak Transport Agency Private Limited v. Appellate Authority MANU/HY/0125/2018 : 2018 (5) ALT 631 : 2018 (159) FLR 885, has also held that the delay beyond 120 days for filing an appeal under section 7(7) of the Act is an incurable defect. The relevant paragraph of the said judgment, is reproduced hereunder:

"10. ..... In this case the petitioner/appellant did not comply with twin conditions to prefer appeal under section 7(7) of the Act and unless those conditions are fulfilled appeal is not maintainable. As noted above, the Appellate Authority has not decided the appeal on merits but only highlighted the requirements to prefer appeal and held that appellant has not fulfilled those requirements. This is an incurable defect. Thus, no useful purpose would be served by such remittance. It is a futile exercise. A breach of procedure cannot give rise to remedy unless there is something of substance which is lost by such failure. In the facts of this case, it cannot be said that prejudice is caused to petitioner as his appeal suffers from incurable defect."

8. The Gujarat High Court in the case of State of Gujarat and another v. Appellate Authority under Payment of Gratuity Act MANU/GJ/0748/2015 : 2015 (147) FLR 564 (Guj.), following the Full Bench judgment of the Gujarat High Court MANU/GJ/0371/2015 : AIR 2015 Guj. 97, has held that the Appellate Authority is not empowered to condone the delay, if the appeal is filed after a period of 120 days and the High Court cannot also condone the delay in filing the appeal exercising powers under Article 226 of the Constitution of India. The relevant paragraphs of the said Gujarat High Court judgment are reproduced hereunder:

"19. The Division Bench of this Court referred certain questions to the Full Bench. The Full Bench of this Court considered the said questions and appropriate answers were given to the said questions. The said decision is reported in MANU/GJ/0371/2015 : AIR 2015 Gujarat 97. In paragraph No. 1, of the said decision, three questions were formulated. Paragraph No. 1 of the said decision reads as under:

"1. The Division Bench of this Court has formulated the following questions and has referred the matter to the Larger Bench:

"(1) Whether the period of limitation provided of 60 days, for filing an appeal under section 35 of the Central Excise Act, 1944, could be extended only upto 30 days as provided by the proviso or the delay beyond the period of 90 days could also be condoned in filing an appeal?

(2) Where a statutory remedy or appeal is provided under section 35 of the Central Excise Act, 1944 and the delay cannot be condoned under section 35 beyond the period of 90 days, then whether writ petition under Article 226 of the Constitution of India would lie for the purpose of condoning the delay in filing the appeal?

(3) When if the statutory remedy or appeal under section 35 is barred by the law of limitation whether in a writ petition under Article 226 of the

Constitution of India, the order passed by the original adjudicating authority could be challenged on merits?"

The Hon'ble Full Bench of this Court after considering various provisions of different Acts and various decisions of the Honourable Supreme Court as well as different High Courts answered the said questions in paragraph No. 31, which reads as under:

"31. We may now proceed to answer the question.

(1) Question No. 1 is answered in negative by observing that the limitation provided under section 35 of the Act cannot be condoned in filing the appeal beyond the period of 30 days as provided by the proviso nor the appeal can be filed beyond the period of 90 days.

(2) The second question is answered in negative to the extent that the petition under Article 226 of the Constitution would not lie for the purpose of condonation of delay in filing the appeal.

(3) On the third question, the answer is in affirmative, but with the clarification that:

(A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that:

(A1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or

(A2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or

(A3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.

(B) Resultantly, there is a failure of justice or it has resulted into gross injustice.

We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the Judge."

20. Therefore, it becomes clear that the provisions of section 35 of the Central Excise Act are in pari materia with the provisions contained in subsection (7) of section 7 of the Gratuity Act.

21. Thus, from the latest decision rendered by this Court in the aforesaid case, it is clear that the Appellate Authority is not empowered to condone the delay if the appeal is filed after a period of 120 days in the present case. Even this Court cannot condone the delay in filing the appeal while exercising powers under Article 226 of the Constitution of India."

9. The issue involved in these batch of writ petitions are one and the same and this Court is in agreement with the view taken by the Andhra Pradesh and Gujarat High Courts. For the aforesaid reasons, this Court is of the considered view that the first respondent has rightly dismissed the appeals filed by the appellant under section 7(7) of the Act, on the ground that the appeal was not filed within a period of 120 days from the date of receipt of the order passed under section 7(4) of the Act by the second respondent. In the result, there is no merit in all these writ petitions.

24. Calcutta High Court in the case of **Ali Hossain Vs. Budge Budge Co. Ltd. And others, 2018 (159) FLR 68** has held as follows:

9. It will not be out of context to observe that in the event the period of limitation in initiating of a proceeding expires during the pendency of a writ proceeding there is no scope to initiate a statutory proceeding or to prefer an appeal to condone such delay on the ground of pendency of a lis before the Writ Court.

10. Reference may be made to the decision of City College, Calcutta v. State of W.B. and others MANU/WB/0397/1986 : 1986 (52) FLR 547, and operative portions of the above judgment is quoted below:

"7. In his impugned order of the Appellate Authority has rightly pointed out that in view of the sub-section (7) of section 7 of the Payment of Gratuity Act, 1972, appeals must be filed within 60 days from the date of the receipt of the order by the Controlling Authority. Under proviso to sub-section (7) of section 7 of the said Act the Appellate Authority may extend the said period of 60 days by a further period of 60 days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period of 60 days. In the above view, after expiry of 120 days from the date of the receipt of the order passed by the Controlling Authority there could be no scope for further extending under section 5 of the Limitation Act the period prescribed by the law for preferring an appeal under section 7(7) of the Payment of Gratuity Act against the order passed under sub-section (4) of section of the said Act.

8. For the foregoing reasons, we hold that the Appellate Authority did not commit any jurisdictional error by refusing to condone the delay beyond 120 days in preferring the appeal of the petitioner. The appeal provided under section 7 of the Payment of Gratuity Act, 1972 is not before any Court. The Act has vested an executive authority with juridical quasi-judicial powers in order to enable it to act as the Appellate Authority. In view of the decisions of the Supreme Court mentioned hereinbefore it is no longer open to us to consider whether or not by force of section 29 of the Limitation Act, 1963, the provisions of sections 5 to 25 of the said Act have been made applicable only in case of appeal and applications under any special presented to Courts of law and not to persona designata or administrative authorities.

We therefore dismiss this Revisional Application without any order as to costs."

11. With the discussions and observations made hereinabove, the order impugned to this appeal stands quashed and set aside. Since no other issue is involved in this appeal, this appeal is treated as on day's list with the consent of the parties and the same is also taken up for hearing. This appeal stands allowed together with the above application. There will be, however, no order as to costs.

25. Applying the principles enumerated herein above, the legal position which emerges that in terms of sub-section 7 of Section 7 of the Act, 1972, an appeal is to be filed in a manner within such time as provided i.e. 60 days and in the event there was sufficient cause for not filing the appeal within same period, the said period can be extended by further period of 60 days only.

26. From perusal of the above judgements of Hon'ble the Apex Court and different High Courts as well as provisions of sub-section 7 of Section 7 of the Act, 1972, which specifically provides for filing an appeal within 60 days and further provision has been made for extension of such period only for specific period of time and no further power has been given to extend the period of limitation. In other words an appeal filed beyond the period of 120 days (60 days + 60 days) cannot be condoned.

27. It is well settled principle of the statute that where a specific period has been provided in the statute then further period of limitation cannot be extended beyond what has been provided under the statute. The Act, 1972 is a special Act, which contained the specific period in which an appeal can be preferred. The provisions of the said Act is to be seen as mentioned therein which is a complete code by itself.

28. The purpose and scheme of the Act and provisions contained under the Limitation Act, would therefore, not be applicable for seeking extension of time beyond the statutory time period of 60 days, extensible by further period of 60 days by the competent authority, being satisfied that the aggrieved person was prevented by sufficient cause from preferring the appeal within the prescribed period.

29. The petitioner has taken a stand that against the order dated 6.7.2017, the petitioner on the legal advise preferred a recall application and after rejection of the recall application, the appeal was filed before the appellate authority and then same ought to have been contended, without taking the ground of limitation, is misconceived in terms of the long line of judgements of Hon'ble Apex Court and High Courts referred herein above.

30. Before parting with the judgement a reference may be made of the Supreme Court, which covers the issue on merit also. The Apex Court in the case of **Netram Sahu Vs. State of Chhattisgarh and another, 2018 (157) FLR 477** had an occasion to consider as to whether the workman, who has retired after rendering 22 years of service before attaining the age of superannuation, he was regularized but the benefit of gratuity was denied on the ground that he was not completed 05 years service as regular employee. The Hon'ble Apex Court has categorically held that employee has continuously worked for 22 years then merely his regularization was done later on, not completing 05 years of service as regular employee, would not dis-entitle him for getting the benefit of gratuity.

31. In the present case, admittedly, the appeal has been preferred on 15.11.2018 after the rejection of recall application on 29.11.2017, much beyond the period of 120 days as per sub-section 7 of Section 7 of the Act, 1972. Therefore, no further extension could be provided or contemplated. The appellate authority could not have extended the period of limitation, therefore, the appellate authority was right in coming to the conclusion that the appeal has been filed beyond the period of limitation.

32. The order passed by the appellate authority does not call for any interference of this Court. Hence the present writ petition is **dismissed** by devoid of any merit.

(2020)1ILR 1186

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 38324 of 2019

Akram Khan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Kumar

Counsel for the Respondents:
C.S.C., Sri Ravindra Singh

A. U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1954 and Rules, 1953 - Sections 12, 15 & 22 - Petitioners-individual cane grower-seek attachment of the cane area to another mill-do not have right -to raise a challenge to the reservation or assignment of areas to sugar factories-Cane growers' co-operative society of the area has the right.

Held, that in terms of the provisions for under the Act, 1953 and the Rules, 1954 an elaborate mechanism is provided for reservation and assignment of cane areas to sugar factories in order to regulate the supply and purchase of sugarcane in their area. The factors which are taken into consideration include ascertaining Mills, Rajpura, District Sambhal for the convenience of the sugarcane growers in their village. A further prayer has been made for a direction to decide their representation which is stated to have been submitted before the respondents.

the views of the cane growers'cooperative society of the area. The individual cane growers have therefore no right or locus standi to raise any challenge to reservation or assignment of cane areas in favour of a particular sugar factory and any grievance in this regard is to be espoused only through the cane growers'cooperative society which represents the cane growers of the area. (Para 22)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Satnam Vs. State of U.P. & Ors., Writ C No.2075 of 2014

2.Dharam Veer Singh & Ors. Vs.State of U.P. & Ors.- PIL No.1081of 2013

3.Harveer Singh & Ors. Vs. State of U.P. & 4 Ors, Writ C No.2201 of 2019

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

1. Heard the learned counsel for the petitioners, learned Standing Counsel appearing for the State-respondents and Sri Revindra Singh, learned counsel for the fourth respondent.

2. The petitioners herein asserting themselves to be sugarcane growers who are residents of Village Nawabganj, Tehsil Sahaswan, District Budaun have filed the present writ petition seeking a direction to the respondents to attach the Zarifnagar Cane Purchase Centre to D.S.M. Sugar

3. Learned Standing Counsel appearing for the State-respondents and Sri Ravindra Singh, learned counsel for the fourth respondent have raised a preliminary objection that the writ petition at the behest of the individual cane grower is not maintainable and that any grievance in this regard can be espoused through the

cane growers' co-operative society of the area in question. It is submitted that the writ petition filed by the petitioners claiming themselves to be sugarcane growers of the area is misconceived and is liable to be dismissed.

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

5. The regulation of supply and purchase of sugarcane in the State of U.P. is governed in terms of the provisions contained under the Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 19531 and the rules made thereunder namely the Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Rules, 19542.

6. The aforementioned Act, 1953 and the Rules, 1954 contain detailed and elaborate provisions regarding supply of the sugarcane by the cane growers, its purchase by the sugar factories and payment of price thereof. In terms of the scheme of the Act, 1953, a mechanism is provided for ensuring the required continuous supply of sugarcane to the sugar factories during the crushing season. Keeping in mind the interest of the sugarcane growers, cane growers' co-operative societies, sugar factories and also the *inter se* interest of the sugar factories in the area, the supply of sugarcane to the sugar factories in the quantity which may reasonably be required by them for production in a particular crushing season is regulated by the provisions of the Act, 1953.

7. A duty has been cast upon the Cane Commissioner, under Section 12 of the Act, 1953 to require the occupier of each factory to furnish in the manner and by the date specified in an order to be issued by him an estimate of the quantity of the sugarcane which would be required by a factory during such crushing season or seasons as may be specified in the order. The Cane Commissioner is obliged to examine every such estimate and is enjoined to publish the same with such modifications, if any, as he may make.

8. The publication of the estimate is made for the purpose of making it known to all sugar factories that the estimates prepared by them of the requisite quantity of sugarcane for a particular crushing season or seasons has been accepted by the Cane Commissioner with or without modification. Section 13 of the Act, 1953 enjoins upon the occupier of the factory to maintain a register of all cane growers and cane growers' co-operative society or societies that sell sugarcane to the factory. In terms of Section 14 the State Government may provide for survey of the area which is proposed to be reserved or assigned for supply of sugarcane to a factory, and in terms of Section 15 the Cane Commissioner is empowered to issue an order declaring the reserved and the assigned area for the purposes of supply of sugarcane to a factory.

9. The declaration of the reserved area and assigned area under Section 15 is to be made by the Cane Commissioner after consulting the sugar factory and the cane growers' co-operative societies in the manner so prescribed.

10. The object of the declaration of the reserved area and assigned area is to minimize the conflict in claims of the sugar factories seeking supply of sugarcane which may otherwise have an adverse effect on the sugar factories as well as the cane growers of the area.

11. The guidelines which are required to be followed in reserving an area or assigning an area to a factory and determining the quantity of sugarcane to be purchased from the area by a factory are provided for under Rule 22 of the Rules, 1954.

12. The provision with regard to declaration of reserved and assigned area as contained under Section 15 of the Act, 1953 is reproduced below:-

"15. Declaration of reserved area and assigned area.--(1) Without prejudice to any order made under Clause (d) of sub-section (2) of Section 16 of the Cane Commissioner may, after consulting the Factory and Cane-growers' Co-operative Society in the manner to be prescribed:

(a) reserve any area (hereinafter called the reserved area); and

(b) assign any area (hereinafter called an assigned area),

for the purpose of the supply of cane to a factory in accordance with the provisions of Section 16 during one or more crushing seasons as may be specified and may likewise at any time cancel such order or alter the boundaries of an area so reserved or assigned.

(2) Where an area has been declared as reserved area for a factory, the occupier of such factory shall, if so directed by the Cane Commissioner, purchase all the cane grown in that area, which is offered for sale to the factory.

(3) Where any area has been declared as assigned area for a factory, the occupier of such factory shall purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner.

(4) An appeal shall lie to the State Government against the order of the Cane Commissioner passed under sub-section (1)."

13. The guidelines for the aforesaid purpose for reserving an area or assigning an area as provided under Rule 22 of the Rules, 1954, are being extracted below:-

"22. In reserving an area for or assigning an area to a factory or determining the quantity of cane to be purchased from an area by a factory, under Section 15, the Cane Commissioner may take into consideration--

(a) the distance of the area from the factory,

(b) facilities for transport of cane from the area,

(c) the quantity of cane supplied from the area to the factory in previous year,

(d) previous reservation and assignment orders,

(e) the quantity of cane to be crushed in factory,

(f) the arrangements made by the factory in previous years for payment of cess, cane price and commission,

(g) the views of the Cane-growers' Co-operative Society of the area,

(h) efforts made by the factory in developing the reserved or assigned area,

(i) efforts made by the factory to provide information to the farmers pertaining to survey, supply tickets, weighment, payment etc. through the use of website, Short Messaging Service (SMS), Interactive Voice Response System (IVRS), Hand Held Computer (HHC), Global Positioning System (GPS), electronic weigh-bridge etc."

14. The order passed under Section 15 containing declaration of reserved area and assigned area in respect of a sugar factory is appealable before the State Government in terms of sub-section (4) of Section 15 of the Act, 1953.

15. In the aforesaid manner it is seen that as per the terms of the scheme provided for under the Act, 1953 and the Rules, 1954 an elaborate mechanism has been provided to regulate the supply and purchase of sugarcane to sugar factories so as to secure the interest of the sugar factories, the sugarcane growers and also the cane co-operative societies of area. The provision for declaration of reserved area and assigned area by the Cane Commissioner after consulting the sugar factories, has also been made for the aforesaid purpose of regulating the supply and purchase of sugarcane, minimizing the conflict in claims of the sugar factories in the area and also for securing the interests of the cane growers and the cane growers' co-operative societies.

16. The guidelines provided under the Rule 22 of the Rules, 1954 provide for consideration of all the relevant factors before making a declaration of the reserved area and assigned area of a particular sugar factory. The factors which are required to be considered also include ascertaining the views of cane growers' co-operative society of the area which in turn represents the cane growers of the area.

17. The petitioners herein claiming themselves to be cane growers of the area are seeking a direction for attachment of their cane purchase centre to D.S.M. Sugar Mills in place of another sugar mill namely Yadu Sugar Mill, Bisauli to which their cane purchase centre has been attached for the ongoing crushing season. In effect the petitioners have sought to raise a grievance against the orders declaring the reserved area and the assigned area of the two sugar mills in question.

18. In view of the foregoing discussion and taking into consideration the scheme for regulating the supply and purchase of sugarcane as per the provisions contained under the Act, 1953 and the Rules, 1954, it follows that an individual cane grower would not have the right to raise a challenge to the reservation or assignment of areas to sugar factories and the grievance, if any, in this regard would have to be espoused through the cane growers' co-operative society of the area in question.

19. In this regard we may refer to a judgment of this Court in **Satnam Vs. State of U.P. & Ors.** wherein a similar challenge sought to be raised by an individual cane grower in respect of reservation of cane areas was repelled and it was held as follows:-

"We are of the view that the petitioner even if he is representing some more farmers at village Undra does not have a right to maintain the writ petition as the Cane Commissioner or the State Government is not obliged to issue notice to all the farmers to ascertain their views. In order to pass orders for establishing Cane Centres, the Cane Commissioner is to consider the interest of majority of cane growers of the concerned Cane Cooperative Societies, and it is the Cane Cooperative Society, which may be treated to be aggrieved as it is representing all the sugarcane growers attached to the purchase centers set up by such society, to

espouse the cause of its member cane growers before the Cane Commissioner, State Government or in the High Court."

20. Taking a similar view this Court in its judgment passed in the case in **Dharam Veer Singh & Ors. Vs. State of U.P. & Ors.** held that under Rule 22 of the Rules, 1954, the Cane Commissioner while passing an order of reservation of cane area is required to ascertain the view of the cane growers' co-operative society of the area and there is no requirement to issue notice to individual farmers or to ascertain their views. The observations made in the judgment are as follows:-

"We find no merit in this claim because under the relevant Rule-22 of the U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954, the Cane Commissioner while passing the initial order for reservation of cane area is required to ascertain the views of the Cane Growers Cooperative Society of the area. There is no requirement even at that stage to issue notice to individual farmers or ascertain their views. Hence there can be no such responsibility or liability upon the State Government while hearing the appeal under Section 15(4) of the Act to issue notice to individual farmers like the petitioners."

21. In a recent judgment of this Court in **Harveer Singh & Ors. Vs. State of U.P. & 4 Ors.** the aforementioned legal position has again been reiterated and it has been held that writ petition at the behest of an individual cane growers seeking to raise grievances with regard to reservation or assignment of cane areas is not maintainable and that their cause can be espoused only by the cane growers' co-operative society.

22. Having regard to the aforementioned facts and circumstances the position which emerges is that in terms of the provisions for under the Act, 1953 and the Rules, 1954 an elaborate mechanism is provided for reservation and assignment of cane areas to sugar factories in order to regulate the supply and purchase of sugarcane in their area. The factors which are taken into consideration include ascertaining the views of the cane growers' co-operative society of the area. The individual cane growers have therefore no right or locus standi to raise any challenge to reservation or assignment of cane areas in favour of a particular sugar factory and any grievance in this regard is to be espoused only through the cane growers' co-operative society which represents the cane growers of the area.

23. We are therefore not inclined to entertain the present writ petition which has been filed by the petitioners claiming to be sugarcane growers of the area in their individual capacities.

24. The writ petition is accordingly dismissed.

(2020)1ILR 1191

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Writ C No. 39769 of 2018
With
Writ C No. 40129 of 2018

M/s Amrit Bazar Patrika Pvt. Ltd., Allahabad ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Amit Kumar Upadhyay, Sri Aditya Bhushan, Sri Anurag Khanna

Counsel for the Respondents:

Sri Ajit Kumar Singh (Addl. A.G.), Sri Devi Prasad Mishra, Sri Suresh C. Dwivedi, Sri Amit Verma, Sri Nimai Das & Sri Sudhanshu Srivastava (Addl. C.S.C.), Sri M.D. Singh 'Shekhar'

A. Nazul - defined - historic evolution - Article 296 of the Indian Constitution - power of State Government or Union of India to get ownership of land which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

The 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. (Para 40)

B. Government Grants Act, 1985 - Section 2 and 3 - any grant or transfer of land or of any interest, as the case may be, excludes applicability of Transfer of Property Act, 1882, for all purposes - therefore, 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise - Grant includes 'lease'.

After the U.P. Amendment Act, 1960, Section 2 and 3 got amalgamated in Section 2 of Government Grants (U.P. Amendment) Act, 1960. The intent, effect and declaration by legislature is almost *pari materia* with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of Transfer of Property Act, 1882. (Para 54)

Even though petitioner is an 'unauthorized occupant' but the provisions of U.P. Act, 1972 shall not be applicable based on the aforementioned reason.

The terms and conditions of the Indenture of Lease/Grant shows that the transfer of lease was clearly prohibited unless permission of Government i.e., the lessor or its Authorized agent i.e., Collector has been obtained. Therefore, the transfer and possession of land by M/s Amrit Bazar Patrika Pvt. Ltd. to M/s Allahabad Patrika Pvt. Ltd was wholly illegal as per the terms of the Grant as nothing is on record to suffice that the permission was obtained. (Para 76)

C. Limitation on Sub-Granting - any otherwise transfer by Sub-Grantor, of land subjected to Grant, will not confer any valid right or interest upon the person to whom Sub-Grantee had transferred property under 'Grant' in violation of stipulations contained in Grant.

It is a general principle of property laws, that a person can transfer only such rights and interest which he or she possesses and not beyond that. Therefore in light of the above principle, the Court observed that the transfer of any part of disputed land to petitioner-1 of WP2 founded on agreement dated 23.06.1995 executed between Directors of Allahabad Patrika Pvt. Ltd. and petitioner-1 of WP-2 is also of no consequence and legal sanction since none of the parties to the said agreement had any right or interest in law, over land in dispute. Lease having expired on 14.03.1962, all lease rights possessed by erstwhile Lessee came to an end, and thereafter when Lessee itself did not have any legal right or interest over property in dispute, others or so called transferees also cannot claim anything more than that. Further, any such invalid transfer can be construed as breach of terms of Grant and would empower the principal Grantor i.e., the State, owner of the property, to take steps including resumption/re-entry to the property under Grant, to itself, besides claiming

damages, compensation, as the case may be, as law permits (Para 77, 78 & 79).

D. Doctrine of election - it is based on rule of estoppel - no party can accept and reject the same instrument.

The condition of resumption of land is part of contract between the parties and having accepted the same and contract has been carried out and completed its term, it order to wriggle out the rights, obligations and liabilities incurred and acquired thereunder, one of the parties cannot wriggle out by contending that one of the conditions of such agreement is bad. (Para 112)

E. Possession - its concept - kinds of possession - possession is not restricted to physical control - the nature of article and its attitudes and activities of other person determines whether a person is in possession of an article or not.

F. Transfer of Property Act, 1882 - Section 106 - once the lease stood determined by efflux of time(stand expired), there is no necessity to issue quit notice - status of lessee is that of 'tenant at sufferance' i.e., one who wrongfully continues in possession after extinction of lawful title - section 116 is not applicable.

G. Resumption of land - State is empowered to resume/re-enter Nazul land at any time, more so for public purpose.

Editor's note

Concisely, the disputed plot of land is a Nazul land, which during the Colonial times was leased out by the Crown to one William Rome for residential purposes. The lease of the disputed land was eventually sold to the petitioner of Writ petition-1 who obtained the permission to carry on business activities and registered its name in the Nazul Register. Meanwhile, the petitioner sub leased the land to its associate company and the closed its business unit in that premises. But it continued to be the lessee as per the Nazul Register. It is noteworthy that the lease was executed for 50 years i.e., valid till 14.03.1962 therefore the petitioner sought renewal which was rejected for flouting the terms and conditions of the lease deed. Aggrieved by the said rejection the instant writ petitions were filed.

The allocation of Nazul land by English Rulers used to be called "Grant". These lands were leased out at the whims of the Rulers either with or without any stipulations to those who were faithful to the foreign regime. Despite the enactment of Transfer of Property Act, 1882 for the regulation of immovable properties, the Rulers enacted Government Grants Act, 1895 (hereinafter referred as "Act of 1895") so as to exercise unfettered power to resume/forfeit the transferred property. Section 2 and 3 of the Act of 1895 declares that any grant or transfer of land or creation of any interest made by or in behalf of the Government, in favour of any person, on and after the enactment of Act of 1895 would not be governed by Transfer of Property Act of 1882. By way of U.P. Amendment Act, 1960, the State of U.P. in addition to the Act of 1882 (hereinafter referred as "Act of 1882"), excluded U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 in the same manner. This implies that the Grant of Nazul land will be governed by the terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute whatsoever. Grant includes lease therefore the terms and conditions agreed by the parties in the lease deed will be binding on them, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary.

In other words, notwithstanding any Statute, the terms and conditions of the lease deed will govern the relationship between the parties. The parties had explicitly agreed not to transfer the leased property without prior permission of the Lessor (State) or its authorized agent (Collector). However, Krishna Chandra Mukherjee, to whom the disputed land was leased out by Anandi Prasad Dube, had sold the leased disputed Nazul land via sale deed to the petitioner. Neither Anandi Prasad Dube nor Krishna Chandra Mukherjee was the owner of the property and thus have no right over the said disputed land. The sale of the leased disputed land was without any authority therefore no right, title or ownership could be

transferred to the transferee i.e., the petitioner. In property laws, it is said that a person can transfer only such rights and interest which he or she possesses and not beyond that. Since parties has to abide by the terms and conditions of the lease deed, therefore, at best the transferor could have transferred only lease rights which he himself possessed. Moreover, further transfer of any part of disputed land to petitioner-1 of W.P.-2 by the Directors of M/s Allahabad Patrika Pvt. Ltd. also does not find legal sanction as none of the parties had any right or interest in law over that disputed land. Transfer of land against the terms and conditions of the deed or beyond the right over the property makes such a transfer invalid and unenforceable in the eyes of law. The lease of the disputed Nazul land expired on 14.03.1962 with which all the lease rights possessed by erstwhile Lessee came to an end so the Lessee itself did not have any legal right or interest left over the disputed land.

Besides this, the Hon'ble Court has also observed that the petitioner has not obtained any permission from the Lessor i.e., the State to transfer the disputed land to the M/s Allahabad Patrika Pvt. Ltd (even though it was contented to be an associate company of the petitioner but the court has considered this transfer to be from one legal person to another as it is a separate legal entity). Therefore, the transfer by petitioner-1 of WP-1 is patently illegal and confers no right upon transferee, i.e., M/s Allahabad Patrika Pvt. Ltd. As far as petitioners of W.P.-2 are concerned, they are deriving their claim from M/s Allahabad Patrika Pvt. Ltd., they also have no right over the disputed land. Since the petitioners have lost their right over the disputed land, either on account of the violation of terms of the Grant or on transferring beyond their legal right, therefore question of renewal of the Grant does not arise at all.

The Grant deed empowers the Grantor i.e., the State (owner of the property) to take steps for resumption/re-entry to the property after cessation, determination or expiry of lease or on violation of the terms and conditions of the deed. In addition to the resumption, the State can also claim damages or compensation, as law permits. Further, the Court did not find any arbitrariness in the resumption clause as the State being the owner of the land can claim it back for public purpose. Also, resumption clause is part of the contract between the parties and having accepted the same and carried out the contract, the parties are restrained from questioning it. Section 35 of the Act of 1882 incorporates the doctrine of election which is based on the rule of estoppel. It postulates that where a party have accepted a contract as a whole and agreed to the terms and conditions, then subsequently it is not open for either of the parties to retain some or leave another. No party can accept and reject the same instrument. A party cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the condition that it is valid and then turn around and say that it is void for the purpose of securing some other advantage.

After consider the various jurisprudential aspects of possession, the Court held that the petitioner can be said to be in juridical possession of the disputed land, though admittedly unlawful and illegal. When the person is in possession, may not be legal, the recovery of possession by owner must be legal. After validating the resumption clause, the Court further observed that even if the petitioners are rank trespassor and in possession of land in dispute, the use of force for evicting them would not justified and without sanction of law.

Precisely, after the expiry of lease on 14.03.1962, the State (Lessor) is the actual owner of the disputed Nazul land. The status of lessee is of 'Tenant at Sufferance'; who entered into possession of a land validly in terms of lease deed but with the efflux of time or in other words, after expiry or determination of lease continue to hold the property. The status of the petitioner is even worst to that of the lessee. The petitioner-1 W.P.1 has no actual possession over land in dispute while possession of other petitioner is illegal. The right of re-entry exercised by the State is in terms of the lease-deed where under even the original lessee is obliged to surrender over possession to State.

Writ Petitions rejected. (E-10)

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4. Collector of Masulipatam vs. C. Vencata Narainapah 8 MIA 500, 525

5. Ranee Sonet Kowar Vs. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101

6. Bombay Dyeing and Manufacturing Co. Ltd. Vs State of Bombay [1958] SCR 1122,1146

7. Superintendent and Legal Remembrancer vs. Corporation of Calcutta [1967] 2 SCR 170, 204

8. Cook Vs. Sprigg (1899) AC 572

9. Raja Rajinder Chand Vs. Mst Sukhi, AIR 1957 SC 286

10. Nayak Vajesingji Joravarsingji Vs. Secretary of State for India in Council AIR 1924 PC 216

11. Dalmia Dadri Cement Co. Ltd. Vs. CIT [1958] 34 ITR 514 (SC): AIR 1958 SC 816

12. Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288

13. Amarsarjit Singh Vs. State of Punjab AIR 1962 1305

14. Thakur Amar Singhji Vs. State of Rajasthan AIR 1955 SC 504

15. State of Rajasthan Vs. Sajjanlal Panjawat AIR 1975 SC 706

16. Director of Endowments, Govt. of Hyderabad Vs. Akram Ali AIR 1956 SC 60

17. Sarwarlal Vs. State of Hyderabad AIR 1960 SC 862

18. Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364

19. State of U.P. Vs. Zahoor Ahmad 1973 (2) SCC 547 *(followed)*

20. Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. Vs. Government of Tamil Nadu (1997) 3 SCC 466

21. Azim Ahmad Kazmi and ors Vs. State of U.P. and ors (2012) 7 SCC 278

22. State of U.P. and ors Vs. United Bank of India and ors. (2016) 2 SCC 757 *(followed)*

23. Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and ors (2011) 5 SCC 270

24. Shakira Khatoon Kazmi vs. State of U.P. AIR 2002 All 101

25. Sayeed Shah Khursheed Ahmad Kashmi Vs. State of U.P. Writ Petition No. 44517 of 1998

26. Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406*(followed)*

27. Purshottam Das Tandon and ors Vs. State of U.P. and ors AIR 1987 All 56 *(distinguished)*

28. Mt. Bilas Kunwar Vs. Desraj Ranjit and ors AIR 1915 P.C. 96

29. Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and ors Vs. Director General of Civil Aviation and ors (2001) 5 SCC 435

30. Babu Ram alias Durga Prasad Vs. Indra Pal Singh 1998(6) SCC 358

31. P.R. Deshpande Vs. Maruti Balram Haibatti 1998(6) SCC 507

32. Mumbai International Airport Private Limited Vs. Golden Chariot Airport and anr 2010 (10) SCC 422

33. Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International Company Limited) (2011) 10 SCC 420

34. Nagubai Ammal Vs. B. Shama Rao AIR 1956 SC 593

35. CIT Vs. MR.P. Firm Muar AIR 1965 SC 1216

36. NTPC Ltd. v. Reshmi constructions Builders & Contractors (2004) 2 SCC 663

37. Ramesh Chandra Sankla v. Vikram Cement (2008)14 SCC 58

38. Pradeep Oil Corpn. v. MCD (2011) 5 SCC 270

39. V. Chandrasekaran and another v. Administrative Officer and others, (2012) 12 SCC 133

40. Rajasthan State Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another (2013) 5 SCC 470

41. State of Punjab and others v. Dhanjit Singh Sandhu (2014) 15 SCC 144

42. Maharashtra SRTC v. Balwant Regular Motor Service AIR 1969 SC 329

43. R.N. Gosain v. Yashpal Dhir (1992) 4 SCC 683

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45. Bansraj Lalta Prasad Mishra v. Stanley Parker Jones, (2006) 3 SCC 91

46. Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570 *(followed)*

47. Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

48. Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 *(distinguished)*

49. Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others AIR 1968 SC 620*(distinguished)*

50. Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278 *(followed)*

51. Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543 *(followed)*

52. R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698 *(followed)*

53. Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664*(followed)*

54. Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228

55. Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58

56. Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218

57. Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415 *(distinguished)*

58. Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133

59. State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685

60. Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782 *(distinguished)*

61. Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211

62. Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746

63. Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879

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

1. Both these writ petitions relate to Nazul Land i.e. Plot No.120-1/2 Civil Station, Allahabad. Total area of aforesaid plot is 12219.60 Sq.Meters and in both the matters, petitioners are claiming their rights over half of said plot. Since they relate to same plot, therefore, have been heard together and are being decided by this common judgment.

2. Writ Petition No. 39769 of 2018 *(hereinafter referred to as "WP-1")* has been filed by M/s Amrit Bazar Patrika Pvt. Ltd. Allahabad having its registered office at 9, India Exchange Place, 7th Floor, Room No.1A, Kolkata through its authorized Secretary, Ranen Chaterjee (General Manager). State of Uttar Pradesh through Principal Secretary, Housing and Urban Planning Development; District Magistrate, Allahabad and Additional District Magistrate, Finance & Revenue (Nazul) are impleaded as respondents 1, 2 and 3; Allahabad Development Authority (Now Prayagraj Development Authority) *(hereinafter referred to as "PDA")* is respondent no.4 and Nagar Nigam Allahabad (Now Nagar Nigam, Prayagraj), through Nagar Ayukt *(hereinafter referred to as "NNP")* is impleaded as respondent-5.

3. Petitioner in WP-1 has prayed for issue of a writ of certiorari for quashing notice dated 18.08.2018 (Annexure 1 to writ petition) passed by District Magistrate, Allahabad (respondent-2) informing petitioner and others that land in dispute has been resumed by State Government and therefore, the same be vacated within 15 days. Petitioners have also prayed for issue of a writ of certiorari for quashing letter/order dated 13.11.2018 issued in respect of land in dispute. A writ petition No.36210 of 2018 was filed by Lal Ji Pandey and others and the same was dismissed by this Court vide judgment dated 31.10.2018, therefore, PDA, NNA and respondent-3 were directed by respondent-2, vide letter dated 13.11.2018, to ensure take over possession of land in dispute and hand over to respondent-5.

4. Facts in brief in respect of WP-1 are that a registered lease deed dated 01.3.1862 was executed by Commissioner of Allahabad Division in favour of "William Rowe" on yearly rent of Rs.30/- for the purpose of building a dwelling house. Term of lease was 50 years with the condition that lessee, if desirous of taking a new lease, should at lease six calendar months before expiration, signify his intention or desire of a new lease by a notice in writing to Secretary to the Government of North Western Provinces, or to such person as shall be appointed in that behalf by Government. The disputed land bear plot no.120 -1/2, had an area of 3 acres 45 sq.yards. A new lease deed subsequently was executed on 12.5.1915 in respect of disputed land i.e. Plot No.120-1/2, area 3 acres 45 Sq. Yards by Collector, Allahabad District on behalf of Secretary of State in favour of Anandi Prasad Dube, son of Bal Mukund, resident of 10, Edmonstone Road, Allahabad, for a period of 50 years, commencing from 15.3.1912, on yearly rent of Rs.40/-. Broadly, stipulations/terms of lease, relevant for our purpose are as under :

"(i) that he will during the term hereby granted pay unto the Secretary of State the yearly rent hereby reserved on the days and in manner herein before appointed

(ii) AND ALSO will from time to time and at all times during the said term pay and discharge all rates, taxes, charges and assessment of every description which are now or may at any time hereafter during said term be assessed charged or imposed upon the said premise hereby demised or the building erected thereupon or the landlord or tenant in respect thereof

(iii) AND ALSO will not ***without the previous consent*** *in writing of the said Collector* ***erect or setup or suffer to be erected or setup on any part of the said***

premises *hereby demised any messuage or building other than and except the messuage and building already erected and delincated upon the map here to annexed.*

(iv) AND THAT if ***breach of the said proceeding covenant*** *any messuage or building is erected or setup or suffered to be erected or setup without such permission as aforesaid* ***it shall be lawful for the Collector or for any person or persons duly deputed by him to cause such messuage or building to be pulled down after the expiration of fourteen days of his giving or causing to be given notice to the said lessee his Executors,*** *Administrators and Assigns, to remove the same which notice may be given either verbally or in writing upon the said premises. AND will not* ***without the previous consent in writing of the said Collector make any alteration in the plan or elevation of the said dwelling house and out*** *building or carry or permit to be carried on the said premises any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of a dwelling house*

(v) AND ALSO ***will not without the previous consent in writing of the said Collector grow any crops or keep any horse, cattle or other animals for hire or profit allow*** *the same to be done in or upon the said demised premises but shall use the same for the purposes of a garden or pleasure grounds attached to the said dwelling house*

(vi) AND ALSO ***upon the breach of any of the aforesaid covenant*** *the said lessee has Executors, Administrator or Assigns shall and* ***will on demand pay or cause to be paid to the Secretary of State the sum of Rs. 500 by way of liquidated damages*** *and not penalty and that on* ***a second breach of the same it shall be lawful for the said Secretary of State his Successors or Assigns into and upon the same demised premises or any part thereof in the name of the Whole to re-enter and the same to have again repossess and enjoy as in their former estate anything herein contained to the contrary notwithstanding.***

(vii) AND ALSO that the said lessee his Executors, Administrators and Assigns ***will not without the permission in writing of the said Collector*** *or of some person authorized by him in that behalf* ***construct, thatch or cover or cause or permit to be instructed thatched or covered, with grass reeds or other*** *inflammable materials any building which shall or may be erected or constructed upon the said piece or parcel of land or ground, unless such thatch or roof or inflammable material shall be protected by a covering of titles. And that i****f in breach of the said lastly preceding covenant any building which shall or may be erected or constructed upon the said piece or parcel of land or ground be thatched or covered with grass reeds or other inflammable materials without such permission as aforesaid*** *and aforesaid and without being protected by a covering of tiles, it shall be lawful for the said Collector or for any person duly deputed by him to cause such building, shed, roof, covering or other inflammable material to be pulled down after the expiration of twelve hours from the time of his giving or causing to be given notice to the said lessee his Executors, Administrators or Assigns to remove the same, which notice may be given either verbally or in writing upon the said premises*

(viii) AND ALSO shall and ***will at the end, expiration or other sooner determination of the said term peaceably and quietly leave surrender and yield up***

to the said Secretary of State his Successor or Assign the said piece or parcel of land or ground together with all such of the said erection or building and all fixtures and things which at any time and during the said term shall be affixed or setup within or upon the said *demised premises as the said Secretary of State, his Successor and Assigns shall desire to takeover at a valuation according to the option hereinafter reserved to them, subject however to the conditions hereinafter contained,*

(ix) PROVIDED ALWAYS and it is hereby understand and agreed, that ***in case the said Secretary of State shall not at the expiration of the said term desire to take over the said buildings, erection or fixtures or thing which shall have been at any time during the said term granted under the lease dated 1st day of March 1862 or during the said term hereby granted affixed to or set up within*** *or upon the said premises* ***it shall be lawful for the said lessee his Executors,*** *Administrators or Assigns to* ***remove and take away the same as and for his and their absolute property,*** *but in case the said Collector shall at the expiration of the said term hereby granted give notice to the said lessee his Executors, Administrators or Assigns of his intention to take over the buildings,erections, fixtures or things which shall have been at any time during the said term granted under the lease dated 1st day of March 1862 or during the said term hereby granted set up within or upon the said premises or any part thereof, it shall be lawful for the said Secretary of State, his Successors and Assigns to take over the said buildings, erection, fixtures and things or any part thereof with the land, and in that case the said Secretary of State, his Successor and Assigns shall pay unto the said lessee his Executors, Administrators or Assigns the value of such buildings, erections, fixtures or other things or of such part thereof as they shall so take over as aforesaid, such value to be ascertained in case the parties themselves cannot agree, by the arbitration of two arbitration, the one to be named by the Secretary of State, his Successor and Assigns, and the other by said Lessee his Executor, Administrators or Assigns and in case they shall differ by an umpire to be appointed by the said two arbitrators, or in case either of the parties hereto shall neglect to appoint an arbitrator for more than one fortnight after notice has been served upon them or him by the other party to appoint such arbitrator, then by the sole arbitration of the arbitrator appoint by such other of the parties hereto which arbitration shall be final.*

(x) Provided ALWAYS and it is hereby declared and agreed that no compensation or payment shall be claimable by the said Lessee his Executors, Administrators or Assigns for any buildings, erections or fixtures erected, affixed, or placed by him them or any of them in or upon the said premises or any part thereof. ***In case these presents shall be determined by re-entry for forfeiture in which case the buildings, erections and fixtures shall rest absolutely in the said Security of State his Successors and Assigns as his own property without any compensation or payment in respect thereof***

(xi) PROVIDED FUTURES as it is hereby agreed that the ***said Lessee*** *his Executors, Administrators or Assigns or underlet of otherwise* ***part with the possession of the said premises or any part thereof without the permission of the said secretary of State his Successors or Assign*** *(which permission* ***may be***

signified by the said Collector or by such other person as the Government of the North Western Provinces or the said Secretary of State may appoint in that behalf) for that express purpose had any obtained

(xii) PROVIDED ALWAYS that if the ***said Lessee*** *his Executors, Administrators or Assigns* ***shall Assign or transfer these presents, or the lease or term hereby granted or created, or the unexpired portion of the said term,*** *or shall underlet the said premises or any part thereof with such permission as aforesaid* ***unto any other person or persons of whom the said Collector shall approve, and if such person or persons shall engage and bind themselves to observe all the conditions, agreements and provisions of these presents in respect of such*** *portion of the said term or of the said premises as shall* ***have been so assigned*** *or underlet to him as aforesaid and* ***shall procure such assignments or sublease to be registered in such manner as shall be appointed by the said Secretary of State for purpose of registering lease and other instruments of or relating to lands situate within the local limits of Allahabad*** *(and for the registry of which assignments or sublesses a fee of not more than Rs. 16 shall be paid by the person of persons tendering such assignment or sublease for registry) then and* ***otherwise the liability of the said lessee his Heirs, Executors, Administrators, for the purpose or subsequent observance and performance of the covenants on the leases part herein contained, so far as relates to the portion of the said term or of the said premises so assigned or underlet as aforesaid, but not further or otherwise, shall cause and determine, but without*** *prejudice however to the* ***right of section of the Secretary of State his Successors or Assigns in respect or on account of any previous breach of any covenant or covenants herein contained,***

(xiii) PROVIDED ALWAYS and it is hereby desired that if the said yearly rents hereby reserved or any part thereof shall at any time be in arrears and ***unpaid for the space of 21 days*** *next after any of the said days whereon the same shall have become due whether the same shall have been lawfully demanded or not or if their shall be any breach or non observance by the lessee of any of the covenants hereinbefore contained on his part to be observed and performed then and in any such case* ***it shall be lawful for the Secretary of State notwithstanding the waiver of any previous cause or right of the re-entry to enter into and upon the said demised premises and the Willam Rome and out building erected as aforesaid or any part thereof in the name of the whole and thereupon the same shall remain to the use of and be vested in the Secretary of State and this demise shall absolutely determine out which entry if made shall not prejudice the right of the said Secretary of state his Successors or Assigns to damage*** *for the previous breach of any covenant on the part of the said Lessee his Executors, Administrators, or Assigns herein contained.*

(xiv) AND the said Secretary of State doth hereby for himself his Successors and Assigns covenant with the said lessee his Executors, Administrators and Assigns that the said lessee his Executors, Administrators and Assigns paying the rent hereinbefore reserved at the times and in manner hereinbefore appointed, and observing and performing all and singular the covenants, conditions

and agreements herein contained, and on and their parts to be observed and performed according to the true intent and meaning of these presents, shall and may peaceably and quietly hold, use occupy, possess and enjoy the said piece and parcel of land and ground and premises hereby demised during the said term of fifty years hereby granted without any let, suit, denial, eviction or disturbance of or by the said Secretary of State his Successors or Assigns, or of or by any person or persons claiming or to claim through or under them."

5. Lessee transferred disputed land to Krishna Chandra Mukarjee and subsequently, vide registered sale deed dated 23.03.1945 disputed land was transferred to petitioner of WP-1, M/s Amrit Bazar Patrika Pvt. Ltd.. Vide letter dated 02.5.1951, Collector, Allahabad permitted use of disputed land for press/business purpose. In terms of lease deed, lease expired on 28.2.1962. After 18 years, petitioner applied for renewal of lease vide application dated 14.10.1980. On the ground that petitioner has violated terms and conditions of lease in a major way, a show cause notice was issued to petitioner on 14.5.1999 which was replied on 28.5.1999. Thereafter Collector Allahabad, vide order dated 09.05.2005, rejected application for renewal of lease and resumed disputed land in favour of Government. Order dated 09.5.2005 was challenged in Writ Petition No. 44629 of 2005 wherein an interim order was passed on 07.6.2005 staying aforesaid order of Collector/ District Magistrate, Allahabad. Thereafter Collector, Allahabad has passed order dated 18.08.2018 resuming/ reentering upon disputed land for "public purpose" i.e., for development of "Sports Field".

6. Lease deed dated 12.5.1915 was to be construed as per the provisions of Government Grants Act, 1895 *(hereinafter referred to as "GG Act, 1895").* Petitioner of W.P.-1 claimed that it did not have any clause permitting resumption of land for public purpose by lessor. Moreover, GG Act, 1895 was repealed by Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal Act, 2017")* notified on 05.01.2018.

7. Order dated 18.8.2018 has been challenged on the ground that there is no provision for re-entry/resumption in lease deed hence question of resumption does not arise, particularly when GG Act, 1895 has been repealed; State Government cannot forcibly evict a person from immovable property which is leased out to him, without following due procedure of law and reliance is placed on a Constitution Bench Judgment in **Express Newspaper Pvt. Ltd. and others vs. Union of India and others, (1986) 1 SCC 133;** Judgment and provisions relied by District Magistrate/ Collector, Allahabad in the impugned order are in respect of different land, which are not applicable to the land in dispute; Petitioner sent a letter dated 30.8.2018 after receiving resumption notice dated 18.8.2018 but no decision has been taken thereon; Impugned notice has been given after approval of resumption granted vide order dated 16.8.2018 by State Government which is in utter violation of Principles of Natural Justice i.e. without giving opportunity to petitioner; Writ petition filed by Lalji Pandey and five others i.e. Writ Petition No. 36210 of 2018, dismissed on 31.10.2018, would not affect rights of petitioner, inasmuch as, they were employees of Northern India Patrika Press,

residing in the premises of petitioner i.e. disputed land and writ petition was dismissed on the ground that they could not establish any legal right in respect of land in dispute; Impugned notice has been issued to frustrate interim order passed by this Court in Writ Petition No. 44629 of 2005 and, therefore, is a gross abuse of process of law; impugned order has been passed without application of mind and on incorrect facts; the property in dispute is said to be required for public purpose i.e. to develop as a play ground; the area of land is only 3 acres and 45 sq. yards i.e. 12219 sq. meters, which is a very small area for developing as "Playground"; there already exists a big garden namely 'Alfred Park' within a radius of 300 meter, which is a huge vacant area for development as 'Playground' and there also exists a Cricket Stadium, which can be used for the said purpose; the grounds taken in the impugned notice with regard to alleged violation of condition of lease are same on which earlier order dated 09.5.2005 was passed and which is subject matter of challenge in Writ Petition No. 44629 of 2005, wherein an interim order has been passed but the same has been ignored while passing the impugned order; after repeal of GG Act, 1895, power of resumption under terms of lease, if any, read with provisions of GG Act, 1895 cannot be exercised by Government; Resumption clause, if any, is violative of Article 14 of Constitution of India; there are various other leases, period whereof has already expired but respondents have not chosen to resume such land and, therefore, notice in question is illegal having been passed by adopting pick and choose policy; when an objection is raised that land required for 'public purpose' is not suitable for particular purpose and no suitable areas are available, Executive Authorities are under an obligation to examine this aspect and thereafter take decision by a reasoned order; State may not execute freehold sale deed/ lease deed in respect of Nazul land under GG Act, 1895 but can execute freehold sale deed/ lease deed in respect of Nazul land under Article 299 of Constitution of India read with Transfer of Property Act, 1882 *(hereinafter referred to as "Act, 1882")* and Indian Contract Act, 1872 *(hereinafter referred to as "Act, 1872")*; petitioner has invested a huge amount in raising constructions etc. and cannot be deprived of benefit thereof by such illegal resumption; respondents cannot, merely by giving notice, forcibly re-enter the property in dispute and throw out petitioner from possession of land in dispute forcibly; and notice has been issued in a hurried manner without any force of law, hence, liable to be set aside.

8. On behalf of respondents 2 and 3, a counter affidavit has been filed which is sworn by Sri Gore Lal Shukla, Additional District Magistrate (Nazul), Allahabad wherein basic facts of execution of lease deed in respect of land in dispute initially on 01.3.1862 and thereafter on 12.5.1915 with effect from 15.3.1912 are not in dispute. It is said that after expiry of lease, State is entitled to re-enter upon property in dispute in terms of conditions of lease and provisions of GG Act, 1895.

9. Writ Petition No.40129 of 2018 *(hereinafter referred to as "WP-2")* has been filed by four petitioners namely Girdhar Gopal Gulati; his son Vinkesh Gulati; M/s United Automobiles through its Partner Vinkesh Gulati and Rishi Gulati; impleaded as petitioners 1 to 4. Dispute relates to Nazul Plot No.120-1/2, Civil Station, Allahabad, area 3 Acres 45

Sq. Yards, which also subject matter of WP-1.

10. Facts in brief, as stated in WP-2 is that Secretary of State of India in Council executed a lease-deed in favour of Sri William Rome on 01.03.1862 for a period of 100 years (i.e. 50 + 50) i.e. till 28.02.1962 for valuable consideration. The aforesaid lease was transferred in favour of "Anandi Prasad Dube" vide registered extension of lease, dated 12.05.2015, copy whereof has been filed as Annexure 2 to WP-2. Lessee transferred aforesaid lease to Sri Krishna Chandra Mukherjee and subsequently vide registered sale deed dated 23.03.1945, it was transferred in favour of M/s Amrita Bazar Patrika Pvt. Ltd. Vide letter dated 02.05.1951, Collector, Allahabad granted permission to M/s Amrit Bazar Patrika Pvt. Ltd. to use Nazul Site 120-1/2, Civil Station, Allahabad for press/business purpose. M/s Amrit Bazar Patrika Pvt. Ltd. established another associate Company namely M/s Allahabad Patrika Pvt. Ltd. having its registered office at Kolkata and it functioned as subsidiary and associate Company. An agreement dated 23.06.1995 was executed in favour of petitioner Girdhar Gopal Gulati in respect of a portion of building, situated over Nazul Site No.120-1/2, Civil Station, Allahabad. He got possession thereof in the capacity of tenant at the rate of Rs.7,500/- per month. A partnership firm M/s United Automobiles commenced its business thereon operating its showroom of Mahindra and Bajaj. In the meantime, as per best knowledge of petitioner of W.P. 2, M/s Amrit Bazar Patrika Pvt. Ltd. applied for renewal of lease vide application dated 14.10.1980, which was rejected by District Magistrate, Allahabad vide order dated 09.05.2005. This order was challenged in Writ Petition No.44629 of 2005 and this Court granted an interim order dated 07.06.2005. Now, District Magistrate has issued impugned order dated 18.08.2018 for resumption of land. Rest of the facts stated in writ petition challenging order dated 18.08.2018 raise similar grounds, as are taken in WP-1, therefore, we are not repeating the same. Respondents have also taken similar defence as has been taken in WP-1, therefore, the same is also not repeated.

11. We have heard Sri Aditya Bhushan, Advocate, holding brief of Sri Amit Kumar Upadhyay, Advocate, for petitioners in WP-1 and Sri Ashish Kumar Singh, Advocate, for petitioners in WP-2. Sri Ajit Kumar Singh, Additional Advocate General assisted by Sri Nimai Das and Sri Sudhanshu Srivastava, Additional Chief Standing Counsels for State of U.P. and its Authorities and Sri M.D.Singh 'Shekhar', Senior Advocate, assisted by Sri Amit Verma appeared for Prayagraj Development Authority *(hereinafter referred to as "PDA")* have advanced their submissions in the both WP-1 as well as WP-2.

12. In the light of submissions advanced by learned counsel for petitioners, grounds mainly pressed, may be summerized as under:

i. There is no provision for resumption of land in lease-deed dated 12.05.2015.

ii. After repeal of GG Act, 1895, respondents could not have resorted to provision of said Act and therefore, impugned order is patently illegal.

iii. No opportunity was granted to petitioners before passing impugned order.

iv. Petitioners cannot be ousted forcibly and either respondents must file

suit for recovery of possession, ejectment of petitioners, and recovery of compensation or should avail procedure prescribed under Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 1972 *(hereinafter referred to as "U.P. Act, 1972").*

v. There is no 'public purpose' involved justifying resumption of land in question.

vi. Order rejecting renewal of lease has been stayed by this Court and to frustrate the above writ petition, impugned order has been passed.

vii. Impugned order has been passed arbitrarily, without application of mind.

viii. Petitioners have invested huge amount in raising constructions and therefore, in the garb of resumption, they cannot be deprived of benefit of the same.

13. On behalf of respondents arguments are that land in question is Nazul, owned by State, terms and conditions of Grant, are governed by provisions of GG Act, 1895; rights/obligations etc. thereunder have been saved by Section 4 of Repeal Act, 2017, hence State Government has power to resume/re-enter land in dispute for public purpose whenever it is so required and that is what has been done; principles of natural justice are not at all attracted; impugned order is nothing but a notice to petitioners and in any case, petitioners not only have violated provisions of conditions of lease-deed but petitioners in WP-2 are wholly unauthorised occupants, hence have no right over land in dispute and therefore, writ petitions are liable to be dismissed.

14. From the facts stated above and before proceeding further, we find it appropriate to place certain dates and events borne out from record, in a chronological manner for better understanding of dispute.

Date	Events
01.03.1862	Lease-deed for fifty years was executed in favour of William Rome for the purpose of building dwelling house.
12.05.1915	Another lease-deed was executed in respect of land in dispute by Secretary of State of India in Council in favour of Anandi Prasad Dube in view of desire expressed by William Rome to execute renewal of lease in favour of Sri Dube and this time also lease was for dwelling house and for a period of fifty years with effect from 15.03.1912.
------	Lease was transferred by lessee, Anandi Prasad Dube to Sri Krishna Chandra Mukherjee son of Shyama Charan Mukherjee.
23.03.1945	Sri Krishna Chandra Mukherjee vide sale deed transferred entire lease land to M/s Amrit Bazar Patrika Pvt. Ltd. and the name of M/s Amrit Bazar Patrika Pvt. Ltd. was recorded in Nazul register.
02.05.1951	Collector granted permission to M/s Amrit Bazar Patrika (P) Ltd. to run Printing Press on disputed land.
1959	M/s Amrit Bazar Patrika Pvt. Ltd. closed its Allahabad Branch and disputed land was given in possession of "M/s Allahabad Patrika Pvt. Ltd." for publication of English Newspaper 'Northern India Patrika' and Hindi Newspaper 'Amrit Prabhat'.

28.02.1962	Lease expired
14.03.1962	M/s Amrit Bazar Patrika Pvt. Ltd. through its Secretary Sri Tulsi Kanti Dey Vishwas submitted application requesting for renewal of lease.
------	Collector sought report from Mukhya Nagar Adhikari, Nagar Nigam, Allahabad.
11.11.1990	Mukhya Nagar Adhikari informed that several unauthorised constructions have been raised on disputed land on an area of 3990 Sq.Yards.
30.06.1994	Superintendent (Nazul), Nagar Mahapalika, Allahabad informed Collector that on 100 ft. x 40 ft., part of disputed land, an unauthorised commercial establishment, i.e. Service Center and Workshop ofL.M.L.Vespa Scooter is being run in which Sri V.K.Ghosh has 51% share and Girdhar Gopal Gulati, petitioner-1 of WP-2 has 49% share.
23.06.1995	An agreement was executed by Tamal Kanti Ghosh, K.B.Mathur, Directors, Allahabad Patrika Pvt. Ltd. and Om Prakash Mall, all on behalf of Allahabad Patrika Pvt. Ltd. and Sri Girdhar Gopal Gulati, petitoner 1 of WP-2 stating that they have 51% and 49% share-holding respectively in M/s Allahabad Patrika Pvt. Ltd. and Sri Gulati shall hand over possession of all movable and immovable assets except building mentioned in later part of said agreement and thereon Sri Gulati was allowed to remain in possession and enjoy premises 6-1, Patrika Marg, where Show Room and Workshop is/ was existing, on payment of rent of Rs.7,500/- per month till advances/loans received by Sri Gulati are fully paid. (This agreement is Annexure 4 to WP-2 and shows a settlement of assets of M/s Allahabad Patrika Pvt. Ltd. between the shareholders, which included petitioner-1 of WP-2.
14.05.1999	Show Case Notice was issued by Collector to M/s Amrit Bazar Patrika Pvt. Ltd. .
28.05.1999	Sri B.P.Twari, Secretary, M/s Amrit Bazar Patrika Pvt. Ltd. submitted reply admitting that said Company has closed publication of its newspaper at Allahabad in 1959. He further said that M/s Allahabad Patrika Pvt. Ltd. is Associate Company of M/s Amrit Bazar Patrika Pvt. Ltd., who is publishing two newspapers Northern India Patrika and Amrit Prabhat.
09.05.2005	District Magistrate rejected application for renewal of lease.
07.06.2005	Petitioner-1 of WP-1 filed Writ Petition No.44629 of 2005 wherein order dated 09.05.2005 was stayed till next date of listing.
19.06.2018	Proposal sent by Collector, Allahabad to State Government for resumption of land so as to develop it as "Sports Field".
16.08.2018	State Government granted approval for resumption.
18.08.2018	Order of re-entry /resumption was passed by Collector, Allahabad.

15. In the backdrop of aforesaid facts, we proceed to consider merits of writ petition and relief claimed by petitioners.

16. It is not in dispute that land in question is 'Nazul' but interestingly lease holder has sold out land by sale deed to third party and also it has been subjected to Will for its user ignoring Lessor and its authority altogether, hence, some serious questions have arisen in these matter.

17. The **first question** would be, *"what is Nazul?"*

18. Every land owned by State Government is not termed as 'Nazul' and therefore it has become necessary to understand, what is 'Nazul'.

19. State Government may own land by having acquired and vested in various ways, which includes vesting of land in the capacity of a Sovereign body and having right of bona vacantia. Property may also be acquired and owned by State by way of acquisition under the Statute relating to acquisition of land or by purchase through negotiation or gift by an individual or in similar other manners. All such land, which is owned and vested in State Government results in making the State, owner of such land, but in legal parlance, the term "Nazul" is not applicable to all such land.

20. It is only such land which is owned and vested in the State on account of its capacity of Sovereign, and application of right of bona vacantia, which is covered by the term 'Nazul', as the term is known for the last more than one and half century.

21. In Legal Glossary 1992, fifth edition, published by Legal Department of Government of India, at page 589, meaning of the term 'Nazul' has been given as 'Rajbhoomi, i.e., Government land'.

22. Nazul is an Arabic word. It refers to a land annexed to Crown. During British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as 'Nazul property'. The reason being that neither it was acquired nor purchased after making payment. In old record, when such land was referred in Urdu, this kind of land was shown as 'Jaidad Munzabta'.

23. For dealing with such property, under the authority of Lt. Governor of North Western Provinces, two orders were issued in October, 1846 and October, 1848. Therein, after the words "Nazul property", its english meaning was given as 'Escheats to the Government'. Sadar Board of Revenue on May 20, 1845 issued a circular order in reference to "Nazul land" and in para 2 thereof it mentioned, "The Government is the proprietor of those land and no valid title to them can be derived but from the Government". Nazul land was also termed as "Confiscated Estate". Under Circular dated July 13, 1859, issued by Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each District and lay it before Government for orders.

24. Right of King to take property by 'escheat' or as 'bona vacantia' was recognized by common law of England. Escheat of property was Lord's right of re-entry on real property held by a tenant, dying intestate, without lawful heirs. It was an incident of Feudal Tenure and based on the want of a tenant to perform Feudal services. On the tenant dying intestate without leaving any lawful heir,

his estate came to an end, and Lord, by his own right and not by way of succession or inheritance from the tenant, re-entered real property as Owner. In most cases, land escheated to Crown as the 'Lord Paramount', in view of gradual elimination of Intermediate or Mesne lords since 1290 AD. Crown takes as 'bona vacantia' goods in which no one else can claim property. In **Dyke v. Walford 5 Moore PC 434= 496-13 ER 557 (580)** it was said 'it is the right of the Crown to bona vacantia to property which has no other owner'. Right of the Crown to take as "bona vacantia" extends to personal property of every kind. The escheat of real property of an intestate dying without heirs was abolished in 1925 and Crown thereafter could not take such property as bona vacantia. The principle of acquisition of property by escheat, i.e., right of Government to take on property by 'escheat' or 'bona vacantia' for want of a rightful owner was enforced in Indian territory during the period of East India Company by virtue of Statute 16 and 17 Victoria, C. 95, section 27.

25. We may recollect, having gone through history, that prior to 1857, several Estates were taken over by British Company i.e. East India Company by way of annexation. Doctrine of lapse applied in Jhansi was another kind of above mentioned two principles.

26. The above provisions had continued by virtue of section 54 of Government of India Act, 1858, section 20(3)(iii) of Government of India Act, 1915 and section 174 of Government of India Act, 1935. After enactment of Constitution of independent India, Article 296 now continue above provision and says:

"Subject as hereinafter provided, ***any property in the territory of India which,*** *if this Constitution had not come into operation,* ***would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union."***

(Emphasis added)

27. Article 296, therefore, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to enforcement of Constitution of India. The above power continued to apply after enactment of Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. Vesting of land and giving ownership to State Government or Union of India under Article 296 is clearly in respect of a land, which will come to it by way of 'escheat', 'lapse' or 'bona vacantia' and not by way of acquisition of land under some Statute or purchase etc.

28. In **Pierce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapsnare, AIR 1969 SC 843,** Court has considered the above principle in the context of 'Sovereign India' as stands under Constitution after independence, and, has observed :

"....in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor. *In this country*

escheat is not based on artificial rules of common law and is not an incident of feudal tenure. ***It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction".***

(Emphasis added)

29. Court also placed reliance on **Collector of Masulipatam v. C. Vencata Narainapah 8 MIA 500, 525; Ranee Sonet Kowar v. Mirza Himmut Bahadoor (2) LR 3 IA 92, 101, Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay [1958] SCR 1122, 1146, Superintendent and, Legal Remembrancer v. Corporation of Calcutta [1967] 2 SCR 170, 204.**

30. Judicial Committee in **Cook v. Sprigg (1899) AC 572** while discussing, 'what is an act of State', observed :

"The taking possession by Her Majesty, whether ***by cession or by any other means by which sovereignty can be acquired,*** *was an act of State."*

(Emphasis added)

31. This decision has been followed in **Raja Rajinder Chand v. Mst. Sukhi, AIR 1957 SC 286.**

32. In **Nayak Vajesingji Joravarsingji v. Secretary of State for India in Council AIR 1924 PC 216**, Lord Dunedin said :

"When ***a territory is acquired by a sovereign State for the first time, that is an act of State.*** *It matters not how the acquisition has been brought about. It may be* ***by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same.*** *Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such* ***rights as he had under the rule of predecessors avail him nothing."***

(Emphasis added)

33. In **Dalmia Dadri Cement Co. Ltd. v. CIT [1958] 34 ITR 514 (SC) : AIR 1958 SC 816,** Court said (page 523 of 34 ITR) :

"The expression 'act of State' *is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It* ***includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."***

(Emphasis added)

34. In **Promod Chandra Deb v. State of Orissa AIR 1962 SC 1288,** Court said, 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise.

35. To the same effect was the view taken by a Constitution Bench in **Amarsarjit Singh v. State of Punjab AIR 1962 SC 1305,** where in para 12, Court said:

"It is settled law that ***conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another*** *State, and that the* ***same result can be achieved in any other mode which has the effect of establishing its sovereignty."***

(Emphasis added)

36. In **Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504,** in para 40, Court said :

*"The **status of a person must be either that of a sovereign or a subject.** There is no tedium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. **A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject..."***

(Emphasis added)

37. In **State of Rajasthan vs. Sajjanlal Panjawat AIR 1975 SC 706** it was held that Rulers of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not have been challenged prior to the Constitution. Court relied on earlier decisions in **Director of Endowments, Govt. of Hyderabad vs. Akram Ali, AIR 1956 SC 60, and Sarwarlal vs. State of Hyderabad, AIR 1960 SC 862.**

38. In **Promod Chandra Deb vs. State of Orissa AIR 1962 SC 1288** "act of the State" was explained in the following words :

'an "act of State" may be the taking over of sovereign powers either **by conquest or by treaty or by cession or otherwise.** It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State.'

39. This decision has been followed later in **Biswambhar Singh vs. State of Orissa 1964 (1) SCJ 364** wherein Court said:

*"16. Thus, **a territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State. The land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift, etc.** In such a case the ownership vests in State, like any other individual and **State is free to deal with the same in a manner like any other owner may do so.***

*17. Thus '**Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State,** it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition."*

(Emphasis added)

40. Thus the land in question which is admittedly 'Nazul', belonged to the category as discussed above i.e. it came to be vested and owned by State in its capacity of Sovereign and right of bona vacancia. When acquisition is made under the provisions of a Statute, purpose of acquisition is already known and State pay its price but when land is owned by State,

which is Nazul, objective of use of such land is not predetermined but it can be utilized by State for larger public welfare and its benefit, as necessitated from time to time. In other words 'Nazul' land forms the assets owned by State in trust for the people in general who are entitled for its user in the most fair and beneficial manner for their benefit. State cannot be allowed to distribute such largesse by pick and choose manner or to some selected groups, or in a whimsical manner etc. The **first question** is answered accordingly.

41. The **second question** up for consideration is "lease in question whether governed by provision of Transfer of Property Act, 1882 *(hereinafter referred to as "TP Act, 1882")* or GG Act, 1895 and what is inter-relationship of the two?"

42. Historical documents, record as also authorities discussed above show that earlier Government i.e. East India Company upto 1858 and thereafter British Government used to allot "Nazul land" to various persons, who had shown their alliance to such Government in various ways, sometimes by deceiving their Indian counter parts who had raised voice against British Rule, or those who remained faithful to Foreign regime and helped them for their continuation in ruling this country and similar other reasons. Sometimes land was given on lease without any condition and sometimes restricted for certain period etc., but in every case, lease was given to those persons who were faithful and had shown complete alliance to British Rule. The reason was that in respect of Nazul, no predetermined objective was available as was the case in respect of land acquired by State by way of acquisition under Statute of Acquisition after paying compensation or purchase. Further allocation of Nazul land by English Rulers used to be called "Grant".

43. In other words, we can say that initially land owned by State used to be allotted in the form of 'Grant' by British Government. No specific statutory provisions were available to govern it. TP Act, 1882 was enacted to govern transfer of immovable property. Sections 10 - 12 of TP Act, 1882 made provisions invalidating, with certain exceptions, all conditions for forfeiture of transferred property on alienation by transferee and all limitations over consequence upon such alienation or any insolvency of or attempted alienation by him. Apprehending that above provisions of TP Act, 1882, may be construed as a fetter upon discretion of Crown in creation of inalienable Jagirs in 'Grants', acting upon advice that it would not be competent for Crown to create an inalienable and impartible Estate in the land comprised in the Crown Grant, unless such land has heretofore descended by custom as an impartible Raj, it was sought to make a separate Statute to give supremacy to the provisions contained in Crown's Grant, notwithstanding any other law including TP Act, 1882. With this object, i.e., 'GG Act 1895' was enacted.

44. Preamble of GG Act, 1895 gives purpose of its enactment stating that doubts have arisen to the extent and operation of TP Act, 1882 and to the power of Crown (later substituted by word "Government") to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, hence to remove such doubts, GG Act, 1895 was enacted.

45. Section 2 of GG Act, 1895, as it was initially enacted, read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land*** *or of any interest therein heretoforce made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***
(Emphasis added)

46. The above provision was amended in 1937 and 1950. The amended provision read as under :

"2. Transfer of Property Act, 1882, not to apply to Government grants.- ***Nothing in the Transfer of Property Act, 1882,*** *contained* ***shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein*** *heretoforce made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***
(Emphasis added)

47. Section 3 of GG Act, 1895 read as under :

3. Government grants to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *over* ***contained in any such grant or transfer*** *as aforesaid* ***shall be valid and the effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."***

48. In the State of Uttar Pradesh, vide Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No.XIII of 1960), Sections 2 and 3 of GG Act, 1895, were substituted by Section 2, as under :

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants.- ***Nothing contained in the Transfer of Property Act, 1882, shall apply or be deemed ever to have applied to any grant*** *or other transfer of land or of any interest therein, heretoforce made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever; and* ***every such grant and transfer shall be construed and take effect as if the said Act had not been passed."***

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government.- ***Nothing contained in the U.P. Tenancy Act, 1938, or the Agra Tenancy Act, 1926, shall affect, or be deemed to have ever affected any rights, created, conferred or granted,*** *whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960, by leases of land by, or on behalf of, the Government in favour of any person; and* ***every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926.***

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor.- ***All provisions, restrictions, conditions and limitations*** *contained in any such creation, conferment or grant referred to in Section 2,* ***shall be valid*** *and* ***take effect according***

to their tenor, *any decree or direction of* ***a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding :***

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, ***the effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural land."***

(Emphasis added)

49. A perusal of Section 2 of GG Act, 1895 shows two things :

i. A declaration is made that any grant or other transfer of land or of any interest therein, made by or on behalf of Government, in favour of any person, on and after enactment of GG Act, 1895, would not be governed by provisions of TP Act, 1882 i.e. nothing contained in TP Act, 1882 shall apply to such Grant, transfer or interest.

ii. A clarification that a Grant or Transfer, referred to in Section 2, when is to be construed and given effect, it shall be done in such manner and by treating as if TP Act, 1882 has not been passed.

50. Thus GG Act, 1895 in fact was a declaratory statute. The first declaration is in respect of Grant or transfer of land or creation of any interest, as the case may be, to exclude TP Act, 1882 for all purposes. Second part of Section 2 clarified that while construing and giving effect to a Grant or Transfer, referred to in Section 2, it will be presumed that TP Act, 1882 has not been passed at all.

51. In Section 2(1) of GG Act, 1895, as amended in Uttar Pradesh, we do not find any distinction vis a vis what has been said in Section 2 of GG Act, 1895. There is an addition in GG Act, 1895 in its application to Uttar Pradesh, by inserting sub-section (2) in Section 2, a provision in respect of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 also, making a similar declaration, as made in sub section (1) in respect of TP Act, 1882.

52. Sub-section (3) of Section 2 of GG Act, 1895 protects certain leases, already made, declaring the same to be valid in the light of insertion of sub-section(1) of Section 2 in the State of Uttar Pradesh and that is why, notwithstanding any decree or direction of Court of law, leases already made, were validated, which otherwise might have been affected by U.P. Tenancy Act, 1938 or Agra Tenancy Act, 1926.

53. Proviso to sub-section (3) of Section 2 of GG Act, 1895 further declares that all provisions of Section 2 of GG Act, 1895 will have no effect when land is sought to be acquired under the provisions of Statute relating to acquisition or for giving effect to a Statute relating to land reforms or imposition of ceiling on agricultural land.

54. Section 3 of GG Act, 1895 is not available in State of U.P. after U.P. Amendment Act, 1960 since Sections 2 and 3 of Principal Act virtually got amalgamated in the form of Section 2, by Government Grants (U.P. Amendment) Act, 1960. However, intent, effect and declaration by legislature is almost pari materia with the only addition that in State of U.P., U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 are also excluded in the same manner as was done in respect of TP Act, 1882.

55. Sections 2 and 3 of GG Act, 1895 were considered in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** and in para 16, Court said :

*"**Section 3** of the Government Grants Act **declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be.** The meaning of Sections 2 and 3 of the Government Grants is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The **Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."***

(Emphasis added)

56. Again in **Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Government of Tamil Nadu (1997) 3 SCC 466,** Court said that combined effect of two sections of GG Act, 1895 is that terms of any Grant or terms of any transfer of land made by a Government would stand insulated from tentacles of any statutory law. Section 3 places terms of such Grant beyond reach of restrictive provision contained in any enacted law or even equitable principles of justice, equity and good conscience adumbrated by common law, if such principles are inconsistent with such terms. Court said :

*"The two provisions are so framed as to **confer unfettered discretion on the government to enforce any condition or limitation or restriction in all types of grants made by the government to any person.** In other words, the rights, privileges and obligations of any grantee of the government would be **completely regulated by the terms of the grant, even if such terms are inconsistent with the provisions of any other law."***
(Emphasis added)

57. In **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** observations made in para 16 in **State of U.P. vs. Zahoor Ahmad (supra)** have been reproduced and followed.

58. In **State of U.P. and others vs. United Bank of India and others (2016) 2 SCC 757,** in para 30 of the judgment, Court said :

*"Indisputably, the lease of nazul land is governed by the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 very specifically provide that the **provisions of the Transfer of Property Act do not apply to government lands ….."***
(Emphasis added)

59. Thus, a 'Grant' of a Nazul will be governed by terms and conditions contained in the instrument/deed of Grant, wholly unaffected by any Statute providing otherwise.

60. It neither can be doubted nor actually so urged by petitioners that the lease granted in the case in hand is/was a 'Grant' governed by GG Act, 1895.

61. Broadly, 'Grant' includes 'lease'. In other words, where 'Nazul' is let out to a person by Government under agreement of lease i.e. Grant, it is governed by GG Act, 1895 and rights of parties, therefore, have to be seen in the light of stipulations contained in the document of 'Grant'.

'Grant' includes a property transferred on lease though in some cases, 'Grant' may result in wider interest i.e. transfer of title etc. Whatever may be nature of document of transfer i.e. instrument of 'Grant', the fact remains that terms and conditions of 'Grant' shall be governed by such document and it shall prevail over any other law including TP Act 1882. One cannot take resort to TP Act, 1882 to wriggle out of any condition or limitation etc. imposed in terms of document of 'Grant'.

62. In the State of Uttar Pradesh, management of 'Nazul', in absence of statutory provisions, is governed by various administrative orders compiled in a Manual called "Nazul Manual". Here Government has made provisions of management of 'Nazul' through its own authorities namely District Magistrate or Commissioner, or, in some cases, through local bodies.

63. Nature of orders compiled in "Nazul Manual" in the context of 'Nazul' have been considered recently in **State of U.P. vs. United Bank of India (supra)** where Court has said that land and building in question is "Nazul" being property of Government, maintained by State authorities in accordance with 'Nazul Rules' but not administered as a 'State property'. Court has also observed that lease of "Nazul" land is governed in accordance with GG Act, 1895. Sections 2 and 3 thereto very specifically provide that provisions of TP Act, 1882 do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations contained in any such 'Grant' or 'Transfer', as aforesaid, shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary, notwithstanding. Thus stipulations in "lease deed" shall prevail and govern the entire relation of State Government and lessee.

64. In **Pradeep Oil Corporation vs. Municipal Corporation of Delhi and others (2011) 5 SCC 270,** Court said that GG Act, 1895 is a special Statute and will prevail over general Statute i.e. TP Act, 1882. It says:

*"In the **present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former,** i.e. the Government Grants Act, 1895 being **a special statute would prevail over the general statute, i.e. the Transfer of Property Act, 1882.** Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the **Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority."***

(Emphasis added)

65. Superiority of the stipulations of Grant to deal the relations between Grantor and Grantee has been reinforced in **Azim Ahmad Kazmi and others (Supra).** Therein dispute related to Plot No. 59, Civil Station, Allahabad, area 1 acre and 4272 sq. yard, i.e., 9112 sq. yard or 7618 sq. meter. Initially a lease deed was executed on 11.01.1868 by Secretary of State for India in Council, in favour of one, Thomas Crowby, for a period of 50 years and it was signed by Commissioner,

Allahabad Division on behalf of Secretary of State for India in Council. After expiry of lease, a fresh lease was executed for another period of 50 years on 12.04.1923 w.e.f. 01.01.1918. Lease holder with permission of Collector, Allahabad transferred lease rights to Purshottam Das in 1945. The legal heirs of Sri Purshottam Das, on 31.10.1958, transferred leasehold rights in favour of Smt. Shakira Khatoon Kazmi, Smt. Sabira Khatoon Kazmi and Smt. Maimoona Khatoon Kazmi. After the death of Smt. Maimoona Khatoon Kazmi, her legal heirs, namely, Azim Ahmad Kazmi, Omar Ahmad Kazmi, Shamim Ahmad Kazmi, Alim Ahmad Kazmi and Maaz Ahmad Kazmi also claimed lease rights by succession. Lease granted on 12.04.1923 w.e.f. 01.01.1918 expired on 31.12.1967. It was renewed on 19.03.1996 for a period of 30 years w.e.f. 01.01.1968 which period expired on 31.12.1997. Again on 17.07.1998 it was renewed for a further period of 30 years w.e.f. 01.01.1998. While lease was continuing, vide Government Order dated 15.12.2000, right of resumption was exercised by State Government. It directed resumption of possession of plot in question and lease deed was cancelled. District Magistrate, Allahabad served a notice dated 11.01.2001 to lease holders intimating them that State Government's order dated 15.12.2000 has cancelled lease and resumed possession of land in question, as the same was required for public purpose. Notice also directed lease holders to remove structures standing on plot, failing which possession would be taken in accordance with Clause 3(c) of lease deed. Lease holders filed objections against notice to District Magistrate and also stated that they have sent representation/ objection to Chief Minister praying for revocation of Government Order dated 15.12.2000. District Magistrate passed order on 24.08.2001 rejecting objection of lease holders and sent a cheque of Rs. 10 lacs representing compensation for the building standing over plot. State authorities claimed that they took possession of open land on 01.09.2001. Lease holders filed writ petition which was dismissed vide judgment dated 07.12.2001, **Shakira Khatoon Kazmi vs. State of U.P., AIR 2002 All 101**. Lease holders challenged judgment dated 07.12.2001 in Supreme Court to the extent they failed. State Government filed appeal against part of order of this Court wherein an observation was made that State Government is not entitled to take forcible possession though it may take possession of demised premises in accordance with procedure established by law. After considering Clause 3(c) of lease deed which provides for resumption of land for public purpose after giving a month's clear notice to lessee to remove any building standing at the time on demised premises and within two months of receipt of notice, to take possession thereof on expiry of that period, and Sections 2 and 3 of GG Act, 1895, Court said that Clause 3(c) of lease deed confers power upon State Government that plot in question, if required by Government for its own purpose or for any public purpose, it shall have the right to give one month's notice in writing to lessees to remove any building standing on the plot and to take possession thereof on expiry of two months from the date of service of notice. Court said that land, if required for any public purpose, State Government has absolute power to resume leased property. Under the terms of Grant, it is absolute, therefore, order of resumption is perfectly valid and cannot be said to be illegal. It also refers to an earlier instance where

Nazul Plot No. 13, Civil Station, Allahabad situate in Civil Lines area was resumed by State Government for the purpose of construction of a 'Bus Stand' by exercising similar power, without initiating any proceeding under Land Acquisition Act, 1894 *(hereinafter referred to as "L.A. Act, 1894").* Resumption in that case was challenged in **Writ Petition No. 44517 of 1998, Sayed Shah Khursheed Ahmad Kashmi vs. State of U.P.** and said writ petition was dismissed on 16.12.1999 by a Division Bench of this Court, whereagainst Special Leave Petition No. 4329 of 2000 was dismissed by Supreme Court on 07.09.2001. First question, therefore, was answered in negative and in favour of Government.

66. With respect to procedure for taking possession, Supreme Court, while considering Question-2, said that in absence of any specific law, State Government may take possession by filing a suit. When a land is acquired under L.A. Act, 1894, Government can take possession in accordance with provisions of said Act and in case of urgency, Collector can take possession after publication of notice under Section 9 and no separate procedure is required to be followed. Court said that similarly where a lease has been granted under the terms of GG Act, 1895, then what procedure has to be followed is provided by Section 3 of GG Act, 1895 which says that all provisions, restrictions, conditions and limitations contained in any such creation, conferment or Grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a Court of Law or any rule of law, statute or enactments of the Legislature, to the contrary notwithstanding. Court relied on its earlier judgment in **State of U.P. vs. Zahoor Ahmad, 1973(2) SCC 547** holding that Section 3 of GG Act, 1895 declares unfettered discretion of Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. Then Court construing Clause 3(C) of lease deed said that it provides procedure for taking possession of demised premises when State Government re-enter or resume possession of demised land. Court in para 30 and 32 of judgment said:

"30. In the case of ***The State of U.P. vs. Zahoor Ahmad and Another, 1973(2) SCC 547,*** *this Court held that the Section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitation as it thinks fit, no matter what the general law of land be. From Clause 3(C) of the deed, it is clear that the* ***State of U.P. while granting lease made it clear that if the demised premises are at any time required by the lessor for his or for any public purpose, he shall have the right to give one month's clear notice to the lessee to remove any building standing at the time of the demised property and within two months' of the receipt of the notice to take possession thereof on the expiry of that period*** *subject to the condition that the lessor is willing to purchase the property on the demised premises, the lessee shall be paid for such amount as may be determined by the Secretary to the Government of U.P. in the Nagar Awas Department."*

"32. Under Clause 3(C) of the lease deed, the respondent-State was permitted resumption of the land which required for its own use or for public purpose and after giving one month's clear notice in writing is entitled to remove any building standing at the time on the

demised premises and within two months of the receipt of the notice to take possession thereof subject to the condition that if the lessor is willing to purchase the building of the demised premises required to pay the lessee the amount for such building as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department...."

(Emphasis added)

67. Having said so, Court said :

"we are of the view that there is no other procedure or law required to be followed, as a ***special procedure for resumption of land has been laid down under the lease deed".***

(Emphasis added)

68. Supreme Court then set aside direction of this Court that State will not take possession forcibly except in accordance with procedure established by any other law, holding that since special procedure for resumption is prescribed under lease deed, no direction otherwise could have been issued to State Government.

69. The above discussion makes it clear that 'Nazul' is a land owned and vested in State. It is such land which has vested in State by virtue of its 'Sovereignty' and incidence of 'Sovereignty' i.e. annexation, lapse and bona vacantia. Further, 'Grant' means transfer of property by a deed in writing and includes within its ambit, an instrument of lease/lease deed. Such 'Grant' is governed by provision of GG Act, 1895, which were applicable to 'Grants' executed on and after enforcement of GG Act, 1895 and rights and entitlement of private parties in respect of land, which was transferred under such 'Grant' would be governed by terms and conditions contained in such 'Grant' and not by provisions of TP Act, 1882 or any other Statute. The terms and conditions of 'Grant' shall override any statute providing otherwise. Moreover, in State of U.P., wherever applicable, U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 will also be inapplicable to such 'Grant'.

70. Above discussion, therefore, leaves no manner of doubt that Grant/Lease of Nazul land shall be exclusively governed by stipulations/conditions/terms contained in Grant/Indenture of Lease and no Statute can be resorted to govern rights of parties over Nazul land, which will be governed by aforesaid Grant/Indenture of Lease. **Second question** is answered accordingly.

71. The **third questio**n is, "Whether Lessee can transfer Nazul land itself to anyone or transfer, if any, made will result only transfer of lease rights or land itself; and, if transfer is not made in accordance with conditions of Indenture of Lease/Grant, what will be its effect and whether it will confer any valid right or interest on Nazul land, subjected to transfer, upon such Transferree?"

72. We have reproduced contents of lease deed constituting terms and conditions to govern land in dispute. In almost every aspect, some restrictions on exercise of lease rights over Nazul land were imposed by Grantor/Lessor i.e. State. Some such instances are :

(i) Without permission, no erection etc. of building etc., except what was already existing and raised in accordance with map, made part of lease

deed dated 01.03.1862 and 12.05.1915, was permissible.

(ii) Without permission, no growing of any crop or keeping of horses, cattle or other animals for hire or profit is permissible.

(iii) Without permission, no construction of any thatched or covered with grass reeds or other inflammable material etc was permissible.

(iv) At the end of tenure of lease or termination at will or determination, Lessee would peacefully and quietly leave, surrender and yield to the Lessor, the land together with all such erection etc., as were existing, if so desired by Lessor for taking over such erection etc. for valuation but if it is not desired of taking such erection etc., then the same shall be removed by Lessee within such time, as directed by Lessor.

(v) No compensation was claimable by Lessee or his assign etc. for any building etc. in case lease is determined by re-entry for forfeiture and building etc. shall absolutely rest in Lessor as his own property.

(vi) Lessee or his agents shall not assign or underlet or otherwise part with the possession of the premises or any part thereof without permission of Secretary of State or his authorized person.

(vii) Any transfer without prior permission will cause lease-deed, ceased and determined, but without prejudice however to the right or action of Lessor in respect or on account of any previous breach of any covenant or covenants.

(viii) If Government, at any time require to re-enter on site, it can do so on, on paying value of all buildings that may be on the site, plus 10 per cent for recompense for resumption of lease and Lessee shall have no further claim of any sort against the Lessor. If building etc. is not taken by Lessor, it has to be removed by Lessee.

73. Above conditions show that any transfer by Lessee in any manner without prior permission of Lessor i.e. Government or its Authorized Agent will result in determination of lease without any further notice. Meaning thereby, transfer of lease was clearly prohibited under terms of lease unless permission of Government has been obtained.

74. In the present case, lease was executed on 12.05.1915 w.e.f 15.03.1915 in favour of Anandi Prasad Dube wherefrom it was transferred to Krishna Chandra Mukherjee and then to M/s Amrit Bazar Patrika Pvt. Ltd. through sale deed dated 23.03.1945. The land, obviously was not owned either by Anandi Prasad Dube or his transferree Krishna Chandra Mukherjee. Therefore, sale deed could not have resulted in conferment or transfer of ownership or title over land in dispute, upon transferee. At the best, aforesaid transfer by sale deed would have confined to transfer of lease rights on land and title over constructions/buildings, if any, existing at that point over land in dispute. Transfer of land however has to abide by terms and conditions of lease deed dated 12.05.1915.

75. M/s Amrit Bazar Patrika Pvt. Ltd., Allahabad closed its business, as admitted by its representative in reply dated 28.05.1999 in 1959. It also admitted that thereafter land in dispute was given in possession of M/s Allahabad Patrika Pvt. Ltd. Though it is said that M/s Allahabad Patrika Pvt. Ltd. is an Associate Company of M/s Amrit Bazar Patrika Pvt. Ltd. but no material in this regard has been shown or placed on record in both these writ

petitions. Even otherwise, the two are independent Companies. Both the Companies were incorporated and registered separately. Both are independent legal person. Lease was transferred by M/s Amrit Bazar Patrika Pvt. Ltd., which is an independent legal person and incorporated under the Provision of Indian Companies Act, 1913 (hereinafter referred to as "Act, 1913"). M/s Allahabad Patrika Pvt. Ltd. is also a Company registered and incorporated under Act, 1913 and a separate legal personality. Therefore, transfer and possession of land by M/s Amrit Bazar Patrika Pvt. Ltd. to M/s Allahabad Patrika Pvt. Ltd. amounts to transfer from one legal person to another. However before such transfer, no permission of Lessor i.e. State Government or its authorized agent i.e. Collector was obtained. There was clear bar in lease-deed and relevant clause we have already quoted and at the pain of repetition, we reproduce herein also:

"...the said Lessee his Executors, Administrators or Assigns or underlet of otherwise ***part with the possession of the said premises or any part thereof without the permission of the said secretary of State his Successors or Assign"***

(Emphasis added)

76. There is nothing on record and no claim has been made that such transfer was made with permission of State or its authorities. Therefore, transfer of disputed land by M/s Amrit Bazar Patrika Pvt. Ltd. to M/s Allahabad Patrika Pvt. Ltd. was wholly illegal and in the teeth of the terms of Grant. Effect of such transfer has been considered in State of U.P. and others vs. United Bank of India and others (supra). Court has held that any transfer without sanction of Lessor will be invalid and would not confer any valid right upon Transferee. In paras 39 and 40 of judgment, Court said :

"39. This "within written lease" is the original lease deed as mentioned in the Form 2 of the Nazul Manual. Form 2 of lease of Nazul land for building purposes it is one of the condition between the lessor and the lessee that " the ***lessee will not in any way transfer or sublet the demised premises or buildings erected thereon without the previous sanction in writing of the lessor".***

40. In the present case ***there was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease*** **deed i.e. mortgage of the Nazul land without previous sanction in writing of the State."**

(Emphasis added)

77. Further transfer of any part of disputed land to petitioner-1 of WP-2 founded on agreement dated 23.06.1995 executed between Directors of Allahabad Patrika Pvt. Ltd. and petitioner-1 of WP-2 is also of no consequence and legal sanction since none of the parties to the said agreement had any right or interest in law, over land in dispute. Lease having expired on 14.03.1962, all lease rights possessed by erstwhile Lessee came to an end, and thereafter when Lessee itself did not have any legal right or interest over property in dispute, others or so called

transferrees also cannot claim anything more than that.

78. Here, we remind ourselves with the principle that a person can transfer only such rights and interest which he or she possesses and not beyond that. If a Sub-Grantor did not possess any right of transfer or such right is subject to any restriction, like prior permission of owner etc., it means that Sub-Grantor himself has no right of transfer and/or his right is restricted in a particular manner and such restriction is to be observed in words and spirit to validate a transfer, else transfer being illegal, will not result in bestowing any legal right upon Transferee. In other words, any otherwise transfer by Sub-Grantor, of land subjected to Grant, will not confer any valid right or interest upon the person to whom Sub Grantee had transferred property under 'Grant' in violation of stipulations contained in Grant.

79. In **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (2016) 11 SCC 406** Court said :

"It is well settled position of law that the person having no right, title or interest in the property cannot transfer the same by way of sale deed."

80. Further, any such invalid transfer can also be construed as breach of terms of Grant and would empower and enable principal Grantor i.e. State, owner of property, to take such steps including resumption/re-entry to the property under Grant, to itself, besides claiming damages, compensation, as the case may be, as law permits.

81. We need not go into question whether order passed by District Magistrate on 09.05.2005 is correct or not since it is subject matter of dispute in another writ petition but for our purpose, suffice it to mention that State Government, owner of land has a right vested in lease deed to re-enter and resume land after cessation, determination or expiry of lease. Such right is not deterred, diluted or stand deprived at any point of time, in any manner, particularly due to any illegal act of Grantee.

82. Here we may again refer to judgment in **State of U.P. vs. United Bank of India (supra),** which was a case in which petitioner-1 of WP-1 was also a party in relation of Bungalow no.19, Clive Road, Allahabad, lease whereof was transferred by original Lessee to petitioner-1 of WP-1 on 22.10.1945 by registered sale deed. Petitioner-1 of WP-1 in respect of some business transaction (loan/advances) mortgaged aforesaid leasehold property by deposit of title deeds to United Bank of India. Castigating the same, Supreme Court held it patently illegal and conferring no right upon Bank. In para 35 of judgment, Court said that petitioner-1 of WP-1 mortgaged Nazul land in favour of Bank and since it had no leasehold interest in the property, nothing more could have been mortgaged to Bank. Moreover, since under lease-deed, no transfer without permission of Lessor was permissible, hence, transfer in favour of Bank was in violation of terms of lease deed and mortgage was bad in law. In Para 40 of judgment, Court said as under :

"In the present case ***there was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest***

in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State." (Emphasis added)

83. Similar observations are reiterated in para 41. In operative part of judgment, in para 48.5, Court has said:

"The ***mortgage so created by the Company in favour of the Bank in respect of nazul land without the sanction of the State of Uttar Pradesh*** *in terms of the lease,* ***is ab initio void, hence no right was created in favour of the Bank*** *by reason of the said mortgage."*
(Emphasis added)

84. Therefore, aforesaid transfer by petitioner-1 of W.P. 1 was patently illegal and confers no right upon Transferree i.e. Allahabad Patrika (P) Ltd. Since petitioners of W.P. 2 are deriving their claim from Allahabad Patrika (P) Ltd., they also had no right over land in dispute. **Third question,** therefore is answered against petitioners.

85. The forth question is, "whether petitioners of W.P. 1 were entitled for renewal of lease in view of judgment in Purshottam Dass Tandon and others vs, State of U.P. And others, AIR 1987 All 56, whereupon heavy reliance has been placed.

86. Submission is that possession has continued with petitioners and petitioner-1 of WP-1 itself applied for renewal of lease on 14.10.1980, therefore, it was entitled for renewal of lease in view of judgment rendered in **Purshottam Dass Tandon and others vs, State of U.P. And others (supra).** This requires us to examine aforesiad judgment in detail.

87. In **Purshottam Dass Tandon and others vs, State of U.P. And others, (supra)** question of renewal of lease came up for consideration in the light of Government Orders dated 23.4.1959, 02.07.1960 and 03.12.1965. Therein historical backdrop of various Government Orders dealing with policy of renewal of lease has been given in detail. The first G.O. was issued in March, 1958 whereby Chief Minister directed that case for renewal of leases may be taken individually and possession may be taken only if lessee surrender or lease stood terminated in absence of any request from lessee for grant of fresh lease. Thereafter, on 23.04.1959, a G.O. was issued to grant fresh lease in cases where lease has already expired but has not been renewed so far, or which is likely to expire within the next 5 or 6 years, on the terms and conditions given in the said G.O. The proposed premium in the said G.O. was objected by Lease Holders, whose leases were already expired or likely to expire. Several representations were sent to Government. Some house-owners met the then Prime Minister Late Pt. Jawahar Lal Nehru, who had visited Allahabad in November or December, 1959. It resulted in issue of G.O. dated 07.07.1960 whereby rate of premium on first three acres was reduced to Rs.2,000/- in each slab. It also permitted payment of premium in five instalments and reduced ground rent to Rs.100/- per acre. In the earlier G.O., there was an insistence on construction of Community latrines till sewer lines were laid but this insistence was given up in G.O. dated 07.07.1960. Lessees were granted further three months' time to get leases renewed. Still lease-holders did not

comply and made representations to Government. On 21.03.1963, again a G.O. was issued declaring rates of premium for commercial sites. On 3.12.1965 a G.O. was issued indicating terms and conditions for renewal of leases for commercial and residential purposes and it was said that rates of premium and annual rent shall be as fixed by G.O. dated 07.07.1960. Payment in five equal yearly instalments was continued but in special cases, Commissioner, Allahabad Division, Allahabad, was authorized to make recommendations to Government for enhancing number of instalments. This G.O. further insisted for renewal of existing leases on payment of at least one instalment, within one month of receipt of intimation by Lessee from Collector, or within three months of the date of expiry of lease, whichever is earlier. Deposit was to be deemed to be proper step on the part of Lessee to get a fresh lease executed by the Lessor. The G.O. of 1965 itself made a distinction between those whose leases had expired and others by describing them as sitting and existing lessees.

88. There was a second phase which covered period from 1966 to 1981. On 16.02.1966, U.P. Awas Vikas Parishad Adhiniyam, 1965 *(hereinafter referred to as "U.P.Act, 1965")* was enacted for providing housing sites and construction of building. G.O. dated 03.12.1965, thus was modified by G.O. dated 04.11.1968, and it was directed that leases of joint lessees should be renewed as far as possible for one acre only. Sub-division was permitted only where sub-divided plot was not less than 800 sq. yards. Concession in payment of lease money and ground rent was allowed on same terms and conditions as it was in G.O. dated 03.12.1965 but time was extended for payment of first instalment for those who had not received any intimation from Collector by a further period of one month from the date of intimation by Collector. Clause (c) of G.O. dated 04.11.1968 categorically said, where steps have been taken for renewal of leases, as stated in earlier G.Os., fresh leases shall be sanctioned according to terms offered by Competent Authority.

89. In March, 1970, a G.O. was issued banning grant of renewal of leases all over the State, since Government was contemplating to bring out legislation on Urban Ceiling. This ban was lifted on 12.01.1972 but leases henceforth were to be sanctioned by State Government only. Commissioner and Collector could make recommendations only. Aforesaid G.O., however, provided that in all those cases where Government had sanctioned grant of leases but it could not be executed or registered because of ban imposed in 1970, steps may be taken immediately for execution. Clause (ii) of G.O. provided that all those cases in which Collector or Commissioner had approved renewal but it could not be executed because of 1970 order, should be sent to Government immediately for acceptance. On 09.05.1972 Urban Building Ceiling Bill was introduced and on 11.07.1972 Uttar Pradesh Ceiling of Property (Temporary Restriction on Transfer), Ordinance, 1972 was promulgated in pursuance of Article 398 of Constitution of India. The Ordinance continued till it was replaced by Urban Land (Ceiling and Regulation) Act, 1976 *(hereinafter referred to as "U.P. Act, 1976")*. The said Act was enacted to prevent concentration of Urban Property and discourage construction of luxurious houses. On 19.12.1972, provisions pertaining to Nazul were amended

providing for maximum area permissible for renewal of leases of 2000 sq. yards plus land on which building was constructed. Remaining area was to be surrendered to Housing Board and Lessees were prohibited from sub-dividing or transferring any land. On 10.12.1976, Government issued an order superseding all previous orders in respect of renewal of leases of Civil Lines, Allahabad in view of Act, 1976 and laid down fresh terms and conditions for renewal of leases.

90. Here leases were to be renewed in the light of Sections 2 and 4 of U.P. Act, 1976 and while doing so, all residents in one house were to be treated as one unit. This again resulted in representations of Lease-Holders to Government requesting for reduction in rate of premium and ground rent. A G.O. was issued on 17.09.1979 superseding all previous orders and it provided for submission of details about extent and type of construction, utilisation of vacant land etc. Again representations were made which culminated in G.O. dated 19.04.1981, which superseded all previous Orders and provided for renewal of leases on fresh and new terms. It is said that Leaseholders and their heirs shall be treated as one Unit. They were supposed to file details about land, constructed area, its user, time when it was taken on lease etc. before 30.06.1981. List of residents including out-houses dwellers was to be prepared by District Magistrate. Heirs of deceased lease-holders were to be treated as one unit. Area for which renewal could be made was reduced to building with 500 sq. metre of land appurtenant and 500 sq. metre open land or 1500 sq. metre whichever was more. Area of building for commercial purpose was fixed at 2000 sq. metres. Premium was fixed at 50 paisa per sq. metre. Thus, from 1976 onwards for the purpose of renewal, area was reduced from acre to square metre and unit for premium and ground rent became square feet instead of acre. All heirs of Lessees became one unit for renewal. Land covered by outhouses were to be excluded. Lessees could not even opt for it.

91. When we considered the claim of petitioners in reference to above G.Os., nothing is on record to show that petitioner ever applied and sought renewal or fresh lease, either before actual expiry of lease term or immediately thereafter, in terms of above G.Os., hence petitioners cannot claim any benefit under the above mentioned G.Os.

92. Lease Holders, whose lease had already expired or those who were sitting Lease Holders and leases were going to expire in a short period, came to this Court in various writ petitions. This entire bunch was decided in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra).** In this case, there were two categories of writ petitioners, as under:

(i) Those, to whom notices were given by Collector and who had complied with terms and conditions as laid down in various orders issued from time to time prior to 1965; and

(ii) Those, to whom no notice was sent and till matter filed before the Court, no steps were taken and no order was passed in their favour.

93. Court held :

(I) A Lessor may, after expiry of period for which lease is granted, renew the same or resume i.e. re-enter. But if out

of the two i.e. re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time, it results in abandonment.

(II) If the land is needed or building has to be demolished in public interest for general welfare, probably no exception can be taken as the interest of individual has to be sacrificed for the society. But asking Lessee to vacate land or remove Malba for no rhyme or reason but because State is the owner, cannot be accepted to be in consonance with present day philosophy and thinking about role of State.

(III) After Act, 1976, no person can successfully or validly claim to hold land, more than the Ceiling limit.

(IV) Some part of G.O. of 1981 was not consistent with Act, 1976. The rules contained in Nazul Manual are set of Administrative Orders or collections of guidelines issued by Government for the authorities to deal with Government property.

(V) When a G.O. was issued and its conditions are complied with, mere for bureaucratic delay, performance under the said G.O. cannot be denied. Therefore, Lessee, who had deposited first instalment, as directed in G.O. of 1965, were entitled for renewal of their lease.

(VI) After enactment of ceiling law, a Lessee cannot hold land more than the provided limit.

(VII) If leases were renewed in respect of those, who had acquired social or political status, whose names are given in para 15 of judgment, which includes, Dr. K. N. Katju, ex-Central Law Minister, Chief Minister and Governor, Dr. S. K. Verma, ex-Chief Justice and Governor, Sri B.L. Gupta, ex-Judge High Court, J. D. Shukla, I.C.S., O. N. Misra, I.A.S., when there was no justification not to give same benefit to others. Similar benefits must be given since most of them were also distinguished persons namely S.N. Kacker, ex-Central Law Minister, Solicitor General of India and Advocate General of the State, Sri S. S. Dhavan, ex-Judge, High Court and Governor and High Commissioner, Sri Lal Ratnakar Singh I.A.S. Ex-Member of Board of Revenue, M.L.Chaturvedi, ex-Judge, High Court and member of Union Public Service Commission, W. Broome, I.C.S. etc.

94. Aforesaid judgment was confirmed by Supreme Court by dismissing appeals preferred by State of U.P. and others i.e. **State of U.P. and others vs. Purshottam Das Tandon and others 1989 Supp.(2) SCC 412.** Supreme Court clarified that renewal of leases shall be subject to the provisions of U.P.Act, 1976 and High Court judgment shall apply to all the leases to whom G.O. dated 23.04.1959, 02.07.1960 and 03.12.1965 were applicable and all those claiming under them. The order of Supreme Court reads as under :

"We have heard the learned counsel for both the parties at length. We do not find any infirmity in the judgment and order passed by the High Court against which these special leave petitions are preferred. We, however, make it clear that the leases that are going to be granted pursuant to the writ issued by the High Court will be subject to the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. On the leases being granted, the Competent Authority under the Act shall be at liberty to apply the provisions of the Act and in particular section 15 thereof to all the leases and take away all the surplus lands in their hands after determining the

surplus lands in accordance with law. The ***directions issued by the High Court can be availed of by all the lessees to whom the G.O. dated 23rd April, 1959, 2nd July, 1960 and 3rd December, 1965 were applicable and all those claiming under them.***

All the Special Leave Petitions are dismissed accordingly with these observations. If any further directions are needed, the persons interested may approach the High Court."

(Emphasis added)

95. Aforesaid judgment has no application to the case of petitioners at all since neither petitioners come within the category of eligible persons to apply for renewal of lease under Government Orders which were considered in **Purushottam Dass Tandon and others vs. State of U.P., Lucknow and others (supra)** nor even otherwise petitioners have shown any provision, whether statutory or executive, including G.O., which may confer entitlement upon petitioner to seek renewal of lease at all.

96. Aforesaid **fourth question**, therefore, is answered against petitioners.

97. The **fifth question** is, "whether Repeal Act, 2017 has effect of denying to State, right of resumption/re-entry due to repeal of GG Act, 1895."

98. It is contended that Section 4 of Repeal Act, 2017 only protects right, title, obligation or liability already acquired, accrued or incurred by State of U.P. under GG Act, 1895 to resume Nazul land according to resumption clause of lease-deed prior to repeal of GG Act, 1895 and nothing more than that. Since no right, title, obligation or liability was already acquired or incurred or accrued by/to State Government for the purpose of resumption under resumption clause before repeal of GG Act, 1895, therefore resumption with reference to GG Act, 1895 is wholly illegal.

99. Meaning of words 'accrued', 'acquired' and 'incurred' has been given in various paragraphs of writ petitions but we find that basic aspect has been ignored and missed by petitioners. Terms of lease as soon as lease was executed caused in creating rights, obligations, duties and interest of both the parties i.e. Lessor and Lessee. Their relations are to be governed in accordance with terms and conditions of lease. Relevant clause says that it shall be lawful for the Secretary of State, notwithstanding waiver of any previous cause or right of re-entry, to enter into and upon said demised premises whereupon the same shall remain to the use of and vested in Secretary of State and said demise shall absolutely determine out. The Lessee, who agreed with the said term incurred duty to allow such re-entry to State whenever Government exercises its right of re-entry. Here lies the right of State to re-enter, which was acquired by State by virtue of execution of lease deed and accepted by Lessee i.e. it incurred liability not to obstruct the said right of State i.e. Lessor.

100. Petitioners, in our view, have misconstrued Section 4 vis-a-vis terms of lease and therefore, entire argument in this respect is devoid of merit, hence rejected. This question is also returned against petitioners.

101. **Sixth question** is "whether resumption clause is arbitrary?"

102. The argument is clearly misconceived. In fact, it is an attempt to extend the argument advanced on question five. Once benefits and rights of parties are in terms of lease, it is not open to a party to challenge one of the conditions of whole document whereupon some right or interest in some property has been transferred. In other words, an act is subject to certain conditions as a whole, and parties to the transaction have accepted all the conditions together, then subsequently it is not open to retain some or leave another. It cannot chose some and leave other. This principle is based on doctrine of election, which postulates that no party can accept and reject the same instrument. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the condition that it is valid and then turn round and say that it is void for the purpose of securing some other advantage.

103. As per **Halsbury's Laws of England (4th Edition) Vol. 16 (Paragraph 1508),** after taking an advantage under an order a party may be precluded from saying that it is invalid and asking to set it aside.

104. Section 116 of Indian Evidence Act, 1872 *(hereinafter referred to as "Act, 1872"),* provides for 'estoppel' of tenant to deny title of landlord to immovable property. It reads under :

"116. Estoppel of tenant; and of licensee of person in possession-

"No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property, and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given."

105. In **Mt. Bilas Kunwar v. Desraj Ranjit Singh and others, A.I.R. 1915 P.C. 96,** Privy Council explained provisions of Section 116 of Act, 1872 and held as under:

"Section 116 is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord."

106. In **Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others v. Director General of Civil Aviation and others, (2001) 5 SCC 435 (Paragraph-12),** Court referred to its earlier judgments in **Babu Ram alias Durga Prasad v. Indra Pal Singh, 1998(6) SCC 358, P.R. Deshpande v. Maruti Balaram Haibatti, 1998(6) SCC 507 and Mumbai International Airport Private Limited v. Golden Chariot Airport and another, 2010 (10) SCC 422** and held that doctrine of election is based on the rule of estoppel. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his action or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. However, taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, parties should not blow hot and cold by

taking inconsistent stands and prolong proceedings.

107. In **Cauvery Coffee Traders, Mangalore v. Hornor Resources (International Company Limited), (2011) 10 SCC 420 (Paragraph 34),** Court referred to its decision in **Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593, CIT v. V. MR.P. Firm Muar AIR 1965 SC 1216, NTPC Ltd. v. Reshmi constructions, Builders & Contractors, (2004) 2 SCC 663, Ramesh Chandra Sankla v. Vikram Cement (2008)14 SCC 58 and Pradeep Oil Corpn. v. MCD (2011) 5 SCC 270,** and held, that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts benefits of a contract or conveyance or an order, he is estopped to deny validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity. However, it must not be applied in a manner as to violate the principles of right and good conscience.

108. In **V. Chandrasekaran and another v. Administrative Officer and others, (2012) 12 SCC 133,** Court followed the law laid down in **Cauvery Coffee Traders, Mangalore (supra).**

109. In **Rajasthan State Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another (2013) 5 SCC 470,** Court again reiterated the law laid down in **Cauvery Coffee Traders, Mangalore (supra)** and held, in paragraph 23, as under :

"A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. *Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and i****t is not permissible for the court to make a new contract,*** *however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely".*

(Emphasis added)

110. In **State of Punjab and others v. Dhanjit Singh Sandhu (2014) 15 SCC 144 (Paragraph Nos. 21, 22, 23, 24, 25 and 26)** Court reiterated the law laid down in **CIT v. MR. P. Firm Muar (supra), Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329; R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683 (Paragraph 10); and P.R. Deshpande v. Maruti Balaram Haibatti, (1998) 6 SCC 507** and held that defaulting allottees cannot be allowed to approbate and reprobate by first agreeing to abide by the terms and conditions of allotment and later seeking to deny their liability as per agreed terms. The doctrine of "approbate and reprobate" is only a species of estoppel. It is settled proposition of law that once an order has been passed, it is complied with, accepted by other party

and he derived benefit out of it, he cannot challenge it on any ground.

111. In **Bansraj Lalta Prasad Mishra v. Stanley Parker Jones, (2006) 3 SCC 91 (Paragraph Nos. 13,14, 15 and 16),** Court considered Section 116 of Act, 1872 and held:

"13.The underlying policy of Section 116 is that where a person has been brought into possession as a tenant by the landlord and if that tenant is permitted to question the title of the landlord at the time of the settlement, then that will give rise to extreme confusion in the matter of relationship of the landlord and tenant and so the equitable principle of estoppel has been incorporated by the legislature in the said section.

14.The principle of estoppel arising from the contract of tenancy is based upon a healthy and salutary principle of law and justice that a tenant who could not have got possession but for his contract of tenancy admitting the right of the landlord should not be allowed to launch his landlord in some inequitable situation taking undue advantage of the possession that he got and any probable defect in the title of his landlord. It is on account of such a contract of tenancy and as a result of the tenant's entry into possession on the admission of the landlord's title that the principle of estoppel is attracted.

15.Section 116 enumerates the principle of estoppel which is merely an extension of the principle that no person is allowed to approbate and reprobate at the same time.

16.As laid down by the Privy Council in Kumar Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern Ltd. : (IA p.318)-

It [Section 116] deals with one cardinal and simple estoppel, and states it first as applicable between landlord and tenant and then as between licensor and lincensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation."

(Emphasis supplied)

112. Even otherwise, we find nothing arbitrary or illegal in resumption clause. State is the owner of land. If for public purpose, it wants to take back its land by way of resumption, there is nothing per se arbitrary. Secondly, condition of resumption is a part of contract between the parties and having accepted the same and contract has been carried out and completed its term, it order to wriggle out the rights, obligations and liabilities incurred and acquired thereunder, one of the parties cannot wriggle out by contending that one of the conditions of such agreement is bad.

113. Aforesaid argument therefore, has no merit and we also did not find that repeal of GG Act, 1895 by Repeal Act, 2017 takes away right of State of resumption, which has already acquired long back under the terms of lease and is attracted by Section 4 thereof. **Sixth question** is thus answered holding that neither Clause 3(c) of lease deed is arbitirary nor can be assailed by petitioners-lessees after enjoying other conditions of lease-deed.

114. **Seventh question** is "whether mere possession of petitioners over land in dispute confers any right upon them to resist entry of owner of land and can it

insist upon owner to follow any particular procedure before compelling petitioner to vacate land in dispute."

115. In this respect, it is contended that even if petitioners are rank trespassor, the fact is that petitioners are in possession of land in dispute and therefore by application of force, petitioners cannot be evicted. Petitioners, at the best, are unauthorized occupants in terms of U.P. Act, 1972 and therefore, atleast procedure prescribed in the said Act has to be followed. Further continued possession of petitioners over land in dispute entitles petitioners notice under Section 106 read with Section 116 TP Act, 1882, since principle of 'holding over' will apply, or in any case, State can evict petitioners by filing a suit for eviction, which is a remedy available in common law. In this regard, reliance is placed on certain authorities namely **Bishan Das and others Vs. State of Punjab and others AIR 1961 SC 1570, Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133, Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1 and Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620.**

116. It is also contended that terms of lease read with GG Act, 1895 cannot be resorted to by respondents since GG Act, 1895 has already been repealed by Repealing and Amending (Second) Act, 2017 *(hereinafter referred to as "Repeal Act, 2017)* and therefore, provisions of GG Act, 1895 are not available to respondents to dispossess petitioners and cannot be resorted to.

117. With regard to applicability of TP Act, 1882 we have already discussed the matter in the light of GG Act, 1895. Law laid down in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (2012) 7 SCC 278** is very clear and holds the field. At the pain of repetition, we may observe that Supreme Court has clearly held that in the matter of Government Grant, it is governed by provisions of GG Act, 1895 and no other Statute including TP Act, 1882 will have any application. Court has also said that procedure prescribed under lease deed for re-entry / resumption of land is a special procedure and that can be followed for re-entry and no other Statute and no other procedure is to be observed.

118. So far as application of Section 116 of TP Act, 1882 is concerned we find nothing to show that Section 116 of TP Act, 1882 has any application in the case in hand. It is attracted only when an assent of landlord has been obtained for continuation of lease after expiry of lease period, which is not the case in hand. These aspects have been dealt with in **Shanti Prasad Devi and others vs. Shankar Mahto and others (2005) 5 SCC 543,** which has been followed in **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd. (supra).**

119. Now, we come to the question of applicability of UP Act, 1972.

120. As we have already said that in view of declaration made under Section 2 of GG Act, 1895, as amended in Uttar Pradesh, no Statute will govern conditions of Government Grant and instead it will specifically be governed only by terms of Government Grant. Therefore, it is not necessary for State to follow procedure of

U.P. Act, 1972, though it is also available and under the provisions thereof admittedly petitioner is 'unauthorized occupant'.

121. Above contention can be examined from another angle. Petitioner's possession at the best can be juridical possession though it is admittedly unlawful and illegal. Property is a legal concept that grants and protects a person's exclusive right to own, possess, use and dispose of a thing. The term property does not suggest a physical item but describes a legal relationship of a person to a thing. Real property consists of lands, tenements and hereditaments. Land refers to ground, the air above, the area below the Earth's surface and everything that is erected on it. Tenements include land and certain intangible rights recognized by municipal laws related to lands. A hereditaments embraces every tangible or intangible interest in real property that can be inherited. An interest describes any right, claim or privilege that an individual has towards real property. Law recognizes various types of interests in real property which may justify possession over property of person concerned. A non-possessory interest in land is right of one person to use or restricted use of land that belongs to other person such as easementary rights. Non-possessory interest does not constitute ownership of land itself. Holders of a non-possessory interest in real property do not have title and owner of land continues to enjoy full right of ownership, subject to any encumbrances. An encumbrance is a burden, claim or charge on real property that can affect the quality of title and value and/or use of property. Encumbrances can represent non-possessory interests in real property.

122. Possession is also of two kinds namely, (a) de facto possession, and *(b) de jure possession.* De facto possession is when a person being in actual physical possession and de jure possession is possession in law. Constructive possession would be a possession through a representative, agent, tenant or a trustee. A person in de facto possession could be in adverse possession. In a civilized society some protection of possession is essential. The methods of protection recognized are :

(i) Possessor can be given certain legal rights, such as a right to continue in possession free from interference by others; and

(ii) Protective possession by prescribing criminal penalties for wrongful interference and wrongful dispossession.

123. When certain legal right are given to a person, one of the mode is that possessory right in rem are supported by various rights in personam against those who violate possessor's right; he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to him. But, whenever such a person invoked such remedies, one of the question would be, whether a person invoking them actually has any possession to be protected. In other words, it has to be examined whether a person is in possession of an object? However, legal concept of possession is not restricted to commonsense concept of possession, namely physical control. Possession in fact is not a simple notion. Whether a person is in possession of an article, depends on various factors namely nature of article itself and attitudes and activities of other persons.

124. Possession may be 'lawful' or 'unlawful' or even 'legal' or 'illegal'. Acquisition of legal possession would obviously be lawful and would, of necessity, involve occurrence of some event recognized by law whereby subject matter falls under the control of the possessor. Problem, however, arises where duration for which possession recognized is limited by Grantor or law. Continuance of possession beyond prescribed period is not treated as a 'lawful possession'. If a landlord does not consent to lease being continued, possession of tenant would not be lawful unless there is some Statute providing otherwise. Nature of possession being not lawful, would entitle landlord to regain possession. Thus, a lawful possession is state of being a possessor in the eyes of law. Possession must be warranted or authorized by law; having qualifications prescribed by law and neither contrary to nor forbidden by the law. However, law recognizes possession as a substantive right or an interest. Continued possession of a person is recognized by law as a sufficient interest capable of being protected by possessor, right being founded on mere fact of possession. Possession is a good title of right against anyone who cannot show a better title. However, when a person in possession may not be lawful, recovery of possession by owner must have sanction of law and it cannot proceed to dispossess the other in a forcible manner not recognized in law. In some authorities, possession of a person, who has entered therein initially, validly, but subsequently become unlawful, has been given a different meaning i.e. juridical possession. A tenant holding over without consent of landlord would be a juridical possession though his possession is not lawful. It is said that possession of tenant, post efflux of lease period, would not be treated as lawful possession still he would not be treated as a rank trespasser. Thus, here concept of possession as juridical possession has been introduced.

125. A person having juridical possession though illegal and unlawful, by a sheer executive fiat may not be thrown out of possession of the land. But where terms of lease, which is the genesis of claim of such person provides manner in which Lessor can re-enter land and such procedure has been recognized by Statute and also upheld by Supreme Court in **Azim Ahmad Kazmi and others vs. State of U.P. and Another (supra),** and Lessor follow such procedure, it cannot be said that eviction is being resorted to illegally or without following lawful method.

126. Now, coming to question of applicability of Section 106 TP Act, 1882, we find that there is no necessity of any quit notice in this case. It is an admitted case that lease stood expired on 14.03.1962 and thereafter it has not been renewed. In such circumstances, status of even valid lessee would be that of "Tenant at sufference" while petitioners position is even worst to that.

127. In case of a lessee, who has entered into possession of a land validly in terms of lease deed, after expiry of period of lease or determination thereof, status of such lessee, if possession continued, would be that of "Tenant at sufference", therefore, even a quit notice is not necessary to be given and Section 106 TP Act, 1882 is not at all attracted. Relying on earlier decision in **R.V. Bhupal Prasad vs. State of A.P. (1995) 5 SCC 698** in a

recent decision in **Sevoke Properties Ltd. vs. West Bengal State Electricity Distribution Company Ltd. AIR 2019 SC 2664,** Court held that once it is admitted by lessee that term of lease has expired, lease stood determined by efflux of time and in such case, a quit notice under Section 106 is not required to be given. Court has said as under :

"Once the lease stood determined by efflux of time, *there* ***was no necessity for a notice of termination Under Section 106."***

(Emphasis added)

128. In the above authority, Court held that after expiry of period of lease, status of Lessee becomes that of 'Tenant at sufferance'. 'Tenant at sufference' is one who comes into possession of land by lawful title, but who holds it by wrong after termination of term or expiry of lease by efflux of time. The tenant at sufferance is one who wrongfully continues in possession after extinction of a lawful title. There is little difference between him and a trespasser. Quoting from Mulla's Transfer of Property Act (7th Edn.) at page 633, Court observed that tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without consent of person entitled. A "tenancy at sufferance" does not create relationship of landlord and tenant. Court further quoted from page 769 of Mulla's transfer of Property Act (7th Edition), that act of holding over after expiration of term does not necessarily create a tenancy of any kind. If lessee remains in possession after determination of term, the common law Rule is that he is a tenant at sufferance.

129. It is in this backdrop we find that authorities relied by petitioners are inapplicable to the facts of this case and will not help petitioners at all.

130. The first authority cited is **Bishan Das and others Vs. State of Punjab and others (supra)** in which a Constitution Bench had an occasion to consider fundamental right of property vis-a-vis infringement therewith by executive orders. Therein, one Lala Ramji Das, , carrying on a joint family business in the name and style of "Faquir Chand Bhagwan Das", desired to construct a Dharmasala on a Nazul property of the then State of Patiala. In 1909, he sought permission of Government to construct a Dharmasala on the said land, since it situate near Barnala Railway Station, and therefore would have been convenient to Travellers who come to that place. It appears that initially for the same purpose, Patiala Government had granted permission to Choudhuris of Barnala bazar, but they could not do so for want of funds. Therefore when Ramji Das sought permission in the name of firm Faquir Chand Bhagwan Das in May, 1909, same was granted and communicated by Assistant Surgeon, In-charge of Barnala Hospital, who was presumably In-charge of Public Health Arrangements at Barnala. The sanction was subject to certain conditions, namely, no tax shall be taken for the land; shopkeepers will arrange 'Piao' for passengers; plans of building shall be presented before sanctioning authority; cleanliness and sanitary rules

shall be followed by the persons maintaining Dharmasala and no permission to construct any shop will be granted and if any condition is violated, State shall dispossess them from the land in dispute.

131. Dharmasala was constructed in 1909 and inscription on the stone to the following effect was made:

"Dharmasala Lala Faquir Chand Bhagwan Das, mahajan, 1909."

132. Though a condition was imposed for not permitting construction of any shop, but as a matter of fact, a number of shops were later constructed, with the permission of authorities concerned, for meeting expenses of maintenance of Temple and Dharmasala. A complaint was made in 1911 against Ramji Das that he was utilizing Dharmasala for his private purpose but it remained unheeded. On the complaint made, some inquiry was also conducted by Tehsildar wherein Ramji Das got his statement recorded in January, 1925. On 07.04.1928, Revenue Minister, Patiala State, passed an order stating that though land on which Dharmasala had been built, was originally Government land (nazul property), it would not be proper to declare it as such and Dharmasala should continue to exist for the benefit of the public. Ramji Das or any other person will not be competent to transfer land and if such transfer is made, it would be unlawful and invalid and in such event, Government will escheat. Further inquiry was also made and it appears that Ramji Das was given permission to make a raised platform and other extensions etc. On 10.09.1954, one Gopal Das, Secretary, Congress Committee, Barnala, filed a petition to Revenue Minister, Patiala, making various allegations against Ramji Das. Thereupon an inquiry was conducted by Tahsildar, who found that Dharmasala was constructed by Ramji Das on Government land, that Dharmasala was for public benefit; and, that Ramji Das had been its Manager throughout. He, however, said that Ramji Das was bound to render accounts which he failed considering that property belong to him and, therefore, he should be removed and past accounts be called for. When the matter went for opinion of Legal Remembrancer of State Government, it was pointed out that Dharmasala and Temple, though built on Government land, but not Government property. It also said that though Ramji Das was repudiating the existence of a Public Trust, he was working as Trustee of a Trust created for public purposes of a charitable or religious nature and could be removed by State only under Section 92 Civil Procedure Code. Ramji Das died on 10.12.1957. Petitioner Bishan Das and others came to manage Dharmasala, Temple and the shops etc. On 23.12.1957, Gopal Das and some others, describing themselves as members of public, made an application that since Ramji Das was dead, new arrangements should be made for proper management of Dharmasala which is used for the benefit of the public. Again a search of old papers was made and this time Sub-Divisional Officer, Barnala, recommended that in the interest of Government, Municipal Committee, Barnala, should take immediate charge of management of Dharmasala. This recommendation was affirmed by Deputy Commissioner, Sangrur, and pursuant to the said order, Kanungo presumably dispossessed Bishan Das and others from part of Dharmasala on 07.01.1958, and, charge thereof was given to Municipal

Committee, Barnala. These orders were challenged alleging that the same were without any authority of law and violative of fundamental rights enshrined under Articles 14, 19 and 31 of the Constitution.

133. The defence taken was that property is trust property of a public and charitable character, hence Bishan Das and others were not entitled to claim any property rights in respect thereof.

134. Supreme Court observed in Para-10 that even if it is assumed that the property is Trust property, no authority of law authorized State or its Executive Officers to take action against Bishan Das and others in respect of Dharmasala. Government counsel sought to argue that Bishan Das and others were trespassers and land on which Dharmasala situate belong to Government, hence Government was entitled to use minimum of force to eject trespassers, but this defence was rejected by holding that it is a clear case of violation of fundamental right of Bishan Das and others. Supreme Court said that nature of sanction granted in 1909 in respect of land whether it was a lease or licence, with a Grant or an irrevocable licence are questions of fact, need not be gone into by it, but admitted position is that land belonged to Government who granted permission to Ramji Das on behalf of joint family firm to build a Dharmasala, Temple and Shops and manage the same during his life time. After his death his family members continued with management. Thus, they were not trespassers at all in respect of Dharmasala, Temple and Shops; nor could it be held that Dharmasala, Temple and Shops belong to State. The question whether Trust created was public or private is irrelevant. Court said that a Trustee, even of a Public Trust, can be removed only by procedure known to law. He cannot be removed by an executive fiat. The maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law in India and in this regard, Supreme Court referred to the decisions in **Thakoor Chunder Parmanick Vs. Ramdhone Bhuttacharjee (1866) 6 W.R. 228; Lala Beni Ram Vs. Kundan Lall (1899) L.R. 26 I.A. 58 and Narayan Das Khettry Vs. Jatindranath (1927) L.R. 54 I.A. 218.** Court said that a person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by application of maxim *quicquid plantatur solo, solo credit.* It said:

"It is, therefore, ***impossible to hold that in respect of the dharmasala, temples and shops, the State has acquired any rights whatsoever merely by reason of their being on the land belonging to the State.*** *If the State thought that the constructions should be removed or that the condition as to resumption of the land should be invoked, it was open to the State to take appropriate legal action for the purpose."*

(Emphasis added)

135. Court said that even if State proceeded on the assumption that there was a Public Trust, it could have taken appropriate legal action for removal of Trustees by way of Suit under Section 92 C.P.C. and not otherwise. Constitution Bench then said:

" .. that ***does not give the State or its executive officers the right to*** *take*

the law into their own hands and ***remove the trustee by an executive order.***

(Emphasis added)

136. Court concluded its findings in Para-14 of the judgment as under:

"The facts and the position in law thus clearly are (1) that the ***buildings constructed on this piece of Government land did not belong to Government,*** *(2) that the petitioners were in possession and occupation of the buildings and (3) that* ***by virtue of enactments binding on the Government, the petitioners could be dispossessed, if at all, only in pursuance of a decree of a Civil Court*** *obtained in proceedings properly initiated."*

(Emphasis added)

137. Court passed serious stricture against State authorities holding that the executive action taken by State and its Officers is destructive of the basic principle of rule of law. Hence action of Government in taking law into their hands and dispossessing petitioners by sheer display of force, exhibits a callous disregard of normal requirements of rule of law, apart from what might legitimately and reasonably be expected from a Government functioning in a society governed by a Constitution which guarantees to its citizens against arbitrary invasion by the executive on peaceful possession of property. Supreme Court reiterated what was said in its earlier judgment in **Wazir Chand Vs. The State of Himachal Pradesh AIR 1954 SC 415** that State or its executive officers cannot interfere with the rights of others unless they can point out some specific rule of law which authorizes their acts. Supreme Court seriously deprecated State and said:

"We have ***here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority.*** *Even if the property was trust property it is difficult to see how the Municipal Committee, Barnala, can step in as trustee on an executive determination only."*

138. Aforesaid decision has no application in the case in hand, inasmuch as, here State has exercised its power following terms and conditions laid down under lease-deed, which were made to prevail over any Statute providing otherwise, including TP Act, 1882 vide Section 2 of GG Act, 1895. Further, respondents, in exercise of right of resumption/re-entry, have not straightway went to dispossess petitioners but notice in question has been given to them, giving time to vacate the premises whereafter respondents proposed to take further action for taking possession. Therefore, it cannot be said that no notice has been given to petitioners in the present case.

139. **Express Newspapers Pvt. Ltd. and others Vs. Union of India (1986) 1 SCC 133** is a matter which was decided in a Writ Petition filed under Article 32 of Constitution by aforesaid Newspaper Company having its Establishment in Express Buildings at 9-10, Bahadurshah Zafar Marg, New Delhi, which was a land on perpetual lease from Union of India, under a registered Indenture of Lease, dated 17.03.1958. Five petitioners, who filed above Writ Petition before Supreme Court included Indian Express Newspaper (Bombay) Private Limited of which Express

Newspapers Private Limited was a subsidiary and petitioners-3, 4 and 5, namely, Sri Ram Nath Goenka was Chairman of the Board of Directors, Nihal Singh was the Editor-in-chief of the Indian Express and Romesh Thapar was the Editor of the Paper published from Express Buildings. Union of India; Lt. Governor of Delhi, Sri Jagmohan; Municipal Corporation of Delhi; Zonal Engineer (Buildings) and Land and Development Officer were impleaded as respondents-1 to 5. The validity of notice of re-entry upon forfeiture of lease issued by Engineer Officer, Land and Development Office, New Delhi on 10.03.1980 was challenged. The notice required petitioners to show cause why Union of India should not re-enter upon and take possession of demised premises i.e. plots nos. 9 and 10, Bahadurshah Zafar Marg, together with Buildings built thereon under Clause 5 of Indenture of Lease, dated 17.03.1958, for committing breach of Clauses 2(14) and 2(5) of lease-deed. Another notice was issued earlier on 01.03.1980 by Zonal Engineer (Buildings), Municipal Corporation, City Zone, Delhi requiring Express Newspapers Pvt. Ltd., New Delhi to show cause why aforesaid buildings being unauthorized, be not demolished under Sections 343 and 344 of Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "DMC Act, 1957"). A challenge was made, besides others, on the ground of personal vendetta against Express Group of Newspapers and also being violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. The questions posed by Supreme Court, to be of far reaching consequence for maintenance of federal structure of Government, were:

(1) Whether the Lt. Governor of Delhi could usurp the functions of the Union of India, Ministry of Works and Housing and direct an investigation into the affairs of the Union of India i.e. question the legality and propriety of the action of the then Minister for Works and Housing in the previous Government at the center in granting permission to Express Newspapers Pvt. Ltd. to construct new Express Building with an increased FAR of 360 with a double basement for installation of a printing press for publication of a Hindi Newspaper on the western portion of the demised premises i.e. Plots No. 9 and 10, Bahadurshah Zafar Marg, New Delhi with the Express Buildings built thereon?

(2) Whether the grant of sanction by the then Minister for Works and Housing and the consequential sanction of building plans by him of the new Express Building was contrary to the Master Plan and the Zonal Development Plans framed under the Delhi Development Act, 1957 and the municipal bye-laws, 1959 made under the DMC Act, 1957 and therefore the lessor i.e. the Union of India had the power to issue a notice of re-entry upon forfeiture of lease under Clause 5 of the indenture of lease dated March 17, 1958 and take possession of the demised premises together with the Express Buildings built thereon and the Municipal Corporation had the authority to direct demolition of the said buildings as unauthorized construction under Sections 343 and 344 of the DMC Act, 1957?

(3) Whether the threatened action which the petitioners characterise as arbitrary, illegal and irrational was violative of Article 19(1)(a) read with Article 14 of the Constitution?

140. Thereafter Court analyzed the facts of case in detail and respective arguments and from Para-45 to 47 we find that Government of India and Lt. Governor of Delhi were Head-on to each other and even Counsel's role was not

appreciated by Court. In the light of arguments advanced by parties, in para-59 of judgment, Court formulated eight questions. The issue of maintainability of writ petition under Article 32 was also raised and it was considered by Supreme Court in the judgment from para-66 onwards. It held that building in question was necessary for running press, any statutory or executive action to pull it down or forfeit the lease, would directly impinge on the right of freedom of speech and expression under Article 19(1)(a) and therefore, writ petition was maintainable. Court said:

"... impugned notices of re-entry upon forfeiture of lease and of the threatened demolition of the Express Buildings are intended and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices constitute a direct and immediate threat to the freedom of the press and are thus violative of Article 19(1)(a) read with Article 14 of the Constitution."

141. Since, land in dispute was Government land, provisions of Government Grants Act, 1895 (hereinafter referred to as "GG Act, 1985") were also relied on by Government and, therefore, Supreme Court examined provisions thereof also. It held that GG Act, 1895 is an explanatory or declaratory act. It said:

"Doubts having arisen as to the extent and operation of the Transfer of Property Act, 1882 and as to the power of the Government to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, the ***Act was passed to remove such doubts as is clear from the long title and the preamble.*** *The Act contains two sections and provides by Section 2 for the exclusion of the Transfer of Property Act, 1882 and, by Section 3 for the exclusion of, any rule of law, statute or enactment of the Legislature to the contrary."*

(Emphasis added)

142. In **Express Newspapers Pvt. Ltd. and others Vs. Union of India (supra)** Court further said:

"It is plain upon the terms that Section 2 excludes the operation of the Transfer of Property Act, 1882 to Government grants. *While Section 3 declares that all provisions, restrictions, conditions and limitations contained over any such grant or transfer as aforesaid shall be valid and shall take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary. A series of judicial decisions have determined the overriding effect of Section 3 making it amply clear that* ***a grant of property by the Government partakes of the nature of law since it overrides even legal provisions which are contrary to the tenor of the document."***

(Emphasis added)

143. Having said so, Supreme Court found that the stand taken on behalf of Union of India that there was non compliance of mandatory requirement of Clause-6, therefore notice of re-entry was valid, is not correct.

144. Court then noted some contradictions in Constitution Bench judgment in **Bishan Das and others Vs. State of Punjab and others (supra) and**

State of Orissa Vs. Ram Chandra Dev AIR 1964 SC 685.

145. In **State of Orissa Vs. Ram Chandra Dev (supra),** Constitution Bench observed:

"Ordinarily, where property has been granted by the State on condition which make the grant resumable, after resumption it is the grantee who moves the Court for appropriate relief, and that proceeds on the basis that the ***grantor State which has reserved to itself the right to resume may, after exercising its right, seek to recover possession of the property without filing a suit.*** **"**

(Emphasis added)

146. It was observed that existence of a right is the foundation for a petition under Article 226 of the Constitution. In Para-84 Court said that in cases involving purely contractual issues, the settled law is, where statutory provisions of public law are involved, writs will be issued and referred to its earlier judgment in **Mohammed Hanif Vs. State of Assam (1969) 2 SCC 782.** Thereafter it also considered provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as "Act, 1971") and observed that Express building was constructed with the sanction of lessor, i.e., Union of India on plots demised on 'perpetual lease' by registered lease-deed dated 17.03.1958 hence cannot be regarded as 'public premises' belonging to the Central Government under Section 2(e). That being so, Act, 1971 has no application.

147. Court then considered other provisions relating to power of Lt. Governor, and Central Government and factual aspects involved in the matter, which, in our view, are not relevant for the purpose of this Case. Court also examined applicability of doctrine of estoppel but that has also not been raised in these matters, hence it is not necessary to examine it.

148. One aspect we may notice hereat that detailed judgment has been written by Hon'ble A.P. Sen, J. Justice E.S. Venkataramiah has agreed with the judgment of Hon'ble A.P. Sen, J in relation to the aspect that Lt. Governor of Delhi, Sri Jagmohan, has taken undue interest in getting notices issued to Express Newspapers and this action is not consistent with normal standards of administration. Notices were issued under pressure of Lt. Governor of Delhi, hence violative of Article 14, suffers with arbitrariness and non application of mind. His Lordship said that it was not necessary to express any opinion on the contention based on Article 19(1)(a) of Constitution. Hon'ble Venkataramiah further said that question relating to civil rights of the parties flowing from lease deed cannot be disposed of in a petition under Article 32 of Constitution since questions whether there has been breach of the covenants under the lease, whether lease can be forfeited, whether relief against forfeiture can be granted etc. are foreign to the scope of Article 32 of Constitution which should be tried in a regular civil proceeding. His Lordship further said in Para-202 of judgment as under:

"One should remember that the property belongs to the Union of India and the rights in it cannot be bartered away in accordance with the sweet will of an Officer or a Minister or a Lt. Governor but

they should be dealt with in accordance with law. At the same time a person who has acquired rights in such property cannot also be deprived of them except in accordance with law."

149. Having said so, while agreeing with ultimate order of quashing of notices, Hon'ble Venkataramiah, J. said:

"I express no opinion on the rights of the parties under the lease and all other questions argued in this case. *They are left open to be decided in an appropriate proceeding."*

(Emphasis added)

150. Hon'ble R.B. Misra, J. also agreed with Hon'ble A.P. Sen and E.S. Venkataramiah, JJ that the notices challenged in writ petition are invalid, having no legal consequences and must be quashed for reasons detailed in both the judgments. His Lordship, however, said that other questions involved in the case are based upon contractual obligations between the parties and can be satisfactorily and effectively dealt with in a properly instituted suit and not by way of writ petition on the basis of affidavits which are so discrepant and contradictory in that case. Hon'ble R.B. Misra, J. in para 207 of judgment said:

"207. The ***right to the land and to construct buildings*** *thereon for running a business is not derived from Article 19(1)(a) or 19(1)(g) of the Constitution* ***but springs from terms of contract between the parties*** *regulated by other laws governing the subject, viz., the Delhi Development Act, 1957, the Master Plan, the Zonal Development Plan framed under the Delhi Municipal Corporation Act and the Delhi Municipal Bye-laws, 1959 irrespective of the purpose for which the buildings are constructed.* ***Whether there has been a breach of the contract of lease or whether there has been a breach of the other statutes regulating the construction of buildings are the questions which can be properly decided by taking detailed evidence involving examination and cross-examination of witnesses."***

(Emphasis added)

151. Thus the above judgment also has no application to the facts of present case. On the contrary, majority view expressed in above judgment is that right to land and to construct building is not derived from Articles 19(1)(a) or 19(1)(g) of Constitution but springs from promise of contract between the parties. Whether there has been breach of contract of lease or there has been breach of any provision regulating lease rights and construction of building etc. are such questions which can be properly decided by taking detailed evidence involving examination and cross examination of witnesses and therefore, such rights can be enforced in common law proceedings by filing suit. In the present case, the right of re-entry is being enforced as per terms of Grant which prevailed over any other law.

152. In **Yar Mohammad and another vs. Lakshmi Das and others AIR 1959 Allahabad 1,** a Full Bench of this Court considered following question :

"Whether the jurisdiction of the Civil Court is barred by virtue of Section 242 of the U. P. Tenancy Act in respect of suit filed under Section 9 of the Specific Relief Act for obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the-suit".

153. Therein plaintiffs instituted suit on 30.11.1948 for possession under Section 9 of Specific Relief Act, 1877 *(hereinafter referred to as "Act, 1877")* alleging that they were in actual possession of land in dispute (land was admittedly an agricultural land) but wrongfully dispossessed by defendants in November 1948. Defendants contested the suit and disputed correctness of above allegations of plaintiffs and pleaded that they were in possession of land as tenants of plaintiffs for more than 12 years, hence, plaintiffs cannot eject them. They also pleaded that suit was filed under Section 9 of Act, 1877 only to evade jurisdiction of Revenue Court. Trial Court i.e. learned Munsif rejected plea of lack of jurisdiction raised by defendants, accepted the case set up by plaintiffs and decreed the suit. Defendants then filed revision no.461 of 1952, which resulted in Reference, to a Larger Bench. The issue was with respect to applicability of Section 242 of U. P. Tenancy Act, 1939. Court said that Section 242 confers exclusive jurisdiction upon Revenue Court and takes away jurisdiction of Civil Court only in respect of two kinds of actions.

(i) suits or application of the nature specified in the Fourth Schedule of the Act; and

(ii) suits or applications based on a cause of action in respect of which any relief can be obtained by means of a suit or application specified in that schedule.

154. It was held that in order to attract Section 242, one has to demonstrate that action would fall under either of the above-mentioned two categories and if does not, jurisdiction of Civil Court is not ousted and Revenue Court will have no jurisdiction to entertain the action.

155. Then construing the cases, which may resort to Section 9 of Act, 1877, Court said that Section 9 gives a special privilege to persons in possession who take action promptly. In case they are dispossessed, Section 9 entitles them to succeed simply by proving:

(1) that they were in possession,

(2) that they have been dispossessed by the defendant,

(3) that dispossession is not in accordance with law, and

(4) that dispossession took place within six months of the suit.

156. No question of title either of plaintiffs or of defendants can be raised or gone into in an action brought under Section 9 of Act, 1877. Plaintiffs will be entitled to succeed without proving any title on which he can fall back upon and defendant cannot succeed even though he may be in a position to establish the best of all titles. Restoration of possession under Section 9 is however subject to a regular suit and person who has real title or even better title cannot be prejudiced in any way by a decree of a suit under Section 9. A person having real or better title always has a right to establish his title in a regular suit and get possession back. The objective and idea behind Section 9, as the Court observed, is, that law does not permit any person to take law in his own hands and to dispossess a person in actual possession, without having recourse to a Court or Institution, in an illegal manner. In other words, objective of Section 9 is to discourage people from taking law in their own hands, how-ever good title they may have. In the interest of public order, self-help is not permitted so far as possession over Immovable property is concerned Section 9 is intended to discourage and

prevent proceedings which might lead to serious breaches of peace. It does not allow a person who has acted high-handedly by wrongfully dispossessing a person in possession from deriving any benefit from his own unjustified act. Section 9, infact, provides for a summary and quick remedy for a person who is in possession but illegally ousted therefrom without his consent. Court observed that 'Possession' is prima facie evidence of title and if a person who is in possession is dispossessed, he has a right to claim back possession from the person who dispossesses him. In an ordinary common law proceedings, a person who has a title, is entitled to possession and cannot be deprived of his right of possession by a person, who has no title or inferior to the former. Court said that for Section 9, claim of title is not allowed to be set up and possession wrongfully taken, has to be restored. Full Bench therefore, answered question formulated above in negative.

157. In our view, above judgment has no application to the facts of this case for the reason that title of land is not in dispute, inasmuch as, it is admitted case of all the petitioners that land in dispute is 'Nazul', hence it is owned and vested in Government. It is also not in dispute that petitioner-1 of W.P. 1 got possession of land in dispute on transfer with permission of Lessor. However petitioner-1 further transferred land without such permission. This is illegal. Hence petitioner-1 of W.P.-1 has no actual possession over land in dispute and possession of others is illegal.

158. In the present case right of re-entry is being exercised by respondent-State in terms of lease-deed whereunder even original lessee was obliged to surrender/hand over possession to State Government.

159. We may also note hereat that in the case in hand, lease was governed by provisions of GG Act, 1895 and Section 2, as amended in State of U.P., has excluded provisions of U.P. Tenancy Act, 1939 for governing rights etc. of parties. Only provisions contained in lease-deed shall apply and have to be given effect to as if U.P. Tenancy Act, 1939 was not passed. Therefore also, reliance placed on the aforesaid judgment is of no consequence.

160. **Lallu Yeshwant Singh (dead) by his legal representative vs. Rao Jagdish Singh and others, AIR 1968 SC 620** is a judgment which came before two Judges Bench of Supreme Court from a dispute raised under Qanoon Mal Riyasat Gwalior Samvat, 1983 *(hereinafter referred to as "Qanoon Mal")* that is from Madhya Pradesh. Under Section 326 of Qanoon Mal, a suit was filed by Yeshwant Singh and others i.e. plaintiffs against Rao Jagdish Singh and others (defendants) in the Court of Tehsildar for possession of some agricultural land. Plaintiffs set up a case that they were in possession of land and forcibly dispossessed by defendants, therefore, should be restored their possession. Tehsildar decreed the suit and order was affirmed in appeal by Collector as well as Commissioner. Revision was also dismissed by Board of Revenue and decree passed by Tehsildar was maintained. Section 326 of Qanoon Mal broadly provided summary remedy as is provided in Section 9 of Act, 1877. In para 7 of the judgment, Supreme Court has referred to both the provisions and said that both are broadly similar. High Court took a different view holding that it was not necessary for a Lessor to resort to Court for obtaining possession and if there is default by plaintiff, it could have been dispossessed by defendants. Supreme Court said that no person can take law in its own hand and in such matter, where

provisions providing summary procedure for restoration of illegal dispossession of land have been made, the same can be resorted to by the person who has been illegally dispossessed. Supreme Court affirmed Full Bench judgment of this Court in **Yar Mohammad (supra)**. Here also we do not find applicability of this judgment to the case in hand for the reasons we have already said in respect of judgment in **Yar Mohammad (supra)**.

161. The decision in **State of U.P. Vs. Zahoor Ahmad and another (supra),** we find, instead of helping petitioners, supports the view which we have taken hereinabove. **The State of U.P. vs. Zahoor Ahmad and another (supra)** was a matter which came up before two Judges Bench of Supreme Court arising from action by State in respect of certain land which fell within reserved forest in State of Uttar Pradesh. Zahoor Ahmad was granted lease of a plot of land at Chandan Chowki, Sonaripur Range in North Kheri Forest Division for an annual rent of Rs.100/-. The aforesaid land was part of Reserved Forest of which State of U.P. is the proprietor. Lease was granted for one year commencing from 18.03.1947. It was renewed on 10.06.1948 with effect from 18.03.1948 for one year and again in 1949 for further one year. Ultimately lease expired on 18.03.1950. State of U.P., after termination of lease, allowed Zahoor Ahmad to continue in possession of land on condition settled between the parties that Licensee i.e. Zahoor Ahmad would pay Rs.1,000/- as annual rent for occupation till 15.07.1950. Even after determination of lease on 15.7.1950, Zahoor Ahmad i.e. Licensee continued in possession and State of U.P. allowed him to remain in possession for three years beyond 15.07.1950 though for this period Zahoor Ahmad did not agree to give any undertaking of making payment of annual rent of Rs.1,000/-. A letter dated 04.12.1951 was issued to Zahoor Ahmad asking him to pay Rs.3,000/- for the year 1950-51. Letter further provided that if Zahoor Ahmad do not agree to pay Rs.3,000/- for the year 1950-51, amount of rent would be reduced to Rs.1800/- but he would not be allowed lease in future in any circumstance. The fact remains that Zahoor Ahmad was allowed to continue in occupation of land without any agreement as to the amount of rent payable for 1950-51. On 29.10.1952, Conservator of Forests sent a letter that Zahoor Ahmad can be allowed to run the mill beyond 15.07.1950 for three years if he pays Rs.3,000/- per annum, and for one year only, if he is ready to pay Rs.1,800/- but thereafter lease would not be renewed. Notice also said that he was only Licensee and should remove his plant and vacate the premises within one month and pay Rs.6,000/- as damages for use and occupation. Zahoor Ahmad did not pay the amount, hence a suit for recovery of damages was filed by State of U.P. High Court came to the conclusion that Licensee (Zahoor Ahmad) was allowed to continue with the consent of State of U.P. though there was no written agreement about rate of rent and lease was granted for industrial purposes. Under Section 106 of TP Act, 1882, such lease is for year to year basis. The lease could have been terminated by six months notice and since no such notice was given, therefore, tenancy was not validly terminated. With respect to amount of rent, Court took the view that under Section 116, renewal would mean the same terms and conditions as made applicable in previous lease. High Court therefore decreed the suit for payment of rent of Rs.3,000/-. Possession was allowed by

State with its consent. Thus, High Court took the view that 'holding over' was applicable under Section 116. State Government bye-passing provision of TP Act, 1882 sought to rely on GG Act, 1895. Whether the kind of above lease, granted by State could have been brought within the purview of GG Act, 1895, Supreme Court examined this issue by referring to two judgments. In one, lease of forest land of Sunderbans was held to be a 'Grant' while, in another, Grant of Khas Mahal was not held to be as 'Grant'. In **Jnanendra Nath Nanda vs. Jadu Nath Banerji AIR 1938 Cal 211** two leases of two lots were granted by Sunderban Commissioner on behalf of Secretary of State. The land comprised in the lots were 'waste lands' of the Government. 'Waste lands' of Sunderbans were not property of any subject. Sunderbans was vast impenetrable forest. It was the property of East India Company and later on vested in Crown by virtue of an Imperial Statute. Court found that history of legislation showed that grants of Sunderbans lands were treated to be 'Crown Grants' within meaning of 'Crown Grants Act'. In another matter i.e. **Secretary of State for India in Council vs. Lal Mohan Chaudhuri, AIR 1935 Cal 746** in respect of Khas Mahal, lease was granted by Government. It was held that lease of Khas Mahal does not come within the category of 'Grant' as contemplated in GG Act, 1935. Having said so, in para 13 of judgment, Court said that lease granted to Zahoor Ahmad was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that State is the lessor will not by itself make above lease a 'Government Grant' within the meaning of GG Act, 1895. We may reproduce para 13 of the judgment in **State of U.P. vs. Zahoor Ahmad (supra)** as under :

"The lease in the present case was for the purpose of erecting a temporary rice mill and for no other purpose. The mere fact that the State is the lessor will not by itself make it a Government grant within the meaning of the Government Grants Act. There is no evidence in the present case in the character of the land or in the making of the lease or in the content of the lease to support the plea on behalf of the State that it was a grant within the meaning of the Government Grants Act."
(Emphasis added)

162. When a question arose whether High Court has rightly applied Section 116 of TP Act, 1882, Supreme Court, in this context, referred to a judgment of this Court in **Lala Kishun Chand vs. Sheo Dutta, AIR 1958 All. 879** wherein after expiry of lease of Nazul land, Licensee was permitted by Board of Revenue to continue in occupation as tenant and rent was also realized from him and held that in these facts, Section 116 TP Act, 1882 was rightly applied.

163. In the present case, it is not the case of any of the petitioners that after expiry of lease on 14.03.1962, they have been permitted to remain in possession of disputed Nazul land and rent has been accepted by respondents or they have paid rent.

164. Even if what is said by petitioners is taken to be correct, we do not find that Section 116 is applicable in the case in hand at all. Section 116 of TP Act, 1882 reads as under :

"116. Effect of holding over.- *If a lessee or under-lessee of property remains in possession thereof after the*

determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."

165. Twin conditions to attract principle of "holding over" vide Section 116 of TP Act, 1882, which need be satisfied are:

(i) After determination of lease, lessor or his representative has accepted rent from lessee or under lessee or assent to his continuing in possession; and

(ii) Lessee or under-lessee has remained in possession.

166. Both the above conditions are absent in this case. Hence Section 116 of T.P. Act, 1882 has no application at all.

167. The **last question** up for consideration is "whether re-entry/resumption of land by Lessor i.e. State Government is valid?"

168. So far as validity of resumption of land for 'public purpose' is concerned, it could not be disputed that land has been sought to be required by State in 'public purpose'. Allahabad City has been selected for development as a Smart City and respondents have pleaded that demand of lot of land has been made by various Government departments since various Offices, Workshops, Parks, Parking places etc. have to be constructed. The land in dispute has been found suitable for 'Sports Field'. Development of 'Sports Field' is a public purpose. In fact, on this aspect, no substantial argument has been made and in our view, resumption of land by State is for 'public purpose'.

169. Having answered all the above issues, we may also observe that litigation initiated by petitioners on the one hand has given enough time to continue to hold and enjoy land in dispute and simultaneously denied opportunity to respondent authorities to take possession of land in question for the purpose of carrying out developmental activities where time is a matter of essence. Impugned notice was issued on 18.08.2018 and for more than fifteen months petitioners have already availed benefit of possession of land in dispute and enjoyed the same without spending even a single penny towards rent, damages, compensation etc. for such enjoyment. Land in question is required for developmental activities, in furtherance of developing Prayagraj City as "Smart City". Developmental activities required an early action, but, by indulging in litigation, petitioners have already delayed it sufficiently, therefore, even if what petitioners' claim that they should have been given notice or sufficient time to vacate, the same has already been achieved as petitioners had already enough time with them. It is, thus, a fit case where we do not find that any other technicality should be allowed to intervene and, earliest is the better that possession of land is transferred to respondents so that developmental activities may proceed without any further delay.

170. However, considering the facts and circumstances and also the fact that petitioners have already enjoyed interim order passed by this Court and continued in possession over land in dispute for the

last almost more than a year, we direct petitioners to vacate disputed land within one month from the date of delivery of judgment.

171. In view of above discussion, we do not find any merit in both the petitions. Subject to above direction about vacation of land in dispute, the writ petitions are dismissed.

172. No costs.

(2020)1ILR 1244

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Writ C No. 41082 of 2019

M/s Trident Engineers ...Petitioner
Versus
Dakshinanchal Vidyut Vitran Nigam Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Tarun Agrawal, Sri Mohit Kumar Shukla

Counsel for the Respondents:
Sri Baleshwar Chaturvedi

A. Administrative law - Violation of the principles of natural justice - Blacklisting - before any executive decision maker proposed any action like blacklisting, adverse action or debarring it is necessary that opportunity of hearing & representation against the said proposed action be given to the affected party - respondent authorities failed to give specific notice to the petitioner showing their intention to blacklist him on the strength of the alleged irregularities - impugned order not sustainable in the eyes of law and deserves to be set aside. (Para 8 & 9)

The claim of the petitioner of the security amount of Rs. 34 lakhs which has been withheld by the respondents even after the expiry of 18 months from the date of completion of the project and just in order to defeat the legitimate claim of the petitioner the impugned order of blacklisting the petitioner's firm has been passed so as to defeat the legitimate refund of the security deposit. (Para 4)

Held: - Before blacklisting or putting a person on a holiday list a person has to be given full opportunity of hearing as the order of blacklisting or keeping on holiday list has an adverse civil consequence and is a harshest possible action. (Para 9)

Writ Petition allowed. (E-7)

List of cases cited: -

1.Gorkha Security Services vs. Government (NCT of Delhi and others), 2014 (9) SCC 105

2.Raghunath Thakur vs. State of Bihar & Ors,1989 (1) SCC 229

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Tarun Agrawal, learned counsel for the petitioner and Sri Baleshwar Chaturvedi, learned counsel for the Respondent-Corporation.

2. The matter was taken up on 12.12.2019 and instructions were supplied by learned counsel for the respondent (Corporation) which were taken on record. Today with the consent of both the counsels the matter is being finally heard and decided.

3. The petitioner has filed the present writ petition for issuance of writ, order or direction in the nature of Certiorari

quashing the order dated 12.09.2019 passed by the respondent No. 2 by which the petitioner has been put on holiday list for three years. The said order is Annexure 10 to the writ petition. The facts of the present case relate to tender No. 45-EWCA / 2016-17 floated by the respondent No. 2 for the supply and erection of material for construction of 33KV single circuit solar power plant line from 220KV s/s, Gokul, Mathura to proposed Solar Power plant of 5MW in District Mathura on semi turnkey basis. The petitioner emerged as the lowest bidder for the said work and was thus issued a letter of intent dated 22.03.2017 by the respondent No. 2. A copy of the same has been annexed as Annexure No. 1 to the writ petition. Subsequently, a formal contract was executed between the respondent No. 1 and the petitioner on 03.04.2017. As per the contract the work was to be completed by 22.07.2017 but the contract also envisaged extension of time in the event of unforeseen circumstances. The total value of the contract was provided in Clause 5 of the same. As per Clause 5.1 of the contract 60% of the material cost was to be paid after successful inspection and delivery of material at site, further Clause 5.2 provided 30% payment of the material cost upon erection of the material, Clause 5.3 provided that the balance payment of 10% against supplies will be done after satisfactory commission and handing over of the project. The petitioner was further required to deposit permanent security deposit equivalent to 10% of the contract value as per Clause 7 of contract. The said amount worked out to Rs. 34 lakhs.

4. Learned counsel for the petitioner argued that the present writ petition is confined to the fact that the claim of the petitioner of the security amount of Rs. 34 lakhs which has been withheld by the respondents even after the expiry of 18 months from the date of completion of the project and just in order to defeat the legitimate claim of the petitioner the impugned order of blacklisting the petitioner's firm has been passed so as to defeat the legitimate refund of the security deposit. It has further been argued that the work of the project was completed on 29.12.2017 and thereafter letter dated 29.12.2017 was sent to the Executive Engineer in the office of the respondent No. 1 informing him about the completion of the project and requesting him to take over the said line and it has further been argued that an inspection was conducted by the Deputy Director, Electrical Safety, Government of U.P., Aligarh Region, Aliagarh and after the said inspection he gave permission of the line by energizing it. It has further been pointed out that a letter dated 17.01.2018 was issued by the said Deputy Director in which he has categorically recorded that the solar link line erected by the petitioner be completed with all the relevant rules and regulations. The said argument is based on Annexures 5 and 6 of the writ petition. It has further been argued that the testing and commissioning of the line was thereafter completed and the petitioner requested the respondent No. 2 to take over the plant vide various letters dated 20.02.2018, 12.03.2018, 31.07.2018, 12.09.2018 and 12.11.2018 but for the reasons best known to them the said plant was not formally taken over by the respondents. It has further been pointed out that in spite of the same the respondents were satisfied by the performance of the plant and thereby they released the entire payment to the petitioner and only the security amount of Rs. 34 lakhs was withheld. On the strength

of the averment in paragraph 22 of the writ petition it has been argued that by releasing the balance amount of 10% which would thereby make the payment to the petitioner complete for the satisfactory commissioning and handing over of the project the respondents had satisfied themselves about the successful commissioning of the plant. The balance amount was thus drawn on 09.07.2019. It has further been argued that till 29.06.2019 the plant was working as desired and there was no reported defect by the respondents. Upon the lapse of the period of 18 months the petitioner requested the releasing of the security amount of Rs. 34 lakhs but instead of releasing the said amount a notice dated 03.09.2019 was issued by the respondents which is Annexure 8 to the writ petition.

5. Our attention has been drawn to the said notice whereby it has been observed that on preliminary enquiry some shortcomings have been found in the plant which have been mentioned in the said notice and subsequently the petitioner has been called upon to submit his reply on 06.09.2019 by 03 p.m. The petitioner submitted his detailed reply on 06.09.2019 itself which was duly received in the office of the respondent No. 2 on 06.09.2019. The said reply is Annexure 10 to the writ petition which bears the signature and date of the concerned receiving person. It has further been argued that the impugned order dated 12.09.2019 Annexure 11 to the writ petition has been passed in an arbitrary manner and in utter violation of principles of natural justice without even considering the detailed reply of the petitioner and even the fact that there was no reference in the said notice of blacklisting of the petitioner due to the insufficiencies in the work as mentioned in the same. The question of blacklisting as referred to in the notice dated 03.09.2019 was only in the event the petitioner could not furnish his reply within the stipulated period as mentioned in the said notice. Further the learned counsel for the petitioner argued that the principles of natural justice have not been followed in the present case at all as the respondents have not considered the reply dated 06.09.2019 of the petitioner and even the petitioner was not heard.

6. Learned counsel for the respondent (Corporation) to the contrary has argued that the impugned order dated 12.09.2019 has been passed after considering the matter in detail and also considering the reply of the petitioner dated 06.09.2019. The said argument of the learned counsel for the respondents is based on the basis of his instructions dated 11.09.2019 which have been supplied by him to the Court on 12.12.2019 which is on record. He further argued that there is no illegality and arbitrariness in the impugned order dated 12.09.2019 but he could not dispute the fact that the reply of the petitioner submitted to respondent No. 2 on 06.09.2019 to the show cause notice dated 03.09.2019 does not find mention in the impugned order.

7. From the facts as emerge from the records and arguments of the learned counsel for the petitioner and the learned counsel for the respondent (corporation) the impugned order dated 12.09.2019 does not anywhere reflect that the reply of the petitioner dated 06.09.2019 was considered by the authorities. From perusal of the impugned order dated 12.09.2019 it is clear that there is no reference by the authority concerned that the reply of the petitioner dated 06.09.2019 was considered and any

hearing was afforded to the petitioner before passing of the said order. The impugned order is confined only to the fact that the same is being passed as some deficiencies have been found in the newly constructed 33KV line and hence the petitioner is being blacklisted for a period of three years from the date of the said order. In the notice dated 03.09.2019 it was not mentioned that if the authorities are not satisfied with the reply of the petitioner then they shall proceed to initiate steps for blacklisting of the petitioner. The said notice is related to the question of blacklisting the petitioner was only confined to the fact that if the reply to the said notice was not given within the said stipulated period then proceedings for blacklisting shall be taken up. Further there is no adjudication in the impugned order about the point-wise reply given by the petitioner to the said notice. In the judgment of ***Gorkha Security Services vs. Government (NCT of Delhi and others)*** reported in ***2014 (9) SCC 105*** it has been held that the authorities must issue a specific show cause notice to the contractor indicating a clear intention to blacklist him before passing any order of blacklisting. The Hon'ble Supreme Court has in para 21 of the same held as follows:-

"The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action."

8. That as per the settled principles of law it has been held that before any executive decision maker proposed any action like blacklisting, adverse action or debarring it is necessary that opportunity of hearing & representation against the said proposed action be given to the affected party. The Hon'ble Supreme Court in the matter of ***Raghunath Thakur vs. State of Bihar & Ors*** reported in ***1989 (1) SCC 229*** has held:-

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objection satisfaction. Fundamental of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

9. In the present case the respondent authorities have failed to give specific notice to the petitioner showing their intention to blacklist him on the strength of the alleged irregularities. Further the impugned notice does not anywhere reflect that the authorities have considered the detailed reply of the petitioner dated 06.09.2019 (Annexure 9 to the writ

petition). In view of the settled proposition of law by the Apex Court in catena of decisions some of which as has been referred above, it is absolutely clear that before blacklisting or putting a person on a holiday list a person has to be given full opportunity of hearing as the order of blacklisting or keeping on holiday list has an adverse civil consequences and is a harshest possible action. Thus we are of the considered opinion that there has been a complete violation of the principles of natural justice in the instant case. The impugned order is not sustainable in the eyes of law and deserves to be set aside.

10. Hence, a writ in the nature of certiorari is issued quashing the impugned order dated 12.09.2019 passed by the respondent No. 2 vide letter No. 1037 /वि0का0/म/आ/0 (Annexure 10 to the writ petition).

11. It is hereby further provided that the petitioner shall submit fresh reply to the notice dated 03.09.2019 to the respondent No. 2 within a period of three weeks from today along with a certified copy of this order and the respondent No. 2 is further directed to decide the same afresh within a further period of three weeks from the date of receipt of the said reply with a reasoned and speaking order in accordance with law.

12. The writ petition thus succeeds and is allowed.

13. No order as to cost.

(2020)1ILR 1248

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 43455 of 2018

M/s Veekay General Industries ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhijeet Mukherji, Sri Sudeepta Kumar Pal

Counsel for the Respondents:
Sri Ranjan Kumar Rai, Sri Vivek Kumar Rai

Contract law- Contract between the Petitioner and North Central Railway- Arbitration clause- Principles of Natural justice -not applicable in contract in private law-Writ Jurisdiction cannot be exercised -for enforcement of pure and simple commercial contract.

Held, that in the matter of pure and simple commercial contract, extraordinary constitutional remedy under Article 226 is not a substitute for getting the contract executed or for allowing damages to a party for alleged breach of contract since remedy lies in common law by filing suit for enforcement of contract wherever it is permissible or for damages/ compensation for alleged wrongful breach of contract. Reason being that such matters involves recording of evidence, oral and documentary, and remedy under Article 226 of the Constitution cannot be made a substitute of common law civil proceedings and parties must avail such remedy. (Para 16)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Bareilly Development Authority vs. Ajai Pal Singh, AIR 1989 SC 1076

2.Kerala State Electricity Board and another Vs. Kurian E. Kalathil and others, 2000(6) SCC 293 C

3.The Rajasthan State Industrial Development and Investment Corporation and Anr. vs.

Diamond and Gem Development Corporation Ltd. and Anr., 2013(5) SCC 470

4.State of U.P. and others vs. Bridge & Roof Co. (India) Ltd., AIR 1996 SC 3515

5.Zonal Manager, Central Bank of India vs. Devi Ispat Ltd. and Ors., 2010(11) SCC 186

6.Union of India and others vs. Tantia Construction Pvt. Ltd., 2011(5) SCC 697

7.State of Gujarat and Ors. vs. Meghji Pethraj Shah 11 Charitable Trust and Ors., 1994(3) SCC 552

8.Pimpri Chinchwad Municipal Corporation and Ors. vs. Gayatri Construction Company and Anr., 2008(8) SCC 172

(Delivered by Hon'ble Sudhir Agarwal, J.
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Abhijit Mukherji, learned counsel for petitioner and Sri Vivek Kumar Rai, Advocate for respondents.

2. This writ petition under Article 226 of the Constitution of India has been filed by sole petitioner-M/s Veekay General Industries, praying for issue of a writ of certiorari quashing modification advice/ notice dated 26.06.2018 (Annexure-17 to writ petition) amending date of delivery to 26.12.2018. Petitioner has also prayed for issue of a writ of mandamus commanding Respondents-2 to 4 to issue a fresh and reasonable last date of delivery to petitioner firm and also directing Respondent-2 to cancel Purchase Order No. 60155048178096 since drawing approval and site was not made ready in time before consuming four months time out of six months of delivery time.

3. By way amendment petitioner has also prayed for issue of a writ of certiorari quashing cancellation advise dated 05.02.2019, communication dated 06.02.2019 calling for penalty of forfeiture of security and consequential letter for encashment of bank guarantee.

4. Facts, in brief, giving rise to present writ petition are that petitioner is a partnership firm engaged in the business of making Escalators. North Central Railway, i.e., Respondents-2 and 3 floated a tender notice for installation of two Escalators, one at Aligarh Railway Station and another at Tundla Railway Station. Petitioner submitted bid dated 24.07.2017 (Annexure-1 to writ petition) stating in para 8 thereof that delivery period is within six months from the date of LOA/Purchase Order, prototype approval, GAD/manufacturing clearance by Railways / Consignee/ Authorized Representative and subject to Site Readiness/ Timely Clearances at Railway/ Consignee End for execution of work, whichever is later. Tender was opened on 25.07.2017. Vide letter dated 31.07.2017, Deputy Chief Material Manager (C), Allahabad (hereinafter referred to as "DCMM (C)") informed petitioner that he has not accepted delivery schedule as per tender. It advised petitioner to accept delivery schedule as per tender, i.e., within six months from the date of Purchase Order (PO). Petitioner was required to give reply within three days. Petitioner submitted reply vide letter dated 02.08.2017 and therein, besides other, with respect to delivery schedule it said, as under:

"It is our endeavor to execute your work at the earliest and even before the delivery schedule. However, in practice we have found that there are several factors/agencies that are beyond

our scope of work and/or control which pose challenges in timely completion of work, thereby resulting in requirement of extensions. Thus we only sought to bring to your kind notice that there are possible reasons for the same. We remain committed on our endeavor to execute your work at the earliest and within your stipulated tender schedule of within 06 months.

You may notice that earlier the Purchase Orders used to be in two parts i.e. one for supply portion and one for installation portion. After the introduction of GST the entire tender is now being evaluated as a single works contract. In your tender your have also specified that no price variation will be given on the installation portion, thus in order to ensure transparency we submitted this clause that our original purchase invoice be used to determine the final amount that becomes payable. We have also done back to back tie up with our principle manufacturer/ supplier with the same price variation formula that you are offering us i.e. our purchase rates are fixed for escalators at 6m+/-0.6% change in price on every variation of 0.15m. If you have a more suitable option for working out the final rate for supply of escalator please suggest/ assist us on the same for incorporation in awaited Purchase Order to avoid any confusions later."

5. On 28.09.2017 North Central Railway from the Office of Principal Chief Materials Manager, Allahabad *(hereinafter referred to as "PCMM")* issued a letter of acceptance. The delivery schedule mentioned therein was six months. Petitioner submitted drawings for two Escalators at Aligarh and Tundla vide letter dated 31.10.2017. Railway vide letter dated 07.11.2017 required petitioner to submit documents till 23.10.2017 as per Research, Design and Standard Organization, Lucknow *(hereinafter referred to as "RDSO")* specifications mentioned in Clause 2.16.2, Annexure-3 of letter of acceptance. Petitioner also submitted bank guarantee. Railway issued Purchase Order No. 60155048178096 on behalf of President of India through PCMM on 09.11.2017. RDSO sent letter dated 10.11.2017 to PCMM stating that Purchase Order was released on 28.09.2017 but copy was not marked to RDSO as such it became aware of Purchase Order only on 24.10.2017 after receiving email from the Firm and hence one and half months has lost. It also stated that Firm still has not submitted necessary documents as per list of submittals mentioned in RDSO specification. It should be advised to submit those documents by 23.11.2017 so that scrutiny of documents can be done for preparation of Work Test Certificate *(hereinafter referred to as "WTC").*

6. Thereafter a joint inspection at Tundla Railway Station was carried on 21.10.2017. Petitioner submitted drawing to Senior Divisional Electrical Engineer of two Escalators at Aligarh and one at Tundla alongwith detailed Railway's Scope Work for Escalator Installation. On 28.11.2017 petitioner also sent drawings to Executive Director, RDSO. Pursuant to RDSO's letter dated 10/14.11.2017, PCMM vide letter dated 01.12.2017 requiring petitioner to submit all necessary documents to RDSO. Petitioner replied vide letter dated 13.12.2017 that it has submitted necessary Preliminary Design Documents vide letter dated 28.11.2017 and further said that petitioner is working on the balance required documents and/ or calculations highlighted by RDSO and will

submit shortly for approval. Vide letter dated 20.12.2017 petitioner stated that due to pendency of approval from Railways it is not in a position to start manufacturing of Escalators, therefore, delivery of six months period be refixed from the date of WTC/ Manufacturing Clearance. Vide letter dated 29.12.2017 Senior Material Manager sent intimation for approval of drawings. On 12.01.2018 Railway wrote petitioner to confirm address of communication in order to ascertain delay.

7. Finally on 15.01.2018 approved GADs were received by petitioner. Vide letter dated 02.02.2018, petitioner informed Senior Divisional Electrical Engineer that RDSO has informed petitioner to relocate Escalator Control Panel Location outside the truss. Petitioner submitted revised GAD (Rev. 2) in line with RDSO's requirement vide letter dated 02.02.2018. Vide letter dated 05.02.2018 petitioner sent progress report and stated that since it was not in a position to start manufacturing of Escalators due to non availability of Work Test Certificate, therefore, considering delay in approval by Railway, delivery period of six months be refixed so as to commence from the date of Work Test Certificate/ Manufacturing Clearance by Railway.

8. Again vide letter dated 07.03.2018 petitioner informed Deputy Chief Electrical Engineer, Allahabad that GAD submitted vide letter dated 02.02.2018 is pending for approval at Railway / Consignee; all technical parameters have been freezed by RDSO to start manufacturing, therefore, Railway should refix delivery period of six months from the date of pending GAD approvals which is necessary for manufacturing of Escalators. It was also pointed out that top notches of both locations at Aligarh and Tundla were incomplete and that requires to be completed before the work of Escalators start.

9. On 12.03.2018 petitioner received amended drawings approved by Competent Authority. A copy of acknowledgment receipt and letter dated 12.03.2018 sent by petitioner acknowledging receipt of approved GADs is Annexure-16 to writ petition. Respondent-2, however, issued Modification Advice / Notice dated 26.06.2018 impugned in the present writ petition amending Purchase Order dated 09.11.2017 and delivery period from existing was amended as 26.12.2018. However, conditions No. 1 to 4 in the aforesaid letter read as under:

"1. Please note that the above extension in delivery date is subject to recovery of an amount equal to full liquidated Damages for delay in supply of stores after the expiry of the Contract Delivery period notwithstanding the grant of the extension. You may now tender the stores (Balance of stores) for Inspection in terms of this letter and any stores already tendered by you for inspection but not inspected will be now inspected accordingly.

2. The ***above extension will also be subject to the following conditions:***

a. That no increase in price on account of any statutory increase in or fresh imposition in Customs Duty/ Sales Tax/ Freight or on account of any other Tax or Duty leviable in respect of the stores specified in the said Acceptance of tender which take place after ..... shall be admissible on such of the stores as are delivered after the said date, and

b. That notwithstanding any stipulation in the contract for increase in price on any other ground, no such increase which takes place after the said date shall be admissible on such of the stores as are delivered after ....

c. But nevertheless the purchaser shall be entitled to benefit of any decease in price on account of reduction on or remission of customs duty, Excise Duty, Sales Tax or on account of any other Tax or Duty or on other ground as stipulated in the price Variation Clause which takes place after expiry of the above mentioned date viz, ...

3. Please intimate immediately your acceptance of this extension on the above condition. Please note that ***in the event of declining to accept the extension on the said conditions, the contract shall be cancelled and the outstanding quantity of stores shall be purchased at your risk and cost under the terms of the contract.***

4. ***Please notice that no further extension would be granted. This is to be treated as final Notice*** *and* ***action for risk purchase will be arranged in the event of default*** *without any further reference to you."*

(Emphasis added)

10. Petitioner vide letter dated 30.06.2018 informed that site is not ready as top notches and other proposed requirements are not complete so as to start civil work by petitioner. It, therefore, requested Senior Divisional Electrical Engineer to direct concerned authorities to complete work to be performed by Railway at the site so that petitioner may start its work. Further, vide letter dated 29.06.2018, petitioner requested PCMM to refix delivery period without LD/DC. On behalf of PCMM Deputy Chief Material Manager issued letter dated 03.08.2018 stating that DP extension with LD and DC up to 26.12.2018 was issued and petitioner was advised to supply material within extended delivery period, failing which action will be taken as per condition of contract.

11. Petitioner made a joint inspection with Senior Engineer and found that minimum civil work, i.e., top notches was not complete. Railway officials, however, informed that by the time Escalators material reached the site, required civil work would stand completed. Next joint inspection was made on 28.08.2018 and on 14.09.2018 but top notches still was not found complete. Ultimately top notches were ready on 10.10.2018 but due to barricading and collection of heavy debris etc. suitable measurement could not be made. Since Railway was not considering extension of delivery time though fault lay upon them, hence present writ petition has been filed.

12. A counter affidavit has been filed by respondents wherein issue of Purchase Order dated 09.11.2017 and its amendment with respect of date of delivery vide letter dated 26.06.2018 is not disputed. It is said that letter of acceptance clearly stated delivery period as six months. Firm accepted this condition and on confirmation submitted security deposit of Rs. 10 lacs in the form of bank guarantee. Letter dated 31.07.2017 was issued reminding the Firm that it must accept delivery schedule as per tender schedule, i.e., six months from the date of Purchase Order. Further, with respect to submission of documents to RDSO, petitioner himself delayed the matter. Petitioner having failed to comply with terms of contract cannot wriggle out thereof and in any case there is an

arbitration clause in agreement and writ petition under Article 226 of the Constitution of India for modification of terms of contract or for enforcement of contract is not admissible.

13. Since during pendency of writ petition, delivery time expired, hence PCMM issued cancellation advise dated 05.02.2019, giving reason of failure to supply. It also imposed penalty of forfeiture of security deposit. By way of amendment aforesaid cancellation and forfeiture has also been challenged.

14. Facts stated above, ex facie, show that here is a case of simple enforcement of contract. Moreover, it is not a mere enforcement of contract but even terms of contract are sought to be modified by intervention of Court by invoking jurisdiction under Article 226 of the Constitution. Under the contract, earlier six months period of delivery was extended upto 26.12.2018 but petitioner wants it to be extended in his own terms.

15. Thus the question is, "whether for enforcement of a pure and simple commercial contract, jurisdiction under Article 226 of the Constitution of India should be exercised", and, secondly, "whether the terms and conditions of contract can be directed to be modified at the instance of one party, by Court, in exercise of jurisdiction under Article 226 of the Constitution"?

16. It is true that remedy under Article 226 of the Constitution of India is not absolutely barred but it has been held repeatedly that in the matter of pure and simple commercial contract, extraordinary constitutional remedy under Article 226 is not a substitute for getting the contract executed or for allowing damages to a party for alleged breach of contract since remedy lies in common law by filing suit for enforcement of contract wherever it is permissible or for damages/ compensation for alleged wrongful breach of contract. Reason being that such matters involves recording of evidence, oral and documentary, and remedy under Article 226 of the Constitution cannot be made a substitute of common law civil proceedings and parties must avail such remedy.

17. An exception has been carved out however in cases where contract is "statutory contract" but it has not been disputed before us by counsel for parties that agreement/ contract, in the case in hand, is not a statutory contract.

18. In **Bareilly Development Authority vs. Ajai Pal Singh, AIR 1989 SC 1076** Court held that if a person is aggrieved in respect of non statutory and purely contractual rights flowing from a contract, remedy under Article 226 of the Constitution is not available. Court said that no writ or order can be issued under Article 226 so as to compel the authorities to remedy a breach of contract, pure and simple.

19. In **Kerala State Electricity Board and another Vs. Kurian E. Kalathil and others, 2000(6) SCC 293** Court said that if a term of contract is violated, ordinarily remedy is not the writ petition under Article 226. Disputes arising out of terms of such contract or alleged breaches have to be settled by ordinary principles of law of contract. Court said that such case is a matter for adjudication by a Civil Court or in arbitration if provided for in the contract.

20. Referring to **Bareilly Development Authority vs. Ajai Pal Singh (supra),** and **State of U.P. and others vs. Bridge & Roof Co. (India) Ltd., AIR 1996 SC 3515,** Court in **The Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond and Gem Development Corporation Ltd. and Anr., 2013(5) SCC 470** observed as under:

"There can be no dispute to the settled legal proposition that ***matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution.*** *Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties."*

(Emphasis added)

21. In **Rajasthan State Industrial Development and Investment Corporation (supra),** Court further said:

"It is evident from the above, that generally the court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus, is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justiceiae). The grant or refusal of the writ is at the discretion of the court. The ***writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the Respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established.*** *While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal. " (Emphasis added)*

22. In **State of U.P. and others vs. Bridge & Roof Co. (supra)** Court said:

"Firstly, the ***contract between the parties is a contract in the realm of private law. It is not a statutory contract.*** *It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act.* ***Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition.*** *That is a matter either for arbitration as provided by the contract or for Civil Court, as the case may be." (Emphasis added)*

23. In **Zonal Manager, Central Bank of India vs. Devi Ispat Ltd. and Ors., 2010(11) SCC 186** Court said:

"It is settled law that the disputes relating to interpretation of terms and conditions of a contract could not be examined/challenged or agitated in a petition filed under Article 226 of the Constitution. It is a matter for adjudication by a civil court or in arbitration, if provided for in the contract or before the DRT or under the Securitization Act. "

24. Reliance is sought to be placed on behalf of petitioner on Supreme Court's judgment in **Union of India and others vs. Tantia Construction Pvt. Ltd.,**

2011(5) SCC 697 but we find that aforesaid judgment lends no help to petitioner in the case in hand. It was a case decided on its own facts. There was an agreement between Railway and Tantia Construction Pvt. Ltd. *(hereinafter referred to as the "Contractor").* Railway insisted upon Contractor to execute certain additional work worth Rs. 36.11 crores under existing agreement for which Contractor did not agree. Railway then issued a notice requiring Contractor to execute enlarged/ extended quantity of work contract which was challenged in writ petition stating that Contractor is ready and abide to work contract already executed and it cannot be forced to agree for additional work in respect of extended portion on same terms and conditions. Contractor in writ petition did not challenge terms and conditions of existing agreement but was aggrieved by action of railway whereby it was compelling Contractor to execute extended quantify of work contract/ additional work contract for which Contractor was not ready. A Single Judge of Calcutta High Court quashed letter issued by railway for additional/ extended work contract and said judgment was upheld by Division Bench as well as Apex Court. Court observed that Contractor expressed its unwillingness to take extended work and agreed to complete balance work of initial contract and for extended work he cannot be compelled. It is in these facts and circumstances Court did find that writ petition was maintainable.

24. Learned counsel for petitioner than contended that entire fault lay with Railway and without giving any opportunity of hearing and notice it has cancelled contract, therefore, here is a case of violation of principle of natural justice also.

25. We find that the Railway issued contract on certain conditions which petitioner wanted to be modified to which Railway did not agree. It has been held time and again that principles of natural justice are not applicable when a contract in private law is terminated. Cancellation of contract in private law is not a quasi judicial act hence observance of principles of natural justice are not required and atleast cancellation of contract by either party cannot be challenged on the ground that it is in violation of principles of natural justice.

26. In **State of Gujarat and Ors. vs. Meghji Pethraj Shah Charitable Trust and Ors., 1994(3) SCC 552,** it has been held:

"We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. ***The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice.*** *It is not also an executive or administrative act to attract the duty to act fairly. It was - as has been repeatedly urged by Sri Ramaswamy - a matter governed by a contract/agreement between the parties.* ***If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field,*** *e.g., where the matter is governed by a non-statutory contract." (emphasis added)*

27. Following aforesaid decision in **Pimpri Chinchwad Municipal Corporation and Ors. vs. Gayatri Construction Company and Anr., 2008(8) SCC 172** Court has held that in the matter of non-statutory contract, High

Court should not have entertained writ petition under Article 226 of the Constitution.

28. In view of above, we are clearly of the view that it is not a fit case where this Court must exercise its public law remedy available under Constitution which is extraordinary, discriminatory remedy and instead petitioner must be relegated to avail its alternative remedy by invoking arbitration clause in the agreement or avail common law remedy in Civil Court.

29. Writ petition is accordingly dismissed.

(2020)1ILR 1257

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2019

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SUNEET KUMAR, J.

Writ C No. 53941 of 2015
Along With
77 Other Writ C Cases

Suresh Jaiswal ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri S.K. Singh Paliwal, Sri Shashi Nandan, Sri Manish Kumar Pandey

Counsel for the Respondents:
C.S.C., Sri Tarun Agarwal

A. Constitution of India - Article 243-O – Bar to interference by courts in electoral matters - Allahabad High Court Rules' 1952 – scope of Chapter V Rule 6 - Reference to a larger Bench – held - reference cannot be made for the mere necessity of creating a precedent - an issue being of importance by itself, cannot be a ground for referring the matter to the Larger Bench. (Para 49 & 60)

Judicial intervention in election matters should be minimal - No absolute bar in exercise of discretionary jurisdiction in a writ by the Constitutional Court - Each matter has to be examined with due care and circumspection by the Court keeping in mind the self imposed limitations and the Constitutional bar under 243-O of the Constitution of India - No straight-jacket formula - The whole idea of self imposed limitations is to provide an internal remedy in such cases without compelling the parties to go all the way to the Constitutional courts or increase the burden of that Court, unnecessarily. (Para 59)

Held: - The questions referred are hypothetical and are only of the academic importance as it is not known whether the issues raised survive or not - Reference cannot be answered by the Larger Bench even if it is of the view that the settled law has not been considered by the Division Bench while making the reference - the questions referred cannot be answered as questions of general importance as there was no conflict - the reference to the Full Bench was not properly made and it is annulled, accordingly.(Para 62 & 65)

Reference answered. (E-7)

List of cases cited: -

1. Rishipal Singh vs. State of U.P. and others

2. Rajesh Kumar Singh vs. State of U.P. and other

3. L. Chandra Kumar Vs. Union of India and others

4. Laxmi Charan Sev Vs. A.K.M. Hasan Usman

5. N.P. Ponnuswami vs Returning Officer, Namakkal

6. Mohindra Singh Gill Vs. Chief Election Commissioner

7. Election Commission of India Vs. Ashok Kumar & others

8. Election Commission of India Vs. State of Haryana

9. Digvijiay Mote Vs. Union of India9, Anugrah Narain Singh & another Vs. State of U.P. & others

10. C. Subrahmanyam Vs. K. Ramanjaneyullu & others

11. Tika Ram and others versus State of U.P and others

12. Suo Moto Action Taken by the Court Vs. I.C.I.C.I. Bank Limited, Allahabad

13. Babu Premarajan Vs. Superintendent of Police, Kasaragode & others

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Suneet Kumar, J.)

1. Heard Shri Manish Kumar Pandey, learned counsel appearing for the petitioner, Shri Neeraj Tripathi learned Addl. Advocate General assisted by Shri Shashank Shekhar Singh learned Addl. Chief Standing Counsel and Shri Tarun Agarwal learned counsel appearing for the State Election Commission.

2. This Larger Bench has been constituted under the orders of Hon'ble the Chief Justice on a reference made by the Division Bench vide judgment and order dated 29.09.2015.

3. For the elections of Panchayats, namely Gram Panchayat, Kshetra Panchayat, Zila Panchayat, State of U.P., process had been initiated in the year 2015. During the said process, a Government order dated 11.08.2015 was issued to adopt certain procedure for reservation and allotment of seats with some modification as provided in the earlier Government order dated 09.07.2010. After receipt of objections on the list of the constituencies, it appears that the District Magistrate had proceeded to decide all objections by means of an order dated 13.09.2015. It appears that at this stage, a number of writ petitions were filed by different persons challenging the manner and methodology adopted by the State Government in delimitation of constituencies, reservation and allotment of seats. Objections were raised on the decision of the State Government vide Government order dated 05.09.2015 wherein it was notified that in Three-tier Panchayat Elections, the proceedings for reservation and allotment of seats for Pramukh, Kshetra Panchayat; members, Kshetra Panchayat and member of Zila Panchayat would continue as per the time-table notified for the same, whereas, the proceedings for reservation and allotment of seats for the Gram Panchayats be kept in abeyance till further orders were passed.

4. In addition to the challenge made against the decision of the District Magistrate on the objections of the petitioner to the list of reservation and allotment of seats, another issue raised was that there was no justification for postponing the elections of Gram Panchayats though the term of Gram Panchahyats was about to expire and further that in Three-tier system, without elections for Gram Panchayats, the constitution of Kshetra Panchayat and Zila Panchayat was not possible. The relief, thus, was sought to issue writ in the nature of mandamus commanding the respondents to re-frame the reservation of territorial constituency of Zila Panchayat.

5. Before the Division Bench, the original records from the office of the District Magistrate in the matter of

application of reservation as per U.P. Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules' 1994 in respect of particular seats in each District were summoned by the order dated 22.09.2015. While examining the said record, certain objections were made by the Division Bench in the order dated 23.09.2015, which is quoted in the referral order. On 24.09.2015, certain more records were examined by the Court and it had framed the issues which arose for consideration before it. The matter was fixed for further hearing on 28.09.2015.

6. The relevant observations of the Division Bench in the order dated 24.09.2015 are quoted herein:-

"how can the elections for Zila Panchayat be held without the first level of three tier panchayat elections, namely, village panchayat elections being first held and then the intermediatory level elections of kshetra panchayat."

7. It appears that on 24.09.2015, when the matter was taken up, State had raised objections regarding maintainability of the writ petitions before the District Magistrate. To strengthen its stand, reliance had been placed upon the judgment of the Coordinate Bench in the case of **Rishipal Singh vs. State of U.P. and others**; as well as in **Rajesh Kumar Singh vs. State of U.P. and other**. The order dated 24.09.2015 passed in the case of **Rishipal Singh** as reproduced in the referral order is relevant to be extracted hereunder:-

"The relief which has been sought in these proceedings which have been instituted as a public interest litigation is as follows:

"A. Issue a writ order or direction in the nature of mandamus directing the Respondent Authorities to cancel the reservation of the seat of Ward No.18 of Zila Panchayat, Meerut to the other backward class (OBC) category and instead of it the said seat may be declared as Unreserved (UR) in the coming Zila Panchayat Elections."

On 21 September 2015, the State Election Commission has issued a notification for elections to the Zila Panchayats. In view of the constitutional bar contained in Article 243-O of the Constitution, it would not be appropriate or proper for the Court to entertain the petition once the electoral process has been initiated. Hence, we decline to exercise our writ jurisdiction under Article 226 of the Constitution on that ground. The petition is, accordingly, dismissed. There shall be no order as to costs."

8. Having noticed the said order passed by the Coordinate Bench, the Division Bench which has referred the question to the larger Bench passed an order dated 28.09.2015 noticing the argument of learned counsel for the petitioners that constitutional remedies as provided under Article 226 of the Constitution of India being basic feature of the Constitution cannot be taken away and the Writ Court can examine the legality of the statutory provisions, in case, they are in violation of the constitutional provisions, including the provisions contained in Article 14 of the Constitution of India. It was argued that the Hon'ble Supreme Court has already held that even the laws put under the 9th Schedule are amenable to exercise of writ jurisdiction. The provisions of U.P. Zila Panchayat Kshetra Panchayat Adhiniyam' 1961 cannot be elevated to any higher position than the Acts put in the 9th Schedule.

9. The arguments of the State-respondents, on the other hand, was that the writ petitions were liable to dismissed in view of the Constitutional bar contained in Article 240-O of the Constitution. The Court though had proceeded to examine the said question as reflected in its order dated 28.09.2015, but on 29.09.2015, on the arguments raised by the learned Advocates for the parties, the Division Bench in its referral order dated 29.09.2015, had recorded its disagreement with the view taken by the Coordinate Bench in the case of **Rishi Pal Singh** (in its order dated 24.09.2015), and observed that the view taken by the said Bench that once the notification for elections of Zila Panchayat had been issued by the State on 21.09.2015, the Constitutional bar under Article 243-O of the Constitution of India in entertaining the writ petition got attracted, was not correct.

10. After having considered the submissions advanced by the learned Advocates on the said issue, it has proceeded to record in paragraph No.'11' of the referral order as under:-

"11. Having considered the submissions advanced by learned counsels at bar with reference to the judgments relied upon, we find that the self-imposed restrictions by a Writ Court under Article 226 of the Constitution of India in matters of holding of elections have been stringently resorted to, and any interference in the process of elections is ordinarily discouraged. In matters where process of election has commenced interference by Writ Court at the intermediate stage is ordinarily not to be resorted. It has been emphasized time and again by the Hon'ble Supreme Court that once the process of election has commenced, any person aggrieved should be allowed to raise his grievance by filing an election petition only. However, in cases where election is not being held in accordance with the Constitution or there are inherent defects or breaches of election law rendering the whole election itself a farce, would warrant an interference under Article 226 of the Constitution of India is the moot question?"

11. Proceeding further, the decision of the Constitution Bench in the case of **L. Chandra Kumar Vs. Union of India and others** was noted to observe that the power of judicial review by the High Court under Article 226 of the Constitution and Hon'ble Supreme Court under Article 32 is an integral and essential feature of the Constitution and, therefore, constitutes part of its basic structure. It was then observed in paragraph No.'18' of the referral order that subject to the inherent limitation on the scope of the exercise of power of High Court under Article 226, in matters relating to holding of elections, the Court was of the considered opinion that the constitutional bar contained in Article 243-O of the Constitution would not be a bar on the jurisdiction of the Constitutional Courts under Article 226 & 32 of the Constitution of India and, therefore, it could not confirm to the view expressed by the Co-ordinate Bench in the judgement and order dated 24.09.2015 in **Rishi Pal.**

12. In paragraph No.'20' of the referral order, the Division Bench has expressed the difficulty it faced to accept the view taken by the Co-ordinate Bench in **Rishi Pal Singh**, in the following words:-

"20. This Bench finds it difficult to accept the law as laid down by the

Division Bench of this Court in Public Interest Litigation (PIL) No. 54008 of 2015 (Rishipal Singh Vs. State of U.P. And others) to the effect that though reservation of seats for the elections is under challenge but once the notification for election of Zila Panchayat has been issued, it would not be appropriate or proper for the Court to entertain the petition once the electoral process has been initiated, in view of the constitutional bar contained in Article 243-O of the Constitution of India."

13. It has further recorded in paragraph No.'21' as under:-

"21. In our opinion, if the very process of holding election or implementation of reservation under the Rules, in respect of the various constituencies of Zila Panchayat has to be challenged, then the only remedy available to a person, not belonging to the reserved category in question for which the seat has been reserved, is to file petition under Article 226 of the Constitution of India. He has no remedy elsewhere. His challenge to the process of reservation may ultimately succeed or may not succeed, is a different issue, but it cannot be said that the writ petition is not maintainable. The writ petition raising such issue, in our opinion, have to be entertained, notwithstanding the bar contained in Article 243-O of the Constitution of India."

14. In the light of the above, following questions have been referred for examination by the Larger Bench:-

"(a) Whether, constitutional remedy of judicial review under Article 226 of the Constitution of India, which has been recognised as a basic feature of constitution in L. Chandra Kumar Vs. Union of India, 1997 (3) SCC 261 could be curtailed in view of the bar created under Article 243-O of the Constitution of India?

(b) Whether, a writ petition under Article 226 of the Constitution of India can be refused to be entertained for the reason that a notification for holding the Panchayat elections has been issued by the State in view of Article 243-O of the Constitution of India, even where:

(i) vires of election laws is questioned,

(ii) Government Orders issued for effecting the election are stated to be in breach of election laws/arbitrary,

(iii) actual implementation by the State of election laws/Government Orders is stated to be in breach of the provisions,

(iv) any other similar issue?

(c) Whether, the High Court in exercise of power under Article 226 of the Constitution of India can interfere in the election process, if the elections are not being held in accordance with the Constitution of India or there is inherent defects or breaches of the election law making the entire election a mockery or a farce?

(d) Whether, this Court would permit ongoing process of election, in the facts of the present case, or not?

(e) Whether, the vires of the election laws as well as reservation of seats can be subjected to challenge only in a petition under Article 226 of the Constitution of India or else the aggrieved person is rendered remedy less?

(f) Whether, the judgment of the Division Bench in the case of Rishipal Singh vs. State of U.P. and others (supra) has laid down the correct law?

15. It is pertinent to note at this stage, that at the point of time when the referral

order was passed, the elections were in progress and various writ petitions were filed raising different issues including some relating to reservation of the various constituencies.

16. It is admitted that the elections were held in the year 2015 and the Panchayats in Three-tier system namely Gram Panchayat, Kshetra Panhayat and Zila Panchayat had been constituted. Nothing has been brought before us to state that any issue having legal ramifications on the elections held in the year 2015 have been brought to challenge which would have required invocation of powers of this Court under Article 226 of the Constitution of India.

17. In the light of the abovenoted facts, we first proceed to examine as to whether in all propriety, this Larger Bench has to answer the questions referred to it or issues have become academic now. We also propose to examine the circumstances in which the reference has been made to note as to whether the decision of the Co-ordinate Bench in **Rishipal Singh**, correctness of which has been doubted by the referral Bench, came in its way and it could not have entered into or adjudicated the dispute, on its own, in view of the conflict of opinion. Further, whether the doubts raised by it to make the reference before the Larger Bench, in fact, arose or not.

18. As far as the first issue is concerned, as noted above, the writ petitions in this bunch were filed against the order of the District Magistrate, Azamgarh in the matter of reservation and allotment of constituencies for Three-tier Panchayat elections, i.e. Gram Panchayat, Kshetra Panchayat and Zila Panchayat. The prayer for mandamus was to command the respondent to re-frame the reservation of territorial constituencies so that a particular ward may not be reserved in any category. The challenge was, thus, to the realtime exercise done by the State Government for delimitation, reservation and allotment of seats. In so far as the Gram Panchayats are concerned, the entire procedure for the purpose has been provided in Section 11 (f) & 12 of the U.P. Panchayat Raj Act' 1947 read with the U.P. Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules' 1994. Another dispute with regard to the Government notification dated 13.09.2015 was only this much that without elections of Gram Panchayats, which were postponed by the State Government by the said notification, the constitution of Kshetra Panchayat and Zila Panchayat was not possible.

19. It is informed by Sri Neeraj Tripathi learned Additional Advocate General and Sri Tarun Agarwal learned counsel for the State Election Commission that the elections for constitution of Three-tier local bodies namely Gram Panchayat, Kshetra Panchayat and Zila Panchayat had been completed in the year 2015 itself. The dispute raised by the petitioners before the Division Bench that the constitution of Kshetra Panchayat and Zila Panchayat would not be possible in view of the postponement of elections of Gram Panchayat, therefore, was rendered infructuous in the year 2015 itself.

20. Now the issue with regard to the reservation and allotment of territorial constituencies for the elections of Zila Panchayat and Kshetra Panchayat, i.e. actual exercise done by the State is concerned, it appears that a preliminary

objection was raised by the State and the Election Commission regarding maintainability of the writ petition in view of the issuance of notification for election to the Zila Panchayat by the State Election Commission. The argument was that in view of the Constitutional bar contained in Article 243-O of the Constitution, once the election process had been initiated, the exercise of writ jurisdiction under Article 226 of the Constitution of India to challenge the actual exercise of reservation and allotment of seats, was not possible. In other words, the plea of bar of Article 243-O of the Constitution of India was raised by the State to entertain the constitutional remedy in view of the nature of the dispute before the Division Bench.

21. On the said plea, with due regards, the Division Bench was required to examine the issue and express its opinion. The only reason why the Division Bench opined that the matter should be referred to the Larger Bench was, that it was of the view that the Constitutional bar contained in Article 243-O of the Constitution would not be an absolute bar on the jurisdiction of the Constitutional Courts under Article 226 of the Constitution of India and that a Co-ordinate Bench while delivering the judement and order dated 24.09.2015 took a contrary view.

22. We have already reproduced the order of the Co-ordinate Bench in the preceding paragraph, which was found in contradiction by the Division Bench referring the matter to the larger Bench.

23. Having carefully read the order in **Rishi Pal Singh**, it is found that the Division Bench therein had refused to entertain the writ petition, at the outset, noticing that in view of the notification issued by the State Election Commission, considering the Constitutional bar contained in Article 243-O of the Constitution, it would not be appropriate or proper for the Court to entertain the public interest writ petition, once the election process had been initiated. Expressing the said view, the Court had declined to exercise writ jurisdiction under Article 226 of the Constitution on that ground only. From the bare reading of the said judgment, we may notice here that the opinion of the Division Bench in **Rishi Pal Singh** was not on any question of law adjudicated by it, rather it was passed in view of the nature of relief sought in the case before it. The challenge to the election process was brought by way of a Public Interest Litigation. The Court therein found that after notification of the Election Commission, the issues raised before it could not be adjudicated. In our opinion, the dismissal of PIL in **Rishi Pal Singh** on the ground stated therein was neither a law laid down by it nor was binding as a precedent upon the Bench referring the matter, restricting it from entering into the preliminary objection or the controversy in the bunch of writ petitions raised before it.

24. It appears that only reason which weighed in the mind of the Division Bench that the matter should be referred to the Larger Bench as various questions of law of general public importance may arise in the trial of the said cases or other cases in future.

25. The observations in paragraph Nos.'20' & '21' of the reference order quoted above reflect the difficulties expressed by the Division Bench in deciding the issues raised before it.

26. In our opinion, the dismissal of the Public Interest Litigation by the Division Bench in **Rishi Pal Singh** was more of a question of judicial propriety rather than on the power to exercise jurisdiction to adjudicate on the question of law raised before that Bench.

27. It appears that within the limits of self-imposed restrictions which is to be exercised in the matter of elections by a Writ Court, the Division Bench dealing with the Public Interest Litigation had refused to entertain the writ petition after notification was issued by the Election Commission.

28. In this context, it would not be out of place to mention here that the Constitutional Bench of the Apex Court in the case of **Laxmi Charan Sev Vs. A.K.M. Hasan Usman** has made a clear statement in paragraph No.'28' as under:-

"28.We have expressed the view that preparation and revision of electoral rolls is a continuous process, not connected with any particular election. It may be difficult consistently with that view, to hold that preparation and revision of electoral rolls is a part of the 'election' within the meaning of Article 329(b). Perhaps, as stated in Halsbury in the passage extracted in Ponnuswami, the facts of each individual case may have to be considered for determining the question whether any particular stage can be a part of the election process in that case. In that event, it would be difficult to formulate a proposition which will apply to all cases alike."

29. The aforesaid observations though were made in the interim order of the courts but in the final order, the Constitutional Bench reiterates the above view in the following words:-

"The order dated March 30, 1982 which we will presently reproduce, contains our reasons in support of this conclusion. Very often, the exercise of jurisdiction, especially the writ jurisdiction involves questions of propriety rather than of power. The fact that the Court has the power to do a certain thing does not mean that it must exercise that power regardless of the consequences."

30. The question of conflict between the jurisdiction conferred in the High Court under Article 226 and the embargo created by the Constitution under Article 329 was firstly considered in the case of **N.P. Ponnuswami vs Returning Officer, Namakkal.** The law enunciated in **N.P. Ponnuswami (supra)** was extensively dealt with in **Mohindra Singh Gill Vs. Chief Election Commissioner**, the Constitutional Bench noticed two types of decisions and two types of challenges in paragraph No.'29' of the report:-

(i) The first relates to proceedings which interfere with the progress of the election and;

(ii) the second which accelerates the completion of elections and acts in furtherance of an election.

A third category has been evolved in the judgment rendered by the Apex Court in the case of **Election Commission of India Vs. Ashok Kumar & others**, wherein the Apex Court has observed that there may be a situation where something has happened which is calling foul of the law of election and by the time an election petition is filed and judicial assistance secured, material evidence may be lost. If the wrong

committed is left undone in such a case until after the result of election, the relief actually given may not amount to anything at all. The invocation of the constitutional remedy under Article 226 or Article 32 of the Constitution of India may be possible even during the election process.

31. We may note that we are not called upon to answer whether in the facts of the cases at hand, the aforesaid third category of question for interference in election arises or not.

32. In **Election Commission of India Vs. State of Haryana,** the Constitutional Bench noticed the following observations in interim order of A.K.M. Hasan4 with approval:-

"The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution."

33. In **Digvijiay Mote Vs. Union of India9, Anugrah Narain Singh & another Vs. State of U.P. & others, C. Subrahmanyam Vs. K. Ramanjaneyullu & others,** it is held that where non-compliance of provision of the Act, governing the election is a ground for election petition, the writ petition under Article 226 of the Constitution of India should not have been entertained.

34. The law settled by the Apex Court in **Ashok Kumar** has been followed consistently in umpteen number of decisions.

35. We may clarify that we are not on the issue of entertainability of the bunch of writ petitions by the Division Bench as the said issue was required to be adjudicated by it in view of law laid down by the Apex Court in the matter of scope of interference in the election process in writ jurisdiction.

36. We are only scrutinizing whether the decision in **Rishipal** was binding on the Division Bench and it could not have addressed the controversy before it on the question of entertainability of the writ petitions.

37. In the case of **Tika Ram and others versus State of U.P and others**, the Apex Court has observed that a decision does not become precedent unless a question is directly raised and considered therein, so also it does not become the law declared unless the question is actually decided upon.

38. With greatest of respect, we are of the view that there was no conflicting opinion facing their Lordships, preventing them from deciding the question itself.

39. After due deliberations of the Counsels for the parties, hearing them at length, we do not find that the questions which were framed by the Division Bench in the referral order, actually arose for adjudication before it in the bunch of writ petitions. For instance, on question (b), we find that before the Division Bench:-

(i) vires of election law was not questioned;

(ii) arbitrariness of the government order issued in the process of

election being in breach of election laws was not an issue;

(iii) the issue regarding actual implementation by the state of the election laws being in breach of the legal provision may be the issue which would have arisen for consideration, had it decided to entertain the writ petition.

40. Similarly, the questions (c), (d), (e) are the issues of larger general importance framed by the Division Bench which may or may not have arisen for consideration, had it entered into the issues on merits.

41. We, however, do not find it proper to express any opinion as to whether the said issues would have arisen, had the Division Bench entertained the writ petition, as this is not the question before us to answer.

42. Now, Question-(a) pertains to the law laid down by the Apex Court in L. Chandra Kumar (supra) which, in our opinion, could have been read and duly applied by the Division Bench for answering the question before it, i.e., as to whether it would entertain the writ petition in the light of the notification issued by the State Election Commission for elections of the Zila Panchayat and the bar under Article 243-O of the Constitution of India is attracted or not. The said issue though has been discussed in few paragraphs of the reference order and some views have been expressed by the Division Bench in paragraph Nos.'20' & '21' of the reference order but whether the said question arose for consideration in the facts and circumstances of these cases, i.e. in the nature of the controversy and the issues before it or not, is not clear.

43. Lastly, question (f), with due respect, is not a proper question as expressed above. The Division Bench in the case of **Rishi Pal Singh** did not lay down any legal proposition so as to make it a binding precedent on any other Co-ordinate Bench or the Benches of lesser strength of this Court.

44. Thus, in absence of a binding precedent, there was no conflict facing the Division Bench which has made the reference. The question No.(f) regarding the correctness of law laid down by the Division Bench in **Rishi Pal Singh**, in our respectful opinion, did not arise at all.

45. The point is whether this is a reference under Chapter V Rule 6 of the Allahabad High Court Rules' 1952:-

46. The scheme of Chapter V Rule 6 of the Allahabad High Court Rules' 1952 provides as under:-

"6. Reference to a larger Bench:- *The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein."*

47. The reading of the said provision goes to show that on conflicting opinion expressed by two Benches of the same strength, larger Bench may be constituted by Hon'ble the Chief Justice to decide the questions of law formulated by the Bench hearing the case.

48. Before a Full Bench of this Court in **Suo Moto Action Taken by the Court**

Vs. I.C.I.C.I. Bank Limited, Allahabad, a question arose as to whether the reference made by the Division Bench was proper or not and further whether the academic issues on question of law had to be answered by the Full Bench.

49. Considering the scope of Chapter V of Rule 6 of the High Court Rules, it was held therein that reference cannot be made for the mere necessity of creating a precedent. If a question of law of whatever importance arises before the Division Bench, ordinarily, the Division Bench should decide it itself and not refer it to a Larger Bench, unless there is conflict of precedent, which makes it impossible for the Division Bench to decide this way or other. It was further held that where the questions of law are formulated by a Division Bench for reference and decision, the case has to be alive before the Division Bench itself. Thus, in other words, in both eventuality where there is no conflict of precedent or the case is not alive before the Division Bench, reference to a Larger Bench should not be made for the mere necessity of creating a precedent. Paragraph '13', '14', '18', '19', '20' of the said report are relevant to be reproduced herein:-

"13. We respectfully follow the Kerala special Bench judgment relied upon by Mr. Mitra appeared for ICICI, being the case of Babu Premarajan reported at . Passages would be found at page 449 to the effect that if a question of law of whatever importance arises before the Division Bench, ordinarily the Division Bench should decide it itself and not refer it to a larger Bench, unless there is a conflict of precedent, which makes it impossible for the Division Bench to decide this way or the other. This was opined in Kerala, even though there was a rule of the High Court which, on a plain reading, appeared to allow two Hon'ble Judges of a Division Bench to refer any questions to a larger Bench merely on their Lordships agreement.

14. As such, if the writ petition before the Hon'ble Division Bench is still alive, the Division Bench is fully at libertyin its own aisdoun to decide all the questions itself and indeed all the questions purportedly got referred to the larger Bench.

18. The other point is whether it is a reference under Chapter V Rule 6 that the Division Bench has in reality resorted to. The said rule is quoted below:-

"6. Reference to a larger Bench.- The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question, of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein .

19. The first part of the rule refers to constitution of a Bench by the Chief Justice himself by use of his own administrative discretion. This is not one such case.

20. So far as the second part of the rule is concerned, where the questions of law are formulated by a Division Bench for reference and decision, the case has to be alive before the Division Bench itself. If the case is alive in the present case, then also a reference under the second limb, is, with the greatest of respect, improper, because nothing prevented the Division Bench from deciding the questions itself. There were no conflicting Division

Benches facing their Lordships and as such, the Kerala principle mentioned above applies with full force."

50. In saying so, the Full Bench has relied upon the Full Bench judgment of Kerala High Court in **Babu Premarajan Vs. Superintendent of Police, Kasaragode & others,** wherein even the rule of the Kerala High Court permitted the Division Bench to refer any question to a Larger Bench merely on their Lordships agreement.

51. The said Rule of Kerala High Court Rules' which was subject matter of consideration therein reads as under:-

.....Powers of a Bench of two Judges.--The powers of the High Court in relation to the following matters may be exercised by a Bench of two Judges, provided that if both Judges agree that the decision involves a question of law they may order that the matter or question of law be referred to a Full Bench.....

52. The Kerala High Court had noted therein the meaning of word "reference" in Stroud's Judicial Dictionary of Words and Phrases, 4th edition, Volume I, page 65, to observe in para '49' as under:-

"Meaning of Reference:- *Reference has been stated to mean the sending of a pending case, for some question therein, by the Court in which it is pending to a private person or some other tribunal to hear and determine the cause of the question."*

Para '49' of the report:-

49. The last question referred for our decision Is viz. whether a reference by a Division Bench to a Full Bench is permissible merely because both Judges in a Division Bench so agree that the decision involves a question of law. Section 4 has been reproduced in para 6 above. It deals with the powers of a Bench of two Judges, Indeed powers of the High Court. The proviso says that when both Judges agree that the decision involves a question of law, they may order that the matter or question of law be referred to a Full Bench. Whereas in Section 3, a single Judge is required to refer the entire case for being heard and determined by a Bench of two Judges, Under Section 4, a Division Bench may refer the entire case or question of law to a Full Bench. Assuming that to be so, it is difficult to appreciate why a Division Bench should not decide the question of law and merely because both the Judges agree that the decision involves a question of law. It should be referred to a Full Bench or the entire matter be referred to a Full Bench.

If a question of law arises before a Division Bench, which situation is not uncommon, is it open to a Division Bench not to decide it and refer it to a Full Bench. One can understand when there is a conflict of Division Bench decisions on a question of law and there is no subsequent decision of the Apex Court on the point; in such a situation a reference to Full Bench would undoubtedly be justified. In the light of the cases we have discussed above, there is no doubt that the power of two Judges in a Division Bench to refer a question of law to a Full Bench must be exercised sparingly and only in cases where there is a conflict of opinion of Division Benches of this Court and there is no latter decision of the Apex Court on that point. Obviously, if there is a subsequent decision of the Apex Court which resolves the conflict or, in the light of which, one of the Division Bench

decisions must be taken to be impliedly overruled and the other Impliedly upheld, the Division Bench is obliged to follow the view which has been impliedly upheld by the subsequent decision of the Apex Court. Our answer to the third question would, therefore, be that the provisions of Section 4 of the Act contemplate a reference by a Division Bench, not merely because both the Judges of the Division Bench agree that the decision involves a question of law. Such a reference by a Division Bench to a Full Bench is permissible only if there is a conflict of Division Bench decisions of this Court and there is no latter decision of the Apex Court resolving the said conflict directly or impliedly."

53. Thus, from the above discussion, it is found that when it appears to a Single Bench or a Division Bench that there are conflicting decisions of the Co-ordinate strength of the same Court or that a question of law of importance having conflicting views arises in the trial of a case, the Judge or the Bench passes an order that the papers be placed before the Chief Justice of the High Court with the request to form the Special or Full Bench to hear and decide the case on the questions raised in the case.

54. Normally, the judge concerned should make a reference briefly indicating reasons for his views which necessitated to refer the matter to a Larger Bench but the same is not indispensable.

55. At the same time, we may clarify that if reasons are not stated in respect of the order of reference, the Full Bench cannot decline to answer the questions referred to it. The brief reasons for making a reference, however, has to be indicated so as to enable the Larger Bench to know the minds of Hon'ble Judge(s) making the reference.

56. In the instant matter, as expressed above, we could not find any conflict between two decisions which warranted a reference before the Larger Bench.

57. The questions, in the reference order, framed by the Division Bench, assuming conflict of opinion in the election matters, with due respect, are sweeping. On a plain reading of the order of reference, it appears that their Lordships have referred the questions to the Larger Bench with a view to create a precedent assuming that those questions of law of importance may arise in election matters and an authoritative pronouncement of a Larger Bench is needed on the subject.

58. The pronouncement by a Full Bench, with due regards to the learned Judges referring the matter, on hypothetical conflict, would not be a proper judicial exercise.

59. We may note that there is difference between the question whether a writ petition would lie to the High Court and as to the scope of interference in writ jurisdiction. From the decisions referred above, it can be seen that judicial intervention in election matters should be minimal. Though, there cannot be an absolute bar in exercise of discretionary jurisdiction in a writ by the Constitutional Court. Each matter has to be examined with due care and circumspection by the Court keeping in mind the self imposed limitations and the Constitutional bar under 243-O of the Constitution of India. There cannot be a straight-jacket formula. The whole idea of self imposed limitations is to provide an internal remedy in such

cases without compelling the parties to go all the way to the Constitutional courts or increase the burden of that Court, unnecessarily.

60. In our considered view, an issue being of importance by itself, cannot be a ground for referring the matter to the Larger Bench.

61. Further, the last question which remains to be considered that if nothing survives, then answering the questions referred, as issues of general importance, by us would be an academic exercise. The Full Bench in **Suo Moto Action** has held that such an exercise is beyond the jurisdiction of the Court. Paragraph Nos.'24', '25' & '26' are relevant to be quoted as under:-

"24. .....It is the problem of the Court having no jurisdiction to answer questions of law merely academically and in the vacuum. Mr. Prasad has already filed another writ petition No. 13778 of 2006 where by he specifically challenges the same contract of the debt collector as being contrary to public policy. But in the case before the Division Bench, which is before us, either nothing survives or something survives for which the Division Bench is itself to give its decision including those on points of law.

25. If nothing survives, then our answering the questions referred as public interest law points, would suffer from this problem that, the declaration of law would be wholly academic and a mere enunciation of law made by the Court without there being a case surviving in which to make the pronouncement. That such declaration might be used later on by the parties to have even their own rights declared, in one particular manner, is no reason or argument why the Court can have seisin or jurisdiction over mere points of law referred as such.

26. The Courts have jurisdiction to decide on points of law only when those arise in relation to and are incidental to questions raised by parties affecting their own rights, liabilities and interest. The Court is all the time deciding questions of law, but it is a paradox that the Court has no jurisdiction to decide a question of law, and a question of law only, like a Professor answering questions to a persistent law student."

62. We, therefore, find that the questions referred are hypothetical and are only of the academic importance as it is not known whether the issues raised survive or not. The reference cannot be answered by the Larger Bench even if it is of the view that the settled law has not been considered by the Division Bench while making the reference. Furthermore, the questions referred cannot be answered as questions of general importance as there was no conflict.

63. Moreover, from amongst the questions referred, those which arise in the facts and circumstances of the instant case(s), if alive, are left open to be answered by the Division Bench.

64. We may clarify that we do no express any opinion as to whether the issues raised in the bunch of writ petitions are still alive or not.

65. We, however, hold that the reference to the Full Bench was not properly made and it is annulled, accordingly.

66. It is further clarified that the observations made herein above are in

order to examine whether the reference was properly made and none of them would cause prejudice to the rights and contentions of the parties in any proceeding whether in the bunch before the Division Bench, or in any other matter.

67. The reference to the Larger Bench, accordingly, stands answered.

68. The writ petitions shall now be placed before the regular Bench according to the roster for disposal in light of the above.

(2020)1ILR 1270

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No: 53982 of 2017

M/s Praveen Kumar Jain ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dinesh Kumar Singh, Sri Sushil Kumar Shukla

Counsel for the Respondents:
C.S.C.

A. Administrative law – Principles of natural justice – principles of natural justice have to be complied with - recent trend - prejudice – Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant - unless and until any prejudice is caused to the petitioner, notice and opportunity is not required to be given - unless prejudice is shown, the impugned order or action cannot be struck down . (Para 11, 12, 21 & 28)

The terms and conditions of the contract not duly complied with by the petitioner after submission of his bid - the bid was rightly cancelled by the respondents - security amount - rightly forfeited as per Clause 30.3 of the ITB -The concept `natural justice' is not a fixed one - Rules of natural justice are not embodied rules and they cannot be imprisoned within the strait-jacket of a rigid formula - In the instant case as well, no purpose will be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, in as much as the defect is incurable; no amount of explanation can change the ultimate result, being a fait accompli - The petitioner can by no means negate the admitted fact. (Para 10, 12, 28 & 30)

Writ Petition dismissed. (E-7)

List of cases cited: -

1. Russel v. Duke of Norfolk, (1949) 1 All ER 109: 65 TLR 225 (CA)

2. Byrne v. Kinematograph Renters Society, (1958) 2 AllER 579: 1958 (1) WLR 762

3. Union of India v. P.K. Roy, AIR 1968 SC 850: 1968 (2) SCR 186

4. A.K. Kraipak v. Union of India, 1969 (2) SCC 262

5.Board of High School v. Kumari Chitra ,1970 (1) SCC 121

6. Malloch v. Aberdeen Corporation, 1971 (2) AllER 1278 (HL)

7. S.L. Kapoor v. Jagmohan, 1980 (4) SCC 379

8. R.S. Dass v. Union of India, 1986 Supp SCC 617: 1987 (2) ATC 628

9. ECIL Vs. B. Karunakar, 1993 (4) SCC 727

10. State Bank of Patiala Vs. S. K. Sharma, 1996 (3) SCC 364: 1996 SCC (L & S) 717

11. M. C. Mehta V. Union of India, 1999 (6) SCC 237

12. Aligarh Muslim University Vs. Mansoor Ali Khan, (2000) 7 SCC 529

13. Ajit Kumar Nag v. Indian Oil Corporation Ltd., 2005 (7) SCC 764: 2005 SCC (L & S) 1020

14. Charan Lal Sahu v. Union of India, 1990 (1) SCC 613 (Bhopal Gas Disaster)

15. P.D. Agrawal v. State Bank of India & Ors. 2006 (8) SCC 776: 2007 (1) SCC (L & S) 43

16. Ranjit Singh v. Union of India, 2006 (4) SCC 153: 2006 SCC (L & S) 631

17. State of Punjab v. Amar Singh Harika, AIR 1966 SC 1313)

18. Haryana Financial Corporation and another Vs. Kailash Chandra Ahuja, (2008) 9 SCC 31

19. Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and Others, (2015) 8 SCC 519

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri D. K. Singh, learned counsel for the petitioner and learned Standing Counsel on behalf of respondents.

2. The petitioner has preferred the present writ petition challenging the order dated 24.10.2017 passed by the respondent no.4 namely Superintending Engineer Rural Engineering Department Meerut Division, Meerut with the further prayer to direct the respondent no.4 to execute the agreement of package no.5257 in favour of the petitioner adding the GST amount in the bid of petitioner.

3. The facts in brief as contained in the writ petition are that the petitioner is A class registered Government Contractor. The respondent no.4 published an advertisement on 12.6.2014 inviting tenders from registered Contractors for upgrading of Meerut-Karnal road being package number 5257 along-with other packages. The petitioner submitted his tender along-with other Contractors. In the bid submitted by the petitioner it was noted that if CGST and SGST is implemented, the same shall be included in the bid of the petitioner. The bid was opened on 23.08.2017 and the bid of the petitioner was duly accepted on 7.10.2017 but without adding the amount of GST and as such the petitioner submitted an application in this regard on 10.10.2017.

4. It is contended by Sri D. K. Singh, learned counsel for the petitioner that without considering the request of the petitioner, the respondent no.4 issued a letter dated 12.10.2017 to the effect that in case the petitioner does not produce the performance security till 16.10.2017 the action will be taken against him as per Clause No.30.3 of the ITB (General Condition of Contract). After the aforesaid letter was received by the petitioner, he wrote a letter dated 14.10.2017 again stating that he is not ready to sign the contract without adding the amount of GST. It is further contended that without considering the aforesaid objection of the petitioner respondent no.4 passed the order dated 24.10.2017 by which the claim of the petitioner was rejected and security amount submitted by the petitioner was forfeited. He further submitted that the order dated 24.10.2017 passed by the respondent no.4 is totally illegal and arbitrary. The amount of security would be forfeited only if the agreement has been executed by the Contractor and after the implementation of GST by the Government, it was a mandatory

requirement to add the GST in the Contract. The amount of security would only be forfeited after the acceptance of the bid but since in the present case bid itself was not accepted the amount of security could not be forfeited. Further argument was made that the order dated 24.10.2017 was passed without giving any notice and opportunity to the petitioner. The order dated 24.10.2017 was passed without assigning any reasons.

5. In the counter affidavit filed by the respondents it is stated that e-tender was invited pursuance to the instructions as per Standard Bidding Document for Pradhan Mantri Gram Sadak Yojana (hereinafter referred as PMGSY) for construction of Meerut-Karnal Road, Rithali to Pali via Chur Kalandi, District Meerut.

6. It is stated in paragraph 6 of the counter affidavit that after going through the entire standard bidding documents for PMGSY, the petitioner applied for the tenders. It is further stated that in the bid amount GST was not added since when the bids were invited at that time the GST was not invoked. After the petitioner was declared successful bidder, he was duty bound to execute the bond but since the bond was not executed by the petitioner within time hence as per Clause 30.3 the action was taken against him. Clause 30.3 of the Standard Bidding Documents reads as follows :-

"Failure of successful bidder to comply with the requirement of delivery of Performance Security of two and a half percent of Contract Price plus additional security for unbalanced bids as per provisions of Clause 30.1 shall constitute sufficient ground for cancellation of award and forfeiture of the Bid Security. Such successful bidder who fails to comply with the above requirements is liable to be debarred from participating in bids under PMGSY for a period of one year."

7. It was further argued that under Clause 13.3. of the bid document it is clearly provided that all duties, taxes, royalties and other levies payable by the Contractor under the Contract, or for any other cause, shall be included in the rates, prices, and total bid price submitted by the Bidder.

8. In view of the aforesaid it was argued by the learned Standing Counsel appearing for the respondents that the order passed by the respondent no.4 dated 24.10.2017 is absolutely perfect and valid order and does not call for any interference by this Court specially under Article 226 of the Constitution of India.

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

10. From perusal of the record it is clear that after the bid was accepted on 4.9.2017 and the same was loaded on the website, objections were invited within five days. It is clear from the record that the objection pertaining to GST was submitted by the petitioner for the first time on 15.9.2017. Since the terms and conditions of the contract were not duly complied with by the petitioner after submission of his bid, the bid was rightly cancelled by the respondents. In so far as the security amount is concerned, the same was rightly forfeited as per Clause 30.3 of the ITB.

11. In so far as the notice and opportunity is concerned, it is well settled that unless and until any prejudice is

caused to the petitioner, notice and opportunity is not required to be given. Nothing has been stated in the entire writ petition nor any argument has been raised by the learned counsel for the petitioner that what prejudice has been caused to the petitioner in the absence of opportunity of hearing.

12. It is settled law that principles of natural justice have to be complied with. One of the principles of natural justice is audi alteram partem ("Hear the other side"). But it is equally well settled that the concept `natural justice' is not a fixed one. It has meant many things to many writers, lawyers, jurists and systems of law. It has many colours, shades, shapes and forms. Rules of natural justice are not embodied rules and they cannot be imprisoned within the strait-jacket of a rigid formula.

13. Seven decades before in the case of ***Russel v. Duke of Norfolk*** reported in ***(1949) 1 All ER 109 : 65 TLR 225 (CA)***, it was held that "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject- matter that is being dealt with, and so forth".

14. In the case of ***Byrne v. Kinematograph Renters Society*** reported in ***(1958) 2 AllER 579 :: 1958 (1) WLR 762,*** it was held that "What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

15. Similar view was taken by the Supreme Court in the case of ***Union of India v. P.K. Roy*** reported in ***AIR 1968 SC 850 : 1968 (2) SCR 186.*** The revelant paragraph 11 of the aforesaid judgement is quoted below:-

"(11).....the extent and application of the doctrine of natural justice cannot be imprisoned within the strait jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case".

16. Apart from the same in the leading case of case of ***A.K. Kraipak v. Union of India*** reported in ***1969 (2) SCC 262*** it was held that :-

"20.What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case".

17. The Supreme Court in the case of ***Board of High School v. Kumari Chitra*** reported in ***1970 (1) SCC 121*** observed that the Board cancelled the examination

of the petitioner who had actually appeared at the examination on the ground that there was shortage in attendance at lectures. Admittedly, no notice was given to the candidate before taking the action. On behalf of the Board it was stated that the facts were not in dispute and therefore, `no useful purpose would have been served' by giving a show cause notice to the petitioner. The Supreme Court was pleased to set aside the decision of the Board of holding that the Board was acting in a quasi-judicial capacity and, therefore, it ought to have observed the principles of natural justice.

18. In the case of ***Malloch v. Aberdeen Corporation*** reported in ***1971 (2) AllER 1278 (HL),*** it was held that :-

".....It was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. ***If that could be clearly demonstrated it might be a good answer".***
(emphasis supplied)

19. In the case of ***S.L. Kapoor v. Jagmohan*** reported in ***1980 (4) SCC 379*** it was held by the Supreme Court that :-

"24.....The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. ***It 'll comes from a person who has denied justice that the person who has been denied justice is not prejudiced".***
(emphasis supplied)

20. In the case of ***R.S. Dass v. Union of India*** reported in ***1986 Supp SCC 617 :: 1987 (2) ATC 628*** it was held that :-

" 25. It is well established that rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of statutory provision, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case".

21. The recent trend, however, is of `prejudice'. Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

22. In the case of ***ECIL Vs. B. Karunakar*** reported in ***1993 (4) SCC 727,*** the Supreme Court after considering the several cases was pleased to hold that "it was only if the Court/Tribunal finds that the furnishing of the report "would have made a difference" to the result in the case that it should set aside the order of punishment."

23. The law laid down by the Supreme Court in the aforesaid case was again reiterated and followed in subsequent cases by the Supreme Court specially in the case of ***State Bank of Patiala Vs. S. K. Sharma*** reported in ***1996 (3) SCC 364*** :: 1996 SCC (L & S) 717 and ***M. C. Mehta V. Union of India*** reported in ***1999 (6) SCC 237.***

24. In ***Aligarh Muslim University Vs. Mansoor Ali Khan*** reported in ***(2000) 7 SCC 529,*** the Apex Court held that though the rules of natural justice have been violated but the order impugned cannot be set aside as no prejudice has been caused. Referring to several cases, and after considering the theory of "useless" or "empty formality" and noting

"admitted or undisputed" facts, the Court held that the only conclusion which could be drawn was that " had the petitioner been given notice", it "would not have made any difference" and, hence, no prejudice has been caused.

25. In the case of ***Ajit Kumar Nag v. Indian Oil Corporation Ltd.*** reported in ***2005 (7) SCC 764 :: 2005 SCC (L & S) 1020,*** it was held by the Supreme Court that principles of natural justice are not rigid or immutable hence they cannot be imprisoned in the strait-jacket formula. It was held by the Supreme Court that :-

"We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre- decisional hearing is better and should always be preferred to post- decisional hearing. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of audi alteram partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten the forbidden fruit. [See R. v. University of Cambridge, (1723) 1 Str 557 : 93 ER 698] But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: " `To do a great right' after all, it is permissible sometimes `to do a little wrong'." [Per Mukharji, C.J. ***In Charan Lal Sahu v. Union of India, 1990 (1) SCC 613 (Bhopal Gas Disaster), SCC p. 705, para 124.] While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential".***

(emphasis supplied)

26. In the case of ***P.D. Agrawal v. State Bank of India & Ors.*** reported in ***2006 (8) SCC 776 :: 2007 (1) SCC (L & S) 43,*** this Court restated the principles of natural justice and indicated that they are flexible and in the recent times, they had undergone a `sea change'. If there is no prejudice to the employee, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority.

27. The Supreme Court in the case of ***Ranjit Singh v. Union of India*** reported in ***2006 (4) SCC 153 :: 2006 SCC (L & S) 631*** referring to the relevant case-law, was pleased to held that :-

"In view of the aforementioned decisions of this Court, it is now well settled that the principles of natural justice were required to be complied with by the disciplinary authority. He was also required to apply his mind to the materials on record. The enquiry officer arrived at findings which were in favour of the appellant. Such findings were required (sic sought) to be overturned by the disciplinary authority. It is in that view of the matter, the power sought to be exercised by the disciplinary authority,

*although not as that of an Appellate Authority, but is akin thereto. The inquiry report was in favour of the appellant but the disciplinary authority proposed to differ with such conclusions and, thus, apart from complying with the principles of natural justice it was obligatory on his part, in the absence of any show-cause filed by the appellant, to analyse the materials on record afresh. It was all the more necessary because even CBI, after a thorough investigation in the matter, did not find any case against the appellant and thus, filed a closure report. It is, therefore, not a case where the appellant was exonerated by a criminal court after a full-fledged trial by giving benefit of doubt. It was also not a case where the appellant could be held guilty in the disciplinary proceedings applying the standard of proof as preponderance of the probability as contrasted with the standard of proof in a criminal trial i.e. proof beyond all reasonable doubt. When a final form was filed in favour of the appellant, CBI even did not find a prima facie case against him. The disciplinary authority in the aforementioned peculiar situation was obligated to apply its mind on the materials brought on record by the parties in the light of the findings arrived at by the inquiry officer. It should not have relied only on the reasons disclosed by him in his show-cause notice which, it will bear repetition to state, was only tentative in nature. As the Appellate Authority in arriving at its finding, laid emphasis on the fact that the appellant has not filed any objection to the show-cause notice; ordinarily, this Court would not have exercised its power of judicial review in such a matter, but the case in hand appears to be an exceptional one as the appellant was exonerated by the inquiry officer. He filed a show-cause but, albeit after some time the said cause was available with the disciplinary authority before he issued the order of dismissal. Even if he had prepared the order of dismissal, he could have considered the show-cause as he did not leave his office by then. The expression "communication" in respect of an order of dismissal or removal from service would mean that the same is served upon the delinquent officer". (**See State of Punjab v. Amar Singh Harika reported in** AIR 1966 SC 1313).*

28. The Apex Court in the case of ***Haryana Financial Corporation and another Vs. Kailash Chandra Ahuja*** reported in ***(2008) 9 SCC 31*** has considered in great detail the consequence of non-observance of principles of natural justice. The Apex Court has held that the recent trend of judgment is that unless prejudice is shown, the impugned order or action cannot be struck down. It has been observed as under:-

"The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

In Malloch Vs. Abendeen Corpn., Lord Reid said : (All ER p. 1283a-b)

"....it was argued to have afforded a hearing to the applicant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer".

(emphasis supplied)

Lord Guest agreed with the above statement, went further and stated: (All ER p.1291b-c)

"...A great many arguments might have been put forward but if none of them had any chance of success then I can see no good reason why the respondents should have given the appellant a hearing, nor can I see that he was prejudiced in any way".

29. The Supreme Court in the case of ***Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and Others*** reported in ***(2015) 8 SCC 519*** held as under :-

"there was no legal duty to supply a hearing if a hearing would not change the ultimate conclusion reached by the decision-maker.' In ***Dharampal (Supra),*** *the Supreme Court, while answering the question whether recovery proceedings could be initiated without a show-cause notice under Section 11-A of the Excise Act which was mandatory, held that a show cause notice was required to be issued before passing an order of recovery irrespective of the fact whether Section 11-A of the Excise Act was attracted in the case and it was not open for the authorities to dispense with the requirement of the rules of natural justice on the presumption that no prejudice was to be caused to the aggrieved persons by not issuing a show cause notice. At the same time, the Supreme Court observed, that the courts were empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice was caused to the person against whom the action was taken. In the aforesaid case, the Supreme Court, while holding that there was an infraction of the rules of natural justice refused to interfere on behalf of the assessee and remand back the matter to the concerned authority to take fresh decision after issuing a show cause notice to the assessee as such an exercise, in the facts of that case, would have been futile and no prejudice was caused to the assessee because of no show cause notice having been issued to him.*

In this regard the relevant observations of the Supreme Court are reproduced below :-

" 11.2. Whether recovery proceedings can be initiated without show-cause notice under Section 11-A of the Excise Act, which is mandatory?

37. Therefore, we are inclined to hold that there was a requirement of issuance of show-cause notice by the Deputy Commissioner before passing the order of recovery, irrespective of the fact whether Section 11-A of the Act is attracted in the instant case or not.

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasizing that the principles of natural justice cannot be applied in straight-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. ***Nevertheless, there may be situations wherein for some reason - perhaps because the evidence against the individual is thought to be utterly compelling - it is felt that a fair hearing 'would make no difference' - meaning that a hearing would not change the ultimate conclusion reached by the decision-maker - then no legal duty to supply a hearing arises.*** *Such an*

approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corporation, who said that:

'...A breach of procedure...cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court dos not act in vain'.

Relying on these comments, Brandon LJ opined in Cinnamond v. British Airports Authority that:

'...no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing'. In such situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the Courts. Even if it is found by the Court that there is a violation of principles of natural justice, the Courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. ***Therefore, every violation of a facet of natural justice may not lead to the conclusion that order passed is always null and void. The validity of the order has to be decided on the touchstone of 'prejudice'. The ultimate test is always the same, viz., the test of prejudice or the test of fair hearing.***

43. In view of the aforesaid enunciation of law, Mr Sorabjee may also be right in his submission that it was not open for the authority to dispense with the requirement of principles of natural justice on the presumption that no prejudice is going to be caused to the appellant since the judgment in R.C. Tobacco [(2005) 7 SCC 725] had closed all the windows for the appellant.

44. ***At the same time, it cannot be denied that as far as courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. ....***

45. ***Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case, we find that such an exercise would be totally futile*** *having regard to the law laid down by this Court in R.C. Tobacco [(2005) 7 SCC 725].*

48. ***Therefore, on the facts of this case, we are of the opinion that non-issuance of notice before sending communication dated 23-6-2003 has not resulted in any prejudice to the appellant and it may not be feasible to direct the respondents to take fresh action after issuing notice as that would be a mere formality."***

(Emphasis added)

30. In the instant case as well, no purpose will be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, in as much as the

defect is incurable; no amount of explanation can change the ultimate result, being a fait accompli. The petitioner can by no means negate the admitted fact.

31. In view of the same, we are of the considered view that the order passed by the respondent no.4 dated 24.10.2017 does not call for any interference by this Court under Article 226 of the Constitution of India.

32. The writ petition is devoid of merits and is accordingly dismissed.

33. No order as to costs.

(2020)1ILR 1279

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIVEK AGARWAL, J.

Writ C No. 58399 of 2013

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

Counsel for the Petitioner:
Sri Uma Nath Pandey

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh

A. The land Acquisition Act, 1894 - Section 11 - award – acquisition is final and conclusive - land acquired vests with the Government - No provision under the Land Acquisition Act or any other law which directs for re-conveyance of the acquired land to the tenure holders for any reason -Government Order supplements the statutory provisions - no overriding effect upon the statutory provisions - if the Act does not provide for the re-conveyance of the acquired land to the erstwhile owners for any reason, it cannot be done by means of a simple Government Order - Petitioner directed to pursue his remedy before the appropriate authority. (Para 9, 10 & 15)

Land acquired under the provision of the Land Acquisition Act not utilized by the Development Authority for the industrial purpose - Petitioner submitted representation before the Greater Noida Industrial Development Authority for the lease back of the land in view of the Government Order. (Para 2, 5 & 6)

Held: - No writ in the nature of mandamus can be issued to any authority to consider any claim set up by any person on the basis of a Government Order which is violative and contrary to the provisions of the Land Acquisition Act. (Para 12)

Writ Petition dismissed. (E-7)

List of cases cited: -

1. Ravindra Kumar Vs. District Magistrate, Agra and others, 2005 (2) AWC 1650

(Delivered by Hon'ble Pankaj Mithal, J.
Hon'ble Vivek Agarwal, J.)

1. Heard Sri Uma Nath Pandey, learned counsel for the petitioner and learned Standing Counsel for the respondents No. 1 and 2.

2. The petitioner by means of this petition seeks a direction upon the respondent No.3 Greater Noida Industrial Development Authority to decide his representation dated 20.09.2013 for leasing out the land which was acquired from the petitioner in view of the Government Order dated 24.04.2010.

3. There is no dispute to the fact that the land of the petitioner, Khasra No. 356

area 1800 square meters situate in village Sakipur, Pargana Dadri, Tehsil Sadar, District Gautam Buddh Nagar, was acquired by the State of U.P. for the benefit of the Greater Noida Industrial Development Authority in accordance with the provisions of Land Acquisition Act.

4. In respect of the said acquisition, an award has also been pronounced under Section 11 of the Act and the acquisition is final and conclusive.

5. The contention of learned counsel for the petitioner is that the aforesaid land has not been utilized by the Development Authority for the industrial purpose and as such in view of the Government Order dated 24.04.2010, the petitioner is entitled for the lease back of the said land as has been done in the case of one Khajan Singh.

6. It is in respect of such lease back of the land that the petitioner has submitted the aforesaid representation.

7. The aforesaid Government Order provides that in view of public resentment against the acquisition in matters where de-notification of the land has been accepted, the acquired land may be given on lease to the tenure holders at the level of the authority on the approval of the Board.

8. The language of the aforesaid Government Order makes it clear that the lease back policy is applicable where proceedings for de-notification of the acquired land have been approved. In the case at hand, we do not find that there is any averment to the above effect so as to bestow the benefit of leasing out the acquired land in favour of the petitioner.

9. In addition to the above, there is no provision under the Land Acquisition Act or any other law which directs for re-conveyance of the acquired land to the tenure holders for any reason. The land which has been acquired vests with the Government and cannot be re-conveyed to the tenure holders in the absence of any provision in this regard in the concerned Statute.

10. It is well settled that a Government Order simply supplements the statutory provisions but has no overriding effect upon the statutory provisions. Thus, if the Act does not provide for the re-conveyance of the acquired land to the erstwhile owners for any reason, it cannot be done by means of a simple Government Order.

11. A Full Bench of this Court in the case of ***Ravindra Kumar Vs. District Magistrate, Agra and others, 2005 (2) AWC 1650,*** dealing with somewhat a similar controversy regarding a Government Order providing for employment to one of the family members of those whose land has been acquired, held that the Land Acquisition Act is a self-contained Code and any Government Order providing for any benefit not mentioned in the Act would be inconsistent with the intention of the Parliament and as such Government Order providing for such extra benefits would be violative of the Act and would be invalid.

12. It further held that no writ in the nature of mandamus can be issued to any authority to consider any claim set up by any person on the basis of a Government Order which is violative and contrary to the provisions of the Land Acquisition Act.

13. It is also pertinent to mention here that the petitioner is not entitle to any parity with the case of Khajan Singh as the principle of parity is not applicable where the benefit has been extended contrary to the law. There are no pleadings to the effect that the aforesaid Khajan Singh was given the benefit of the aforesaid Government Order as per law.

14. In view of the aforesaid facts and circumstances, we do not find any merit in this petition for exercising the discretionary jurisdiction not even for directing to consider the representation of the petitioner.

15. Accordingly, the writ petition is **dismissed** with liberty to the petitioner to pursue his remedy before the appropriate authority.

(2020)1ILR 1281

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 65211 of 2009

Narendra Giri Mahant ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nisheeth Yadav, Sri C.B. Yadav, Sri Anand Kumar Yadav

Counsel for the Respondents:
A.S.G.I., Sri Pramod Kumar Singh, Sri Prashant Mathur, Sri Vinod Kumar Shukla, Sri Satish Kumar Rai

A. Sanction - Cantonments Act, 2006 - No development activity in the form of erection or re-erection of the building, even in respect of area in occupation of civilian if the land falls in the cantonment area, can be carried out except with the prior sanction of competent authority.

This implies that even in cases where there are temples in the defence area and are in occupancy of civilian or math or mahant for that matter, such math or mahant or civilian cannot carry out or undertake any exercise of erection or re-erection of the temple structure eve within the temple premises except with prior sanction of the competent authority under the Cantonment Act, 2006. The permission so granted in the present case in the year 2004 will automatically deemed to have seized with enforcement of the Cantonment Act, 2006. (Para 43 and 47)

Editor's note

The High Court has settled the legal position with respect to the right of an individual private person to raise construction over the land or in respect of building which is recorded in the GLR as a private land/building in occupation of a private individual either under lease or grant or mere occupancy before and after coming into force of Cantonments Act, 2006. Prior to the enforcement of Act of 2006, erection or re-erection of building in civil area requires sanction by the Cantonment Board, otherwise penal consequences follow (Sections 178A and 179 of Act of 1924). Pursuant to which vide letter dated 06.03.2004 the Board has granted permission/sanction to the Mahant of temple to carry out renovation or repair works only. The letter dated 06.03.2004 which is only a one-time measure cannot be read as to include the permission/sanction by the Board to raise new structures in the temple premises.

The Act of 2006 has widened the powers of the Board and authority designated thereunder. Now, the building erection or re-erection includes any material alterations or enlargement of any building and its existing structure. The Board has power to sanction the work of erection or re-erection which shall be valid for 2 years only from the date of sanction, extended only upon sanction by the Board. Penal consequences will be attracted in case of

illegal erection or re-erection. This implies that even in respect of area in occupation of civilian if the land falls in the cantonment area then no development activity in the form of erection or re-erection of the building can be carried out except with prior sanction of the competent authority.

That even though the Board via letter dated 06.03.2004 has granted permission/sanction to repair and renovate the temple and not to raise new structures in it thereby invalidating all the permanent or temporary structures built beyond the temple premises (4335 Sq.Ft. as given in GLR and verified by spot inspection) , automatically becomes inoperative after the enforcement of Act of 2006.

Writ Petition disposed of. (E-10)

List of cases cited: -

1. Chief Executive Officer Vs. Surendra Kumar Vakil and ors (1993) SCC 555

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

1. Heard Sri C.B.Yadav, learned Senior Advocate assisted by Sri Nisheeth Yadav, learned counsel for the petitioner, Sri Parashant Mathur, learned counsel appearing for respondent no. 4, Sri S.K.Rai, learned counsel for respondent no. 3 and Sri P.K.Singh, learned counsel for respondent 1,2,5 and 6. and Sri Ajay Singh, learned Advocate who has placed before us the report and the survey map prepared by Prayagraj Development Authority today in a sealed cover. We have opened the sealed cover in Court and have perused. Survey map and report of measurement are taken on record. Sri Vikas Budhwar learned Advocate Commissioner who has submitted joint report with Mr. Kunal Shah, learned Advocate as directed by us, is also present.

2. The petitioner Narendra Giri before this Court claims to be Mahant of Sri Bare Hanuman Jee Temple just below the bandh and in close proximity of OD Fort, Allahabad, has approached this Court by means of this writ petition under Article 226 of the Constitution against the order dated 19th November, 2009 issued by the Defence Estate Officer Allahabad Circle wherein direction has been issued to Mahant Narendra Giri to remove encroachment consisting of RCC foundation and Plinth Beam encroaching the Defence land measuring 2404.50 Sq. ft. within five days of the receipt of the notice/letter/order , failing which, necessary action is to be taken against the Mahant at his own risk and cost.

3. A detailed counter affidavit, supplementary counter affidavit have been filed by respondent no. 3, namely, Deference Estate Officer, Allahabad Circle and Chief Executive Officer, Allahabad respectively and rejoinder affidavit and supplementary rejoinder affidavit have also come to be filed by the petitioner and thus, pleadings have been exchanged in the matter.

4. Since, encroachment was seriously disputed by the Mahant, the rival parties have come up with their own measurement report of the alleged encroachment and the area in which temple situates, this Court passed a detailed order on 12.10.2019 directing for survey and measurement exercise and submission of report thereof in the presence of the independent Advocates Commissioners, by the Prayagraj Development Authority with the consent of the parties. The order dated 10.12.2019 passed by us is reproduced hereunder:

"1. Supplementary rejoinder affidavit has been filed today by Sri Nisheeth Yadav, learned counsel for the petitioners, which is taken on record.

2. Heard Sri C. B. Yadav, learned Senior Advocate assisted by Sri Nisheeth Yadav, learned counsel for the petitioner, Sri Prashant Mathur, learned counsel for the respondent No.4 and Sri Pramod Kumar Singh, learned counsel appearing for respondent Nos.5 and 6.

3. In this petition, the petitioners are aggrieved against the action undertaken by the respondent Nos.3 and 4 by putting them to notice to remove certain encroachments/constructions around the main temple of Lord Mahabir (Hanuman) in the close vicinity of the fort, on the ground that these constructions are unauthorized one and have been carried out in an area which belongs to the defence force.

4. Assailing the notice, the argument advanced by learned counsel for the petitioner is that it is the respondents themselves who had sanctioned for construction vide letter dated 06.03.2004 addressed to the Divisional Commissioner in which the total area for which the construction was permitted stood as 6270 sq. feet as a land belonging to the temple and, therefore, the constructions that have been undertaken under the authority issued by the Defence Officer himself, the petitioner cannot be charged for raising any unauthorized constructions over the defence land.

5. A counter affidavit has been filed in the matter in which the respondents have admitted vide Annexure CA-1 issued by the Chief Executive Officer in which qua Survey No.94/71 the total area ad-measuring 4335 sq. feet have been shown to be belonging to the temple of Lord Mahabir (Hanuman) and termed as a private land vide G.L.R. No.94.

6. The counsel appearing for the respondents submits that the letter issued by the authority that is being relied upon by the petitioner was not issued by the competent authority to grant permission to carry out constructions and, it is contended, as per the Government's United Provinces Notifications dated 26.07.2016 it is the General Officer Commanding the Division, who can grant such sanctions. He has further taken us to the paragraph 15 in which it has been stated that unauthorized constructions have come up involving an area of 619.31 sq. feet on a land comprising Survey No.93 as well which, however, has been disputed by the petitioner in their rejoinder affidavit.

7. Both the rival parties have brought before this Court their own survey map on the basis of which they claim their respective stand to be correct. Since both the parties have annexed the map prepared by their own agency or authority and they stand contrary to each other, no definite conclusion can be drawn about the exact area in which the temple is situate and the area which is claimed or alleged to be having unauthorized constructions at the end of those who are taking care of the temple or are managing the affairs of the temple. In such a situation, therefore, to arrive at a definite conclusion as to whether the constructions have really been carried out in violation of the Rules and are liable to go for want of due sanction and further to ensure as to whether disputed constructions/encroachment is over an area beyond 4335 sq. feet that includes main temple, it is necessary that in the presence of both the rival parties and two Advocates to be nominated by this Court, a survey with accurate measurement of the land in question is carried out by an independent Government agency or its instrumentality.

8. At this stage, both the parties agreed for the survey and the

measurement exercise of the land in question to be carried out by the Prayagraj Development Authority in presence of both the parties and also the two learned Advocates, namely, Sri Vikas Budhwar and Sri Kunal Shah.

9. In view of the above, we are issuing following directions:

(a) The Prayagraj Development Authority shall undertake to carry out measurement work through their skilled officers, of the main temple premises where Lord Mahabir (Hanuman) rests and shall prepare a map accordingly.

(b) The measurement shall be separately conducted of the area towards the east and west of the main temple including the constructed area with separate details of constructed area and the walls surrounding the open space as well and will prepare a map with accurate measurement accordingly.

(c) The survey and measurement exercise will also be carried out in respect of any temporary or permanent structure around the temple and its premises and a separate map thereof shall be prepared.

(d) The measurement shall clearly demarcate the main temple area, open area around the temple and constructed area around the temple.

(e) The entire constructions whether permanent or temporary around the main temple and the vacant land will be taken as disputed land except the main temple, so as to facilitate the measurement exercise.

(f) The map will clearly outline the limits of 4335 sq. feet area including the main temple and its structure in the centre of it.

(g) The report so prepared shall be duly signed by the authority preparing, official who carry out measurement exercise on the spot, the two learned Advocates appointed by the High Court and Officer of the respondent duly authorized for the said purpose as well as an authorized person of the petitioner in that behalf as well.

(h) The measurement will be carried out by 16.12.2019 as directed herein above from 02:00 p.m. onwards and report prepared by the officials of the Development Authority shall be submitted to this Court on or before 19.12.2019 in a sealed cover. The expenses shall be borne by the petitioner of the agency who shall carry out the measurement and the survey of the area as per our directions contained herein above.

(i) The temple will remain closed during measurement and survey. The District Magistrate as well as Inspector General of Police, Prayagraj Zone are directed to provide adequate security on the spot so that the measurement and survey work is carried out peacefully without any interference by a third party and the general people except the contesting parties, namely, the petitioner and the respondents, shall be kept away from the premises where the measurement exercise will be carried out as directed herein above.

(j) Learned Advocates Sri Vikash Budhwar and Sri Kunal Shah shall prepare a separate joint report under their signatures about the conduct of survey in their presence and the manner and method in which it has been carried out.

(k) The District Administration shall also ensure that learned Advocates Sri Vikas Budhwar and Sri Kunal Shah are escorted to the place in question for the exercise and are escorted back to their respective places and for that it will contact learned counsels through the Registrar (Protocol), High Court.

10. The Registrar General is directed to supply a complete set of entire pleadings of this case to both the learned Counsels within 48 hours and to communicate this order to the Secretary, Prayagraj Development Authority, District Magistrate, Prayagraj and Inspector General of Police, Prayagraj Zone within 48 hours to ensure the compliance. A copy of this order shall also be supplied to the learned Advocates Sri Vikas Budhwar and Sri Kunal Shah within 48 hours.

11. Put up this matter on 19th December, 2019."

5. In compliance of the aforesaid order, measurement exercise has been carried out by Prayargraj Development Authority with the help of their skilled men and in the presence of the Advocate Commissioners. The Advocate Commissioners have also submitted their report to this Court today and so also the Prayagraj Development Authority has submitted a detailed report and maps prepared by them on the scale given thereunder. We have shown map and records to the counsels of the respective parties and since map and report was prepared by the officials of the Prayagraj Development Authority in the presence of the authorized representatives of the parties, they have not disputed the same and admitted it to be correct report and agreed that Court may decide the matter taking judicial notice of the report and survey map.

6. Sri C.B.Yadav, learned Senior Advocate has agreed with report and submitted that area that have been shown in the map is in access to the area over which temple of Bade Hanuman Jee known as Mahavir Jee recorded in the General Land Register as Survey No. 71, as he has not disputed also CA-1 to the counter affidavit filed by respondent no. 3, wherein area of the temple recorded is 4335 Sq.ft. as a private land and the occupancy has been shown of the then Mahant Purushottam Giri.

7. The facts and controversy involved in the present case can be drawn in a narrow compass like this that temple of Mahavir Jee (Bade Hanuman Jee) is continued to be recorded as private land in the Defence area as Survey No. 71 in the General Land Register maintained by the Cantonment Board, Allahabad. The temple situates with Hanuman Jee resting under it (hereinafter referred to as temple) and the structure to that effect is not disputed. It so happened that one Arun Khanna, Army Colonel, it appears acting on behalf of the then Commander of the area, issued some letter to the Commissioner Allahabad Division, Allahabad on 06th March, 2004 according permission for renovation / repair of the Temple with condition that no new structure should be constructed and no construction should be done outside the area measuring 6270 Sq.ft. of GLR No. 94, Survey No. 71 recorded as land belonging to temple. It is claimed by Mahant that it is on account of this permission accorded on behalf of Commander that constructions have come. However, it appears that when constructions were in progress as late as in the year 2009 that notice was issued to the Mahant on 12th November, 2009 by the Administrative Officers for the Command that an unauthorized construction was being carried out near the temple in question and the land where constructions were being raised, was claimed to be Defence Land as per U.P. State Gazette Notification dated 28th July, 1916.

8. The notice was replied through Advocate by the Mahant vide letter dated 15.11.2009 claiming legal rights for carrying out constructions in the form of repair and renovation as per permission granted under the letter dated 6th March, 2004 by the then Colonel Arun Khanna. The reply was responded by the Colonel Pradeep Arora of the Command that permission granted was restricted to area of circle shown as Red in the map appended and the constructions that were being carried out were in fact in the area of the Defence land. Moreover, it was stated in the reply that permission was one time sanction for such an activity in the year 2004 and not to operate in perpetuity or ad-infinitum and it is thereafter finally order has come to be passed on 19th November, 2009, which is impugned in the present writ petition.

9. Thus issue involved in the present case is three fold: ***firstly***:- whether the permission granted under the letter dated 06h March, 2004 can be said to be permission to raise new construction around temple area and was to operate in perpetuity; ***secondly***:- (i) What exactly is the area of temple premises to be called as such and the exact area of main temple and; (ii) whether the constructions in dispute fall within the area of temple premises ? and ***thirdly*** any construction over a private land so registered/recorded in the GLR notified under the Cantonment Board, can be raised without prior sanction of the Cantonment Board or any competent authority in that behalf.

10. In so far as first and second issues are concerned, they are related to each other and so have to be dealt with together. From perusal of pleadings, we find that the permission that was accorded on behalf of Commander was specifically for renovation/repair of the temple with strict conditions that no new structure should be constructed and no constructions should be done outside the 6270 Sq.ft. area of the GLR No. 94, Survey No. 71 as a land belonging to the temple.

11. In order to find answer to the **first issue** whether the permission accorded under the letter dated 06th March, 2004, can be construed as only one time measurement and for a limited purpose or permission in perpetuity, it is necessary to appreciate the permission quoted under the letter dated 6th March, 2004 that runs as under:

"2. Permission is hereby accorded for renovation/repair of Hanuman Temple at Sangam with conditions that no new structure should be constructed and no construction should be done outside the 6270 Sq. ft area of GLR 94, Survey No. 71, the land belonging to the temple, and no portion of the renovation temple including the flag pole on top of the temple should be more than 52 ft from ground level."

12. From the words and expressions as have come up in the aforesaid letter, it is clearly deducible that permission was limited to the extent of renovation/repair of Hanuman temple with no permission for new structure and also no permission beyond the area 6270 Sq.ft. This letter is admitted to the petitioner and it is claimed that the constructions whatever have come up in the year 2009 were saved being within four corners of conditions mentioned in the letter. A bare reading of the aforesaid letter clearly shows that :

a. the permission was for renovation or repair of Hanuman Temple only;

b. no new structure was permitted to be constructed; and.

c. no construction should be done outside the area 6270 Sq.ft.

13. The words and expression "no construction should be done outside the 6270 Sq.ft and no new structure should be constructed" are to be reached in conjunction with permission for renovation and repair of Hanuman Temple. Thus, the permission accorded was to carry out renovation and repair work only *qua* Hanuman Temple structure and then any such renovation and repair work should not be done beyond the area of 6270 Sq.ft. provided their existed any such structure of the Hanuman Temple upto that area.

14. We have held in the preceding paragraph that it is difficult to find answer as to how new construction permanent in nature can be claimed to be permitted under the letter and in any view of the fact, no new construction was permitted, rather it was renovation and repair work only of Hanuman Temple was to be done and, for which, permission was accorded.

15. It appears that when petitioner started raising new constructions that the encroachment notice was issued on 12th November, 2009 and then in reply to that had been submitted by the petitioner on 15.11.2009, but we do not find any whisper in any of the paragraphs of the reply that construction was carried out in the form of repair or renovation work of Hanuman Temple. All that is claimed is that the activity was carried out per permission accorded under the letter dated 6th March, 2004 in the area surrounding the Hanuman Temple. Paragraph 1 to 7 of the reply of the petitioner dated 15.11.2009 (in the form of the notice) to letter dated 12th November, 2009 of administrative officer, is reproduced hereunder:

"1. That the Lord Bada Hanuman Temple a renounced Temple in religious field of the world. My client is seer of Lord Bada Hanuman Temple and is managing the entire affairs of the Temple. The Temple of Lord bada Hanuman is very much old, which history is not traceable. The Temple, aforestated, is situated in the bank of Triveni "SANGAM". Under the U.P. State Gazette Notification referred in the letter dated 12.11.2009 the construction is not permissible on the Defence land.

2. That in order to manage the affairs of the Temple and to allow the devotees to perform their rituals in around the Temple an area of 6270 Sq. ft. of GLR 94, Survey No. 71 has been carved out where temporary construction has already been made since long back.

3. That on account of huge rush of devotees, temporary structure was required to be repaired/renovated, and as such, permission of the same was accorded by the Head Quarter, Sub Area, Allahabad on 6.3.2004 by Sri Arun Khanna, Colonel by asking the Commissioner, Allahabad Division, Allahabad, Sri Dev Dutt. A copy of the letter dated 6.3.2004 is being enclosed with this notice as Annexure No. 1.

4. That on account of money crisis the renovation/repair of the surrounding of the Temple could not be done. However, devotees of Lord Hanuman finally donated certain money, for which my client has not thinks over the issue of the renovation/repair of the structures standing thereon.

5. That unfortunately even in religious place Cantonment Board, Allahabad has reported about unauthorized construction, factually which is not correct. Without examining the factors of construction, without taking into account the letter/permission accorded by Head Quarter of Sub Area, Allahabad about beatification of area of SANGAM and Re-construction of HANUMAN Temple, you, Naveen Thapa, Lt. Colonel issued this restrained order dated 12.11.2009 .A copy of the letter/restrained order dated 12.11.2009 is being enclosed with this notice as Annexure No. 2.

6. That my client has not violated any terms and conditions, referred in U.P. State Gazette Notification dated 28th July, 2016 as referred in the letter dated 12.11.2009. My client is intended to renovate/repair of the Lord Hanuman Temple and surrounding thereto, which is within the area of 6270 Sq. ft. of GLR 94, Survey No. 71 and not beyond that. For this renovation/repair of the Lord Hanuman Temple and surrounding thereto, permission has already been accorded on 6.3.2004 by Head Quarter, Sub Area, Allahabad. No construction beyond the permission accorded therein is being done by my client, but in the garb of the false report submission by Cantonment, Allahabad about unauthorized construction at Lord Hanuman Temple, the letter/restrained order has been issued on 12.11.2009.

7. That since no construction beyond the sanction accorded on 6.3.1994 is being done by my client, therefore, in view of the facts and circumstances as well as taking into account the religious field of the devotees visiting the Lord Bada Hanuman Temple everyday regularly and for their performance of Pooja etc. , you are hereby requested to kindly withdraw the restrained order/letter dated 12.11.2009 bearing no. 111185/Gen/Adm. And allow my client to start the renovation/repairing work of the Lord Hanuman Temple and surrounding thereto as per sanction accorded on 6.3.2004 and further be pleased to accept the blessing of the Lord Hanuman for yourself and family and also for the Nation."

16. We find above answer given to the effect that permission was only for the renovation and repair of the Hanuman Temple and not of any structure in any area surrounding the temple where it could have been claimed that there existed structure that also needed repair or renovation. It is also not the case of the petitioner in the pleadings raised in the writ petition either.

17. Thus the answer to the first issue is that the contents of the letter only establish a case of permission for repair/renovation as one time measure. The general rule in matters of sanction of map for new construction is also time bound. Even otherwise if structure has reached to a stage to be called as dilapidated, its renovation will always be a time bound activity and once a building is renovated/repaired, it may require only regular maintenance. This issue will be answered, partly with the third issue as well, later in this judgment.

18. In order to find answer to the **second issue,** we have to first determine part **(i)** of it, as to what is the exact area of the temple recorded as Survey No. 71 in the General Land Register maintained by the Cantonment Board. Annexure-CA-1 to the counter affidavit filed by respondent no. 3 shows the area of temple as 4335 Sq.ft. described as a temple of Mahabir,

classified as a private land in the occupancy of the then Mahant Purushottam Giri. So it is an occupancy right *qua* temple land and only to the extent of an area of 4335 Sq.ft.

19. This Annexure CA-1 has come to be referred to in paragraph 4 of the counter affidavit and in pleadings in support thereof have been further raised in paragraph 5 and 6. Paragraphs 4,5 and 6 are quoted as under:

"4(CA). That at the out set it is submitted that the present petition filed by the petitioner is not maintainable as a bare perusal of GLR No. 94, Survey No. 71 reveals that the Mahant Purshottam Giri is holder of occupancy right of temple of Mahavir of 4335 Sq. fr. Area. The objection regarding mutation of the petitioner are already on record. Photostate copy of the GLR No. 94, Survey No. 71 is annexed herewith and marked as Annexure CA-01

5. That a bare perusal of the notice dated 19.11.2009 as issued from the office of Defence Estate Office and the notice issued from the Cantt. Board dated 18.11.2009 would reveal that the said encroachment is made on the defence land is on G.L.R. Survey No. 93 Fort Cantt. Allahabad which is classified B-4 land measuring about 76.65 Acres which in fact is an offence U/s 247 of the Cantt Act, 2006 and as such a show cause notice was issued from the office of Cantt. Board for the said alleged encroachment. Photostat copy of the notice No. E/Fort/BH/2009-2010/570 dated 18.11.2009 is annexed herewith and marked as Annexure CA-2.

A perusal of document filed in support of the claim of the petitioner reveals that a reference of GLR No. 94, Survey No. 71 is made by the petitioner, in fact as per the GLR entry of Survey No. 93 maintained with the Defence Estates Officer the same is classified as B-4 land consisting of area 76.65 acres of vacant (agricultural land)owned by the Government of India and is under the management of Military Estates Officer now known as Defence Estate Officer. Photostat copy of the GLR No. 93 including the site plan map of the encroached site is annexed herewith and marked as Annexure CA-3.

From the submission made above, it is thus abundantly clear that the present encroachment by way of pucca construction which is sought to be carried out by the petitioner is on Survey No. 93 for which suitable action was initiated by the deponent being Chief Executive Officer, Cantt. Board, Allahabad and not on GLR No. 94 Survey No. 71 as mentioned by the petitioner in the petition and in the supporting document.

6. That from the submission made above it is clear that the petitioner has no legal enforceable right to make any construction in the name of erection or re-erection of survey No. 94/71 and 93 as prayed through the present petition. The alleged permission dated 6.3.2004 on the basis of which the claim of the petitioner has been made is also about GLR No. 94 Survey No. 71 and not the GLR No. 93 for which the action for encroachment as contemplated under the Rules have been initiated by the respondent. The claim of the petitioner is thus devoid of any merits."

20. In the rejoinder affidavit in paragraph 3, it has been claimed in reply to the paragraph 4, that petitioner succeeded the earlier Mahant but the reply relevant to the issue is given in paragraph 4 of rejoinder affidavit. In said paragraph, it has been pleaded that temple area of

Bade Hanuman Jee is 6270 Sq. ft. as per the sanction accorded under the letter dated 06th March, 2004 and it is claimed that no construction has been raised beyond the area measuring 6270 Sq. ft. at any point of time by the management of the temple in question, so there is no encroachment as such. Paragraph 4 of the rejoinder affidavit is reproduced hereunder:

"4. That the contents of paragraph nos. 5 and 6 of the Counter Affidavit are total misconceived and the same stand denied. In reply thereto, it is submitted that the total area for part of GLR No. 94/71, recorded in the name of Bade Hanuman Ji Temple is 6270 Sq. Ft, and therefore, when the permission was sought by the Commissioner, Allahabad Division, Allahabad in order to beautify the area of Sangam and beautification of Hanuman Temple, permission was accorded on 06.03.2004 by Colonel Arun Khanna, indicating that no new construction could be constructed and no construction could be turned down outside 6270 Sq. ft. area of GLR Survey No. 71/94, the land belonging to the the temple. Thus, the entire allegation as referred in paragraphs of the Counter Affidavit that the land of Hanuman Temple is only 4335 Sq.ft., which is factually incorrect. As per permission no construction beyond 6270 Sq.ft has been acted upon at any point of time by the Management of Lord hanuman Temple. There is no encroachment at any point of time at present also. Therefore, the notice issued by the authorities without making proper inspection and measurement is factually illegal."

21. This paragraph 4 has been sworn on the basis of personal knowledge so naturally the personal knowledge is based only upon letter dated 06th March, 2004. It is a question to be enquired into on what ground this letter showed area of the temple as 6270 Sq.ft. against the area recorded in the GLR No. 94, Survey No. 71 as 4335 Sq.ft only. A short counter affidavit has come to be filed in the matter, this time on behalf of respondent no. 4, namely, Chief Executive Officer, Cantonment Board, Allahabad, in which vide paragraph 10, it has been stated that the permission dated 6th March, 2004 cannot constitute a legal permission as power to permit erection or re-erection lies with competent authority only, even in respect of property in occupancy of a civilian. It has been further reiterated that the area as recorded in the GLR No. 94, Survey No. 71 is not as claimed by the petitioner and so the permission granted under the letter dated 6th March, 2004 was not a permission either under the Cantonments Act nor, an exercise of power conferred upon the Defence Estate officer in that regard.

22. Reliance has been further placed in the counter affidavit (vide paragraph 11) upon the General Administration Department notification issued by the then Government of United Provinces on 26th July, 1916 that restrains any construction activity in the vicinity of the OD Fort in the Allahabad District within 1000 yards but for the permission to be accorded in writing with approval of the General Officer Commanding. The relevant clause 2 of the notification (*supra*) in its entirety is reproduced hereunder:

"In exercise of the power conveyed by section 3, sub section (1) of the Indian Works of Defence Act, 1903 (VII of 1903), His Honour the Lieutenant-Governor of he United Provinces of Agra

and Oudh is hereby pleaded to declare that it is necessary to impose restrictions upon the use and enjoyment of the lands in the vicinity of Allahabad Fort in the Allahabad district and which are more particularly set forth in the sketch plant of the land referred to, a copy of which has been deposited in the office of the Collector of the Allahabad district.

2. that, from and after the publication of the public notice mentioned in section 3, sub-section (2) of the said Act, the restrictions mentioned in section 7(a) and 7(b) of the said Act shall attach to the land within the said zone, lying within 1,000 yards from the orest of the glaois of the said fort, viz:-

(I) No verification shall be made in the ground level and no building, wall, bank, or other construction of permanent materials above the ground, shall be maintained, or erected, added to, or altered.

Provided that, with the written approval of the General Officer Commanding the Division, and on such conditions as he may prescribe, variation in ground level, huts, fences and other constructions of wood, or other materials, casily destroyed, or removal, may be maintained, erected, added to , or altered.

Provided that, with the general permission of the General Officer Commanding the Division, the railway authorities are exempted from this prohibition in respect of their beng allowed to load, unload and stak ovr the whole area such ballash, bricks, sleepers, or other materials as may be required from time to time for the construction or maintenance of the railway.

Provided, also, that any person having control of lands as owner, lessee, or occupier hall be bound forthwith to destroy or remove such huts, fences, or other constructions without compensation upon the order in writing signed by the General Officer Commanding the Division.

(ii) No wood, earth, stone, brick, gravel, sand, or other material shall be stacked, stored or otherwise accumulated.

Provided that, with the written approval of the General officer Commanding the Division and on such conditions as he may prescribed, road ballast, manure, and agricultural produce, may be erected from the prohibition.

Provided, also, that any person having control of the land as owner, lessee, or occupier shall be bound forthwith to remove such road ballast, manure or agricultural produce without compensation on the requisition of the General Officer Commanding the Division.

(iii) Live hedges, rows or clumps of trees, or orchards shall not be maintained places added to, or altered otherwise than with the written approval of the General Officer Commanding the Division and on such conditions as he may prescribe.

(iv) No surveying operations shall be conducted otherwise than by or under the personal supervision of a public servant duly authorisied in this behalf by the General Officer Commanding the Division, and

(v) where any building, wall, bank, or other construction above the ground has been permitted under this notification to be maintained, erected, added to, or altered, repairs shall not. Without the written approval of the General Officer Commanding the Division, be made with materials different in kind from those employed in the original building, wall, bank or other construction.

Provide further that nothing in this notification shall apply to existing buildings, entered in schedule "B" attached to the plan mentioned in paragraph 1 hereof, or to variations of ground level, banks, hedges, etc, so long as these remain unaltered as they exist on the date of this notification. "

(emphasis added)

23. In reply to the said paragraph in the supplementary rejoinder affidavit what has been stated is that there is no encroachment beyond the area shown in the GLR. Paragraph 10 of the short counter affidavit and reply thereof in paragraph 11 of the short rejoinder affidavit are reproduced hereunder:

"10 (SCA):- That in reply to the contents of para no. 8 of the rejoinder affidavit, the content of Para no. 11, 12 and13 of the counter affidavit are reiterated. The respondent most humbly submits that the contents of para under reply are with the sole intent to mislead to this Hon'ble Court in the light of the fact that the general officer commanding the division has not authority whatsoever vested in his offices to grant any permission whatsoever ."

"11. (SRA) That the contents of paragraph no. 7,8,9 and 10 of the Supplementary counter affidavit filed by respondent no. 4 are not admitted, in the manner, as stated, hence denied. ***It is submitted that the petitioner has not encroached the land either of Defence or Cantonment Board or any GLR beyond the private land allotted to the petitioner's temple rather the map, which has been filed alongwith the order dated 06.03.2004 clearly demonstrates the correct facts. Bhajan-Pravachan Hall already is in existence in 2004,*** *in which much hue and cry has been made by the respondent no. 4 for fresh construction. It is factually incorrect, and therefore, the same is denied."*

(emphasis added)

24. From the above discussions with reference to the pleadings of the respective parties, the admitted position comes to be that the land recorded in the GLR No. 94, survey no. 71 is taken to be the land over which temple in question is recorded with total area of 4335 Sq.ft. The petitioners have not come up with any such evidence to disprove that entry, rather they have come to admit the area recorded as property of temple and are only banking upon permission accorded under the letter dated 06th March, 2004 *qua* their rights to the extent of 6270 square meter.

25. From the legal provisions relied upon by the respondent as quoted hereinabove, it goes without saying that there has to be sanction of the Commander but sanction has to be read in respect of an area recorded in the GLR because sanction is given to civilian occupant in a defence area *qua* the property so recorded. The Hanuman Temple is recorded as private property in the occupancy of the then Mahant possibly from whom the present Mahant is claiming to be a descent. So there could not be any permission but for an area recorded in the occupation of civilian. This Court does not find any document to corroborate the area described under the letter dated 06th March, 2004 and fail to find any justification for mentioning the area as 6270 Sq.ft to carry out repair/renovation of temple as per GLR No. 94, survey no. 71 as a land belonging to the temple, opposed to the one recorded in the GLR. In the absence of any such record to corroborate

the area under the sanction letter, the sanction granted under the order dated 06th March, 2004 cannot be said to be legal one *qua* an area beyond 4335 Sq.ft. Merely because sanction has been granted *qua* a particular mentioned area and which does not find support from the land register on which basis right is claimed, one cannot establish his rights or title, even in terms of possessory / occupancy rights on the basis of such letter or sanction. So therefore, we conclude and hold that temple premises is the area mentioned in the GLR and the petitioner could not have raised any construction temporary or permanent beyond the area of 4335 Sq.ft recorded as survey no. 71 of GLR No. 94 as temple in occupation of Mahant.

26. Coming to the part **(ii)** of the second issue *qua* the disputed constructions we proceed to examine whether the disputed constructions can be said to have come up beyond the area of the temple recorded in the GLR and whether constructions in question are in fact in the surrounding area within 4335 Sq.ft. or beyond that surrounding area of the temple. It is, therefore, also necessary to get the exact area of the temple and its structure. Since, now we have received survey map and measurement report conducted and prepared by the Prayagraj Development Authority in the presence of the respective parties and the Advocates Commissioner and that has not been disputed, it is this report that will give answer to the above issue.

27. Before, we proceed to examine the report, we would like to refer the Advocate Commissioners report submitted by Sri Vikas Budhwaar and Sri Kunal Shah, learned Advocates, in which, it has been stated that the survey exercise and measurement was concluded as per our order dated 6.12.2019. A hand written report which bears signatures of Pawan Kumar Shukla representative of Narendra Giri, Sri Amit Kumar Singh, Chief Executive Officer Cantonment Board, Sri Prashant Mathur, Advocate for Cantonment Board, Sri Rajiv Kumar Shukla, Sub Divisional Officer-II, Defence Estate Officer Allahabad Circle, Sri Pramod Kumar Singh, Ministry of Defence, Sri S.Thapa and Punjab Singh, representatives of OD Fort has been appended to the report of Advocate Commissioners dated 16.12.2019 that runs as under:.

"Spot Inspection Report dated 16.12.2019

In compliance of the order dated 10.12.2019 passed by Hon'ble High Court in Civil Misc. Writ Petition NO. 65211 of 2019 (Narendra Giri Mahant of Bade Hanuman Ji Temple Vs. U.O.I. & Others)

We Vikas Budhwar, Advocate and Kunal Shah in the capacity of Court appointed Advocate Commissioner reached the site being the Temple at 1:50 P.M. On 16.12.2019.

At the site when the survey/measurement activity was to be carried out Sri Pawan Kumar Shukla who was identified by the (petitioner-Mahant namely Shri Narendra Giri) and nominated as his representative for survey, Sri Amit Kumar Mane Chief Executive Officer, Cantonment Board along with his counsel Sri Prashant Mathur, Advocate for Cantonment Board were also present. Also present were Sri Rajiv Kumar Shukla Sub Divisional Officer-II Defence Estate Officer, Allahabad Circle, Advocate Pramod Kumar Singh for Ministry of

Defence, Sri S. Thapa along with Punjab Singh for OD Fort were also present.

To carry out the measurement/survey activity the following officers of the Prayagraj Development Authority were present.

i. Sri Dayanand Prasad Secretary PDA

ii. Sri. S.D.Sharma ` Executive Engineer PDA

iii. Sri T.P.Sngh Town Planner PDA

iv. Smt. Archana Ojha Tehsildar PDA

v. Sri R.S. Verma L.O. PDA

The measurement activity was commenced at 2:30 P.M. In compliance of the order of the High Court.

Firstly, the measurement of Main Temple premise was undertaken. The measurement were arrived at and reported/recorded in presence of concerned party by P.D.A.

Thereafter, the measurment of the area towards the east of the temple was carried out and the details of the measurements were recorded/reported in the presence of the concerned party by PDA

The measurement of temporary/permanent structure towards the east of the temple were carried out separately in presence of parties.

Thereafter the measurement of the area towards the west of the main temple was carried and details of permanent and temporary existing towards the west of the temple was recorded by the official of P.D.A. in presence of concerned party.

Likewise, measurement towards the north & the south of the temple was also carried out in the presence of parties by P.D.A.

The survey exercise/measurement was concluded at 3:55 P.M. The entire exercise of measurement was carried out in a peaceful environment. No dispute of any nature arose from any of the fraction. The parties were satisfied with the measurement/survey.

The District Administration had provided adequate security at the site which ensured peaceful execution of measurement/survey.

In compliance of the order dated 10.12.2019 passed by the Hon'ble High Court the undersigned has prepared this joint spot inspection report detailing the manner in which the survey activity was carried out.

Further with the consent of the parties the measurement so recorded by the PDA on 16.12.2019 has been forwarded for computerized development i.e. Map etc. detailing the measurement, construction existing at the spot to PDA which will develop the same by tomorrow i.e. 17.12.2019 as due to paucity of time instant development cannot be done.

The joint inspection report will be followed by a typed and detail report by the Advocate Commissioner."

28. Now the detailed typed joint report of the Advocate Commissioners that runs in seven paragraphs is reproduced hereunder:

"1. That as per the order dated 16.12.2019 passed in w.p. no. 65211 of 2009 being Narendra Giri Vs. Union of India and other the spot inspection was conducted on 16.12.2019 in the presence of the following parties.

I. Pawan Kumar Shukla (representaive of Narendra Giri),

ii. Sri Amit Kumar Mane (Chief Executive Officer Cantonment Board);

iii. Sri Prashant Mathur (Advocate for Cantonment Board);

iv. Sri Rajiv Kumar Shukla (Sub Divisional Officer-II Defence Estate Officer, Allahabad Circle);

v. Sri Pramod Kumar Singh (Ministry of Defence);

vi. Sri. S. Thapa; and

vii. Punjab Singh (representtive of OD Fort).

The measurement was carried out by the following officials of Prayagraj Development Authority:

1. Sri Dayanand Prasad (Secretary PDA);

ii. Sri S.D. Sharma (Executive Engineer PDA);

iii. Sri T.P.Singh (Town Planner PDA);

iv. Smt. Archana Ojha (Tehsildar PDA); and

v. Sri R.S. Verma (Law Officer PDA)

2. That the measurement activity commenced on 2:30 P.M. And concluded at 3:55 P.M. On 16.12.2019.

3. That the measurement activity commenced in the following manner.

a. Firstly, the measurement of Main Temple premise was undertaken. The measurement were arrived at and reported/recorded in presence of concerned party by P.D.A.

b. Thereafter, the measurement of the area towards the east of the temple was carried out and the details of the measurement were recorded/reported in the presence of the concerned party by P.D.A.

c. The measurement of temporary/permanent structure towards the east of the temple were carried out separately in presence of parties.

d. Thereafter the measurement of the area towards the west of the main temple was carried and details of permanent and temporary existing towards the west of the temple was recorded by the official of P.D.A in presence of concerned party.

e. Thereafter measurement towards the north and the south of the temple was also carried out in the presence of parties by P.D.A.

4. That the entire exercise of measurement was carried out in a peaceful environment. No dispute of any nature arose from any of the fraction. The parties were satisfied with the measurement/survey.

5. That after the completion of the measurement/survey when the stage of preparation of the map giving the outline with regard to the area/measurement and the temporary/permanent construction so existing was to be reflected in the map which was to be prepared then the officials of P.D.A. Apprized the parties including the advocate commissioner's so appointed by the Hon'ble High Court of Judicature at Allahabad that it is not possible to make the map immediately on the site in question as it will require sufficient time to sketch the map and to identify the permanent and temporary constructions including the measurement so recorded therein.

6. That accordingly the officers of the P.D.A. Apprised the parties including the Advocate Commissioner's that the map will be provided by 17.12.2019.

7. That a specific query was raised by the advocate commissioner before the parties concerned as to whether they have any objection to the same that the map will be prepared

subsequently and it cannot be prepared over the site in question, then the respective parties including their representatives and counsels apprised the advocate commissioner that they have no objection as the measurements were taken in their presence and they were satisfied with the measurement which had been recorded.

8. That the said fact which transpired during the entire exercise conducted on 16.12.2019 was recorded in the spot inspection report dated 16.12.2019 which was signed by the respective parties and their representatives.

9. That on 16.12.2019 the officials of the PDA assured that they will provide the map containing the measurements and the nature of the constructions existing on the site in question by 17.12.2019 but the same has not been provided . Thus the map is not being appended alongwith the compliance affidavit.

10. That for the kind perusal of this Hon'ble Court the following documents are being submitted before the Hon'ble Court in purported compliance of the order dated 10.12.2019 passed in W.P. No. 65211 of 2009 which are as under:

I. (Hand Writing) Spot Inspection Report dated 16.12.2019 (containing 3 pages);

ii. Typed copy of spot Inspection Report dated 16.12.2019 (containing 4 pages); and

11. That the present spot inspection report along with the annexures are being filed before this Hon'ble Court in compliance of the order dated 10.12.2019 passed in the aforesaid writ petition the same may be kept and be treated as part of the record."

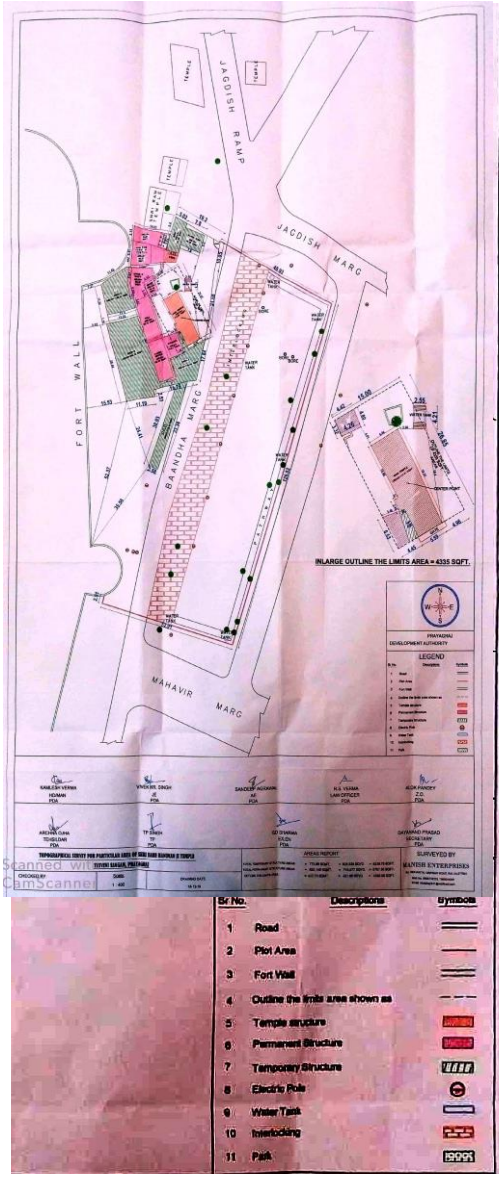
(emphasis added)

29. Now, we proceed to examine the survey report of Prayagraj Development Authority placed before us in sealed cover by learned counsel appearing for Prayagraj Development Authority. As we go through the survey report, we find that the area which has been outlined with dotted dash shown in the 'legend' as outline of the area of the main temple and surrounding in total as 4335 Sq.ft. with width shown to be 15 meters and the length as 26.85 mt, totaling to 402.75 Sq.mt. (approx 4335 Sq.ft.), wherein a part of the back of the varandah on western south is within the area of 4335 Sq.ft. and so also part of the office area on western north is also shown inside the temple premises. The permanent structure that have been shown with red shaded lines are disputed permanent constructions and mostly beyond the area of 4335 Sq.ft. This constructed area includes the flower center area 85.18 Sq.Mt. (approx 916.366 square ft.) and office and shops area 86.30 Sq.mt. (approx 928.95 Sq.ft.) with exception to certain area of varandah and office referred to above. Sri Ram Janki Temple area 59.57 Sq.mt. (approx 642,25 Sq.ft.) then further construction have been carried out of another Sri Hanuman Jee temple with an area to the tune 5.42 Sq.mt. (approx 578.88 Sq.ft.)

30. The temporary structure (shown with green shaded lines) as Hawan Kund Shed area to the extent of 48.36 square meter (approx 520.30 Sq.ft.) and 53.99. square meter (approx 580.82 Sq.ft.) towards north east of the temple premises. Yet another shed has come up in the south as 115.16 square meters (approx 10238.89 Sq.ft.) south. All these structures are shown as green shaded area and are referred to as temporary structure.

31. None of the respective parties have disputed this above measurement exercise nor, put any objection to the survey map and measurement report prepared by P.D.A.

32. The scanned print of the map with measurement details submitted by PDA and referred to above is reproduced hereunder:



33. Since above measurement report and the map have not been disputed by any of the counsels of the respective parties, it is taken to be admitted. Thus the report is found prepared on the spot without any dispute and objection. Accordingly, the ultimate and inevitable conclusion drawn by us is as under:

a. *The main temple area where Hanuman Jee rests and structure above stands is 113,91 Sq.mt. (approx 1,225.44 Sq.ft.)*

b. *Temple premises is the area that includes temple structure (113,91 Sq.mt.) and the surroundings is 4335 Sq.ft (approx 402.75 Sq. mt.)*

c. *Except for a part of area of office (west north corner) and part of Verandah (west south corner) of temple premises, the entire constructions shown with red shaded lines are unauthorized constructions.*

(i) Part of office area inside premises is 14.143 square meter (approximately 152.152 Sq.ft).

(ii) Part of varandah with additional temporary structure inside the premises is 16.062 Sq.mt. (approximately 172.81 Sq.ft.)

d. *Since permission under the letter dated 6th March, 2004 was only for renovation and repair of temple, it would mean only the main temple and the surrounding, shown in the survey map/ report prepared by the PDA, with dotted lines were open space is available and should continue to remain open space upto the extent of 4335 Sq.ft..*

e. *the words renovation and repair in the letter dated 06.03.2004 can only mean improvement upon and retaining the existing structure and not a permission for creating any new structure.*

f. *there is no pleading by the petitioner that there existed any structure permanent or temporary except main temple within an area of 4335 Sq.ft.*

described as Temple of Mahbir Jee in the GLR.

34. Learned counsel for the petitioner has also not sought any time to raise any objection and rather has made a request that after measurement exercise was carried out on the spot in the presence of representatives of Mahant of temple on 16th December, 2019 and since the permanent structure shown with red shaded lines has been found beyond the area shown in the GLR as 4335 Sq.ft. the Mahant has applied to the Ministry of Defence, Government of India on 18.12.2019 to regularize the constructions that have come up beyond the area 4335 Sq.ft. and so the structure that have already come up over the land which is a Defence land quite beyond the area of the private land of the temple, may not be demolished until decision is taken by the Government of India.

35. However, no such letter has been placed before this Court, so it can be safely concluded with the admission of respective parties that except for certain area of the office and verandah and office towards west-south and the west north respectively of the temple premises, the entire constructions that are permanent in nature, beyond the temple premises (4335 Sq.ft.) are upon the Defence land and as such constructions, therefore, are liable to go. Except for transfer of land by Ministry of Defence, Government of India to the temple management, the constructions cannot be taken/deemed to be regularized and since as on date there is no such permission accorded *qua* permanent constructions beyond the area of 4335 Sq. ft. of the Hanuman Temple and its premises, such constructions deserve to be demolished.

36. Now, we take up the **third issue** which is regarding rights of an individual private person to raise construction over the land or in respect of the building which is recorded in the GLR as a private land/ building in occupation of a private individual either under lease or grant or a mere occupancy prior to the coming into force of Cantonments Act, 2006. Till 14.09.2006, the Cantonments Act, 1924 was in promulgation with regard to the development activity in the area notified as an cantonment area. It is the authority created under the Cantonments Act and the Board constituted thereunder exercise same power as by a municipality in a civil municipal area.

37. Section 178-A provides for sanction of the construction in the name of erection or re-erection of a building in a civil area only. There is previous sanction of the Executive Officer and then any exercise of erection or re-erection without sanction has been described as punishable offence in view of section 179 of the Act of 1924. Section 178 A and 179 of the Act of 1924 are reproduced hereunder:

"CHAPTER XI

Control Over Building, Streets, Boundaries, Trees, Etc. Buildings

178-A. Sanction for building:-

No person shall erect or re-erect a building on any land in a cantonment-

(a) in an area, other than the civil area, except with the previous sanction of the Board,

(b) in a civil area, except with the previous sanction of the Executive Officer,

nor otherwise than in accordance with the provisions of this Chapter and of the rules and bye-laws

made under this Act relating to the erection and re-erection of buildings.

179. Notice of new buildings-

:-1. *Whoever intends to erect or re-erect any building in a cantonment shall apply for sanction by giving notice] in writing of his intention,-*

a). Where such erection or re-erection is in an area, other than the civil area, to the Board;

b). Where such erection or re-erection is in a civil area to the Executive Officer:)

(2) For the purposes of this Act, a person shall be deemed to erect or re-erect a building who-

(a) makes any material alteration or enlargement of any building, or

(b) converts into a place for human habitation any building not originally constructed for that purpose, or

(c) converts into more than one place for human habitation a building originally constructed as one such place, or

(d) converts two or more places of human habitation into a greater number of such places, or

(e) converts into a stable, cattle-shed or cowhides any building originally constructed for human habitation, or

(ee) convets into a dispensary, stall, shop, warehouse, godown, factory or garage any building originally constructed for human habitation, or

(f) makes any alteration which there is reason to believe is likely to affect prejudicial the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene, or

(g) makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building, or which reduces the cubic capacity of any room in the building below the minimum prescribed by any bye-law made under this Act.

180A *-SECTION 180A: POWER OF BOARD UNDER CERTAIN SECTIONS EXERCISABLE BY EXECUTIVE OFFICER:-*

The powers, duties and functions of the Board under section 181, sub-section (1) of section 182, section 183-A and section 185 (excluding the proviso to sub-section (1) and the proviso to sub-section (2) of the said section 185) shall be exercised or discharged in a civil area by the Executive Officer."

(emphasis added)

38. In the present case the issue is of sanction quoted in the year 2004 as no erection or re-erection could have been carried out without sanction and so to the extent of renovation/repair permission so granted under the letter dated 6th March, 2004 could have been pressed into service as one time measure. Now with enforcement of the Cantonments Act, 2006 with its publication on 14.09.2006 any development activity in respect of civil occupancy building or land, the provisions of 2006 Act would be applicable and so also in the present case as notice is *qua* constructions carried in the year 2009.

39. We find that notice was issued in the year 2009 and, therefore, it has to be seen as to whether respondent had any authority to carry out any development activity in the form of raising permanent structure or construction over and above the land inclusive of the temple premises without prior sanction of the competent authority.

40. From the reading of the various provisions of Chapter IX,X and XI of the

Cantonments Act, 2006, we find that the powers of the Cantonment Board and authority designated thereunder have been quite widened and are more akin to the municipal functions. Chapter (X) deals with town planning and control over the building etc. Section 233 provides for preparation of plan for the land use in the cantonment area and Section 233 provides for sanction of building. Section 235 provides for notice by the person who wants to erect or re-erect or repair the building. Section 233 requires a person to notify the purpose and then powers lies with the Board / Authority to sanction or refuse sanction and the Board reserves the right to order stoppage of building work in certain cases; then Section 242 provides for completion of erection or re-erection of the building and to give completion notice and then Section 243 provides for prescribed period of limitation for sanction to follow and if within the prescribed period of 2 years, no construction/ re-erection has taken place, a further application for extension of time shall be given to the competent authority, namely, Board or executive officer as the case may be. The Board also reserves power under Section 245 to prescribe a reasonable period within which work has to be completed then completion certificate is issued under Section 246 and under Section 247 notice is given where illegal erection or re-erection of building is carried out and then Section 248 gives power to stop the work and even order for demolition .Section 249 also provides for to seal an unauthorized construction and then Section 250 bars the jurisdiction of Civil Court in such matters.

Section 235 of the Cantonments Act, 2006 defines erection or re-erection vide sub-section 2 as under:

"(2) For the purposes of this Act, a person shall be deemed to erect or re-erect a building who-

(a) makes any material alteration or enlargement of any building; or

(b) converts into a place for human habitation any building not originally constructed for human habitation; or

(c) converts into more than one place for human habitation a building originally constructed as one such place; or

(d) converts two or more places of human habitation into a greater number of such places; or

(e) converts into a stable, cattle-shed or cow- house any building originally constructed for human habitation; or

(f) converts into a dispensary, stall, shops, warehouse, godown, factory or garage any building originally constructed for human habitation; or

(g) ***makes any alteration which there is reason to believe is likely to affect prejudicially the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene; or***

(h) ***makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building, or which reduces the cubic capacity of any room in the building below the minimum prescribed by any bye- law made under this Act."***

(emphasis added)

41. From perusal of the above, therefore, it is clear that building erection or re-erection will include any material alteration or enlargement of any building and its existing structure. Then we find

that Section 243 provides that sanction of erection or re-erection of building shall be only for 2 years from the date of sanction and if work is not carried out during this period, one can apply to the Board or executive officer as the case may be, and in case if construction of building has been started but could not be completed within specified reasonable period as may be provided by executive officer or the board then such construction work will not be continued unless prior sanction is obtained.

42. Section 247 provides for punishment against the person who continues or completes erection or re-erection of the building without giving any valid notice as required by Section 235 and 236 or before any sanction has been issued or without complying with direction as contained under Section 238 and also in cases where sanction has been refused and yet construction work is being carried out. Section 247 and Section 248 and 249 relevant for the purpose, are reproduced hereunder:

*"**247. Illegal erection and re-erection**- Whoever begins, continues or completes the erection or re-erection of a building-*

(a) without having given a valid notice as required by sections 235 and 236, or before the building has been sanctioned or is deemed to have been sanctioned; or

(b) without complying with any direction made under sub-section (1) of section 238; or

(c) when sanction has been refused, or has ceased to be available or has been suspended by the General Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of section 58, shall be punishable with fine which may extend to fifty thousand rupees and the cost of sealing the illegal construction and its demolition.

248. Power to stop erection or re-erection or to demolish:-(1) A Board may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the Board considers that such erection or re-erection is an offence under section 247 and may, in any such case or in any other case in which the Board considers that the erection or re-erection of a building is an offence under section 247, within twelve months of the completion of such erection or re-erection in like manner, direct the alteration or demolition, as it thinks necessary, of the building, or any part t hereof, so erected or re-erected:

Provided that the Board may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable:

Provided further that the Board shall not, without the previous concurrence of the General Officer Commanding-in-Chief, the Command, accept any sum by way of composition under the foregoing proviso in respect of any building OR land which is not under the management of the Board.

(2) A Board shall by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the order under section 238 sanctioning the erection or re-erection has been suspended by the General Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of

section 58, and shall in any such case in like manner direct the demolition or alteration, as the case may be, of the building or any part thereof so erected or re-erected where the General Officer Commanding-in-Chief, the Command, thereafter directs that the order of the Board sanctioning the erection or re-erection of the building shall not be carried into effect or shall be carried into effect with modifications specified by him:

Provided that the Board shall pay to the owner of the building compensation for any loss actually incurred by him in consequence of the demolition or alteration of any building which has been erected or re-erected prior to the date on which the order of the General Officer Commanding-in-Chief, the Command, has been communicated to him.

249. Power to seal unauthorized constructions:-(1) It shall be lawful for the Chief Executive Officer, at any time, before or after making an order of demolition under section 248 or of the stoppage of erection of any building, or execution of any work, to make an order directing the sealing of such erection or work or of the premises in which such erection or work is being carried on or has been completed at the cost of the offender in such manner as may be prescribed by rules for the purpose of carrying out the provisions of this Act or for preventing any dispute as to the nature and extent of such erection or work.

(2) Where any erection or work or any premises in which any erection or work is being carried on, has or, has been sealed, the Chief Executive Officer may, for the purpose of demolishing such erection or work in accordance with the provisions of this Act, order such seal to be removed.

(3) No person shall remove such seal except--

(a) under an order made by the Chief Executive Officer under sub-section (2); or

(b) under an order of an appellate authority in an appeal made under this Act.

(4) Any person who contravenes the provisions contained in sub-section (3) shall be punishable with imprisonment which may extend to six months or with fine which may extend to twenty thousand rupees, or with both."

(emphasis added)

43. From reading of the above provisions, it is absolutely clear that even in respect of area in occupation of civilian if the land falls in the cantonment area then no development activity in the form of erection or re-erection of the building can be carried out except with prior sanction of the competent authority. So even in cases where there are temples in the defence area and are in occupancy of civilian or math or mahant for that matter, such math or mahant or civilian cannot carry out or undertake any exercise of erection or re-erection of the temple structure even within temple premises except with prior sanction of the competent authority under the Cantonments Act, 2006. The permission so granted in the present case in the year 2004 will automatically deemed to have seized with enforcement of Cantonments Act, 2006 and any construction in the name of erection or re-erection of the temple structure even in the temple premises could not have been carried out except with prior sanction and permission

of the competent authority under the Cantonments Act, 2006.

44. Besides above the Cantonments Act, 2006 does not abolish or repeal the notification of the Government of United Provinces dated 26th July, 1916 that is a special notification restraining construction activity in the vicinity of the ordinance depot fort, Allahabad to wit, within 1000 yards except with prior sanction of the General Officer Commanding of the Division.

45. In the present case, we do not find that any such sanction has been accorded to the petitioner to raise new construction or raise any permanent structure removing old one within the area of the 1000 yards from the wall of the OD Fort except direction/ letter dated 6th March, 2004 for repair or renovation. So answer to the 3rd question is that no construction and no development activity in the name of raising construction or re-erection of a building as defined under Section 235 (2) (a)(g)(h) can be carried out except with prior sanction of the competent authority under Cantonments Act, 2006 and that too in the close vicinity of the fort i.e. 1000 yards from the fort wall as per notification of 1916 (*supra*). The survey map and report (*supra*) submitted in this case clearly shows that permanent structures/constructions have come up in various forms within 1000 yards of the Fort.

46. The survey report and the discussions held above give ample answer to the second querry because there is no permission accorded by the competent authority of the Cantonment Board to raise constructions over and above the Defence land at all. The permission under the letter dated 6th March, 2004 cannot be read as permission to raise construction over and above the Defence land.

47. In the present case, we find that area where temple situate is a Defence land, the Mahant of Hanuman temple is a mere occupant of the temple which is recorded as private land. Any development activity, therefore, in and around the temple within the temple premises will be in the nature of altering the structure and if to be carried out, it necessarily requires prior permission from the competent authority of the Cantonment Board. As far as notification of the Government of United Provinces referred to in the counter affidavit dated 26th July, 1916 appended with counter affidavit is concerned, it clearly goes to demonstrate that no such activity can be carried out within 1000 yards from the orest of the *glaois* of the OD Fort.

48. The measurement that has been carried out and the map prepared clearly show that the constructions have been carried out only within the limit of 1000 yards of the Fort wall and therefore, constructions are held to be illegal for want of sanction of the competent authority.

49. The Apex Court in the case of **Chief Executive Officer v. Surendra Kumar Vakil and Others (1993) SCC 555** has clearly held that even in respect of private land of which civilian could be a grantee or a lessee any construction can be carried out only with prior sanction of the competent authority and if no such sanction has been obtained, such authority is well within its right not only to question the same but order for removal /demolition and if occupier does not demolish such

constructions voluntarily, the authority can get that demolished at the cost of the occupant.

50. At this stage, learned Senior Advocate appearing for the petitioner Sri C.B.Yadav submits that since constructions have been found to be beyond area of 4335 Sq.ft. recorded in the GLR No. 94 and Survey No. 71 as per the measurement exercise carried out by the Prayagraj Development Authority in the presence of the representatives of the petitioner and the officers concerned, and the report has been prepared to that count, Mahant has applied on 18.12.2019 for grant of sanction/ regularization of the existing structure and the Magh Mela is shortly to be organized in the area, some reasonable time may be allowed to remove the standing constructions in questions shown as red shaded, beyond the area of 4335 Sq.ft recorded as private land of Hanuman Temple premises in question.

51. To the above request, learned counsel for the respondents has no objection and we also find that since Magh Mela is shortly to begin, it would be in the public interest to grant sufficient time to the petitioner to remove unauthorized constructions.

52. In view of above, therefore, we hereby direct that petitioner shall remove all the constructions permanent and temporary beyond the area 4335 Sq.ft.. shown in the map prepared by the Prayagraj Development Authority (*supra*) within a period of three months from today and positively by 19th of March, 2020, failing which it would be open for the respondent to carry out necessary exercise for removal of the unauthorized constructions.

53. Writ petition thus stands disposed of with the aforesaid observations and directions.

54. The registry is directed to supply certified copy of the survey map and the report to the respective parties, if they apply for the same.

55. However, before we part with the case, we may record our appreciation for the tremendous task undertaken by the Advocate Commissioners in rendering their assistance in the matter by preparing spot inspection report quite meticulously in respect of the inspection carried out by the Prayagraj Development Authority.

(2020)1ILR 1304

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2019

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 66367 of 2015

Anand Prakash & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ram Surat Saroj, Sri Prem Chand Saroj

Counsel for the Respondents:
C.S.C., Sri Shivam Yadav

A. Compensation - Land Acquisition - in view of the Full Bench decision in *Gajraj Singh* case, petitioners have received compensation amount as also the additional compensation at the rate of 64.70%, however they are seeking direction for allotment of developed abadi plot to the extent of 10% of their acquired land - whether the petitioners

who were neither parties in the writ petitions which had been decided along with the *Gajraj Singh* case nor had their land been acquired under the notifications which were subject matter of challenge in the *Gajraj Singh* case and connected matters can claim allotment of developed abadi plot to the extent of 10% of their acquired land.

The directions issued by the Full Bench in the case of *Gajraj Singh* under paragraph 482(4) in terms of which the authority was to take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% was to be given, was confined to those land holders whose writ petitions challenging the notification has been dismissed earlier and to those who had not approached the court to challenge the notifications which were subject matter of challenge in the writ petitions decided along with the case of *Gajraj Singh*. The directions had been made in view of the peculiar facts of the case having regard to the extensive development which had taken place subsequent to the acquisition proceedings and thereafter the Supreme Court in the case of *Savitri Devi* had made it clear that the directions issued by the Full Bench shall not be treated as precedent in future cases. (Para 26)

The directions under paragraph 482(4) of the judgment aforesaid were not in respect of those persons such as the petitioners in the present case whose land had been acquired in terms of notifications which were not subject matter of challenge in the case of *Gajraj Singh* and connected matters. Thus the decision of not giving additional developed abadi land to the persons such as petitions cannot be held to be either arbitrary or discriminatory, more so, when the said decision was based on the reasoning that the authority had not developed land to allot to these landowners. (Para 27)

B. Land Acquisition Act - right to claim additional benefit in lieu of acquisition of land - repelled in the case of *Ravindra Kumar* by Full Bench.

Land Acquisition is a self-contained Code providing the procedure to be followed for acquisition as well as for assessment of the valuation and payment of fair and just compensation to the persons whose and were acquired and in the absence of any statutory provision no other claim can be raised as a matter of right. (Para 21)

Writ Petition rejected. (E-10)

List of cases cited: -

1. Gajraj Singh and others Vs. State of U.P. and ors 2011 (11) ADJ 1 (FB)

2. Savitri Devi Vs. State of U.P. and ors 2015 (7) SCC 21

3. Mange @ Mange Ram Vs. State of U.P. and ors 2016 (8) ADJ 79 (DB)

4. Khatoon and ors Vs. State of U.P. and ors (2018) 14 SCC 346

5. Smt. Rameshwari and 3 ors Vs. State of U.P. and 2 ors Writ C No. 18948 of 2017, decided on 03.05.2017

6. Ramesh and ors Vs. State of U.P. and ors 2019 (4) ADJ 225

7. Ravindra kumar Vs. District Magistrate, Agra and ors (2005) 1 UPLBEC 118

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

1. Vakalatnama filed by Sri Prem Chandra Saroj learned counsel, on behalf of the petitioners, is taken on record.

2. Heard Sri Prem Chandra Saroj, learned counsel for the petitioners, Sri Shivam Yadav, learned counsel for the fourth respondent, and Sri Mata Prasad, learned Standing Counsel appearing for the State-respondents.

3. The present writ petition has been filed seeking a direction to the respondents to allot developed abadi plot to the

petitioners to the extent of 10% of their acquired land in view of the Full Bench decision of this Court in **Gajraj Singh and others Vs. State of U.P. and others.**

4. The petitioners claim to be owners of certain land parcels situate in Village Soharkha Jahidabad, Pargana and Tehsil Dadri, District Gautam Budh Nagar which were subject matter of acquisition proceedings in terms of notification dated 31.07.2005 issued under Section 4 (1)/17(4), and the notification dated 27.07.2006 issued under Section 6/17 (1) of the Land Acquisition Act, 1894. The petitioners admit to having received compensation amount and also additional compensation at the rate of 64.70% in view of the Full Bench judgment of this Court in the case of **Gajraj Singh and others** (supra).

5. It is an admitted position that the petitioners did not challenge the land acquisition proceedings. The writ petition is also silent as to whether the notifications under which the land of the petitioners was acquired, were under challenge in the bunch of writ petitions which were decided along with the case of **Gajraj Singh and others**.

6. Learned counsel appearing for the State respondents and also the learned counsel for the Noida Authority have submitted that the benefit granted by the Full Bench in the case of **Gajraj Singh and others** would not be applicable to the case of the petitioners for the reason that the petitioners were neither parties in the writ petitions which had been decided along with the case of **Gajraj Singh and others** nor there is any assertion by the petitioners that the notifications under which their land had been acquired were subject matter of challenge in the case of **Gajraj Singh and others.** Further more, it has been submitted that in terms of the direction contained in the Full Bench judgment, the Noida Authority had taken a decision not to allot the abadi plot to the extent of 10% to those land owners who had not approached the writ court and had not challenged the acquisition proceedings.

7. The question which thus falls for consideration is as to whether as per the directions in the case of **Gajraj Singh and others**, the petitioners, who were neither parties in the writ petitions which had been decided along with the case of **Gajraj Singh and others** nor had their land been acquired under the notifications which were subject matter of challenge in the writ petitions decided by the Full Bench in the case of **Gajraj Singh and others** and connected matters, could claim entitlement to allotment of abadi plot to the extent of 10% of their acquired land.

8. In the case of **Gajraj Singh and others**, the writ petitions challenging the notifications in respect of land acquisition proceedings with respect to tracts of land situate in different villages of Greater Noida and Noida were decided and the writ petitions were disposed of in terms of the following directions :-

"481. As noticed above, the land has been acquired of large number of villagers in different villages of Greater Noida and Noida. Some of the petitioners had earlier come to this Court and their writ petitions have been dismissed as noticed above upholding the notifications which judgments have become final between them. Some of the petitioners may not have come to the Court and have

left themselves in the hand of the Authority and State under belief that the State and Authority shall do the best for them as per law. We cannot loose sight of the fact that the above farmers and agricultures/owners whose land has been acquired are equally affected by taking of their land. As far as consequence and effect of the acquisition it equally affects on all land losers. Thus land owners whose writ petitions have earlier been dismissed upholding the notifications may have grievances that the additional compensation which was a subsequent event granted by the Authority may also be extended to them and for the aforesaid, further spate of litigation may start in so far as payment of additional compensation is concerned. In the circumstances, we leave it to the Authority to take a decision as to whether the benefit of additional compensation shall also be extended to those with regard to whom the notifications of acquisition have been upheld or those who have not filed any writ petitions. We leave this in the discretion of the Authority/State which may be exercised keeping in view the principles enshrined under Article 14 of the Constitution of India.

482. In view of the foregoing conclusions we order as follows:

1. The Writ Petition No. 45933 of 2011, Writ Petition No. 47545 of 2011 relating to village Nithari, Writ Petition No. 47522 of 2011 relating to village Sadarpur, Writ Petition No. 45196 of 2011, Writ Petition No. 45208 of 2011, Writ Petition No. 45211 of 2011, Writ Petition No. 45213 of 2011, Writ Petition No. 45216 of 2011, Writ Petition No. 45223 of 2011, Writ Petition No. 45224 of 2011, Writ Petition No. 45226 of 2011, Writ Petition No. 45229 of 2011, Writ Petition No. 45230 of 2011, Writ Petition No. 45235 of 2011, Writ Petition No. 45238 of 2011, Writ Petition No. 45283 of 2011 relating to village Khoda, Writ Petition No. 46764 of 2011, Writ Petition No. 46785 of 2011 relating to village Sultanpur, Writ Petition No. 46407 of 2011 relating to village Chaura Sadatpur and Writ Petition No. 46470 of 2011 relating to village Alaverdipur which have been filed with inordinate delay and laches are dismissed.

2. (i) The writ petitions of Group 40 (Village Devla) being Writ Petition No. 31126 of 2011, Writ Petition No. 59131 of 2009, Writ Petition No. 22800 of 2010, Writ Petition No. 37118 of 2011, Writ Petition No. 42812 of 2009, Writ Petition No. 50417 of 2009, Writ Petition No. 54424 of 2009, Writ Petition No. 54652 of 2009, Writ Petition No. 55650 of 2009, Writ Petition No. 57032 of 2009, Writ Petition No. 58318 of 2009, Writ Petition No. 22798 of 2010, Writ Petition No. 37784 of 2010, Writ Petition No. 37787 of 2010, Writ Petition No. 31124 of 2011, Writ Petition No. 31125 of 2011, Writ Petition No. 32234 of 2011, Writ Petition No. 32987 of 2011, Writ Petition No. 35648 of 2011, Writ Petition No. 38059 of 2011, Writ Petition No. 41339 of 2011, Writ Petition No. 47427 of 2011 and Writ Petition No. 47412 of 2011 are allowed and the notifications dated 26.5.2009 and 22.6.2009 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to deposit of compensation which they had received under agreement/award before the authority/Collector.

2(ii) Writ petition No. 17725 of 2010 Omveer and others Vs. State of U.P. (Group 38) relating to village Yusufpur Chak Sahberi is allowed. Notifications dated 10.4.2006 and 6.9.2007 and all consequential actions are quashed. The

petitioners shall be entitled for restoration of their land subject to return of compensation received by them under agreement/award to the Collector.

2(iii) Writ Petition No.47486 of 2011 (Rajee and others vs. State of U.P. and others) of Group-42 relating to village Asdullapur is allowed. The notification dated 27.1.2010 and 4.2.2010 as well as all subsequent proceedings are quashed. The petitioners shall be entitled to restoration of their land.

3. All other writ petitions except as mentioned above at (1) and (2) are disposed of with following directions:

(a) The petitioners shall be entitled for payment of additional compensation to the extent of same ratio (i.e. 64.70%) as paid for village Patwari in addition to the compensation received by them under 1997 Rules/award which payment shall be ensured by the Authority at an early date. It may be open for Authority to take a decision as to what proportion of additional compensation be asked to be paid by allottees. Those petitioners who have not yet been paid compensation may be paid the compensation as well as additional compensation as ordered above. The payment of additional compensation shall be without any prejudice to rights of land owners under section 18 of the Act, if any.

(b) All the petitioners shall be entitled for allotment of developed Abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 square meters. We however, leave it open to the Authority in cases where allotment of abadi plot to the extent of 6% or 8% have already been made either to make allotment of the balance of the area or may compensate the land owners by payment of the amount equivalent to balance area as per average rate of allotment made of developed residential plots.

4.The Authority may also take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% be also given to;

(a) those land holders whose earlier writ petition challenging the notifications have been dismissed upholding the notifications; and

(b) those land holders who have not come to the Court, relating to the notifications which are subject matter of challenge in writ petitions mentioned at direction No.3.

5. The Greater NOIDA and its allottees are directed not to carry on development and not to implement the Master Plan 2021 till the observations and directions of the National Capital Regional Planning Board are incorporated in Master Plan 2021 to the satisfaction of the National Capital Regional Planning Board. We make it clear that this direction shall not be applicable in those cases where the development is being carried on in accordance with the earlier Master Plan of the Greater NOIDA duly approved by the National Capital Regional Planning Board.

6. We direct the Chief Secretary of the State to appoint officers not below the level of Principal Secretary (except the officers of Industrial Development Department who have dealt with the relevant files) to conduct a thorough inquiry regarding the acts of Greater Noida (a) in proceeding to implement Master Plan 2021 without approval of N.C.R.P. Board, (b) decisions taken to change the land use, (c) allotment made to the builders and (d) indiscriminate proposals for acquisition of land, and thereafter the State Government shall take appropriate action in the matter."

9. In terms of the aforementioned directions, particularly the directions issued under paragraph 482(3), it was held that all the petitioners in the bunch of writ petitions would be entitled for payment of additional compensation to the extent of 64.70% in addition to the compensation already received and also would be entitled for allotment of developed abadi land to the extent of 10% of their acquired area.

10. In paragraph 482 (4), the Authority was directed to take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% was to be given to those land owners whose writ petitions challenging the notifications had been dismissed earlier and also those land holders who had not come to the Court to challenge the notifications which were subject matter of challenge in the writ petitions decided along with the case of **Gajraj Singh and others**. It may be pertinent to note that there was no direction for grant of payment of additional compensation/allotment of abadi land or for consideration of the said benefits by the Authority in respect of those persons whose land had been acquired in terms of notifications which were not subject matter of challenge in the case of **Gajraj Singh and others** and connected bunch of writ petitions.

11. The judgment in the case of **Gajraj Singh and others** was challenged before the Supreme Court in the case of **Savitri Devi vs. State of U.P. and others**, and the same was affirmed after duly taking notice of the facts of the case where the High Court was faced with a scenario where, on the one hand, invocation of urgency provisions under Section 17 and dispensing with the right to file objections under Section 5-A, was found to be illegal and on the other hand, there was a situation where because of delay in challenging the acquisitions by the landowners, developments had taken place in the villages and in most of the cases, third party rights had been created.

12. It was in the face of this situation that the Court in the case of **Gajraj Singh and others** came out with a solution which was equitable to both the sides by way of providing them a practical and workable solution by adequately compensating the landowners in the form of compensation as well as allotment of developed abadi land at a higher rate i.e. 10% of the land acquired of each of the landowners against the eligibility under the policy to the extent of 5% and 6% in the case of land parcels under the Noida and Greater Noida respectively.

13. The Supreme Court in the case of **Savitri Devi** also took note of the fact that directions had been issued by the High Court in the peculiar circumstances of the case and would not form a precedent for future cases. The relevant extracts from the judgment in the case of **Savitri Devi** are as follows:-

"44. We have also to keep in mind another important feature. Many residents of Patwari village had entered into agreement with the authorities agreeing to accept enhanced compensation @ 64.7%. This additional compensation was, however, agreed to be paid by the authorities only in respect of landowners of Patwari village. The High Court has bound the authorities with the said agreement by applying the same to all the land owners thereby benefiting them with

64.7% additional compensation. There could have been argument that the authorities cannot be fastened with this additional compensation, more particularly, when machinery for determination for just and fair compensation is provided under the Land Acquisition Act and the land owners had, in fact, invoked the said machinery by seeking reference Under Section 18 thereof. Likewise, the scheme for allotment of land to the land owners provides for 5% and 6% developed land in Noida and Greater Noida respectively. As against that, the High Court has enhanced the said entitlement to 10%. Again, we find that it could be an arguable case as to whether High Court could grant additional land contrary to the policy. Notwithstanding the same, the Noida authority have now accepted this part of the High Court judgment after the dismissal of the appeals filed by the Noida authority, and a statement to that effect was made by Mr. Rao.

45. We may point out that while dismissing the appeals of Noida authority, following remarks were made:

9. Insofar as allotment of 10 per cent of the plots is concerned, the High Court, in exercise of its discretionary power, has thought it fit, while sustaining the notification issued by the authority for protecting them for allotting 10 per cent of the developed plots; and, there again they have put a cap of 2,500 sq.mtrs. In fact, in the course of the order, the High Court has taken into consideration the agreement that was entered into by the authority with the villagers of Patwari and, in some cases, the authority itself has agreed to raise 6 to 8 per cent of the developed plots to the agriculturists. The High Court has also taken into consideration the observations made by this Court in the case of Bondu Ramaswamy v. Bangalore Development Authority 2010 (7) SCC 129, where this Court has gone to the extent of directing the authorities to allot 15 per cent of the developed plots. In our view and in the peculiar facts and circumstances of these cases, since the relief that is given to the Respondents/agriculturists is purely discretionary relief by the Court in order to sustain the notification issued by the authorities, we do not find any good ground to interfere with the impugned judgment(s) and order(s) passed by the High Court, at the instance of the Petitioners/Appellants/ authorities, namely, NOIDA and Greater NOIDA.

10. This order shall not be treated as a precedent in any other case.

46. Thus, we have a scenario where, on the one hand, invocation of urgency provisions under Section 17 of the Act and dispensing with the right to file objection under Section 5A of the Act, is found to be illegal. On the other hand, we have a situation where because of delay in challenging these acquisitions by the landowners, developments have taken place in these villages and in most of the cases, third party rights have been created. Faced with this situation, the High Court going by the spirit behind the judgment of this Court in Bondu Ramaswamy came out with the solution which is equitable to both sides. We are, thus, of the view that the High Court considered the ground realities of the matter and arrived at a more practical and workable solution by adequately compensating the land owners in the form of compensation as well as allotment of developed Abadi land at a higher rate i.e. 10% of the land acquired of each of the landowners against the eligibility and to (sic under) the policy to the extent of 5% and 6% of Noida and Greater Noida land respectively.

47. Insofar as allegation of some of the Appellants that their abadi land was acquired, we find that this allegation is specifically denied disputing its correctness. There is specific averment made by the NOIDA Authority at so many places that village abadi land was not acquired. It is mentioned that abadi area is what was found in the survey conducted prior to Section 4 Notification and not what is alleged or that which is far away from the dense village abadi. It is also mentioned that as a consequence of the acquisition, the Authority spends crores and crores of rupees in developing the infrastructure such as road, drainage, sewer, electric and water lines etc. in the unacquired portion of the village abadi. During the course of hearing, Chart No. 2 in respect of each village of Greater Noida was handed over for the consideration of this Court, wherein the amount spent by the Authority on the development, including village development (which is the unacquired village abadi), has been given in Column No. 4 thereof. It has been the consistent stand of the NOIDA Authority that prior to the issuance of Section 4 Notification under the Land Acquisition Act, 1894, survey was conducted and the abadi found in that survey was not acquired. In fact, affidavits in this respect have also been filed not only in this Court but also in the High Court. We have mentioned that there has been a long gap between acquisition of the land and filing of the writ petitions in the High Court by these Appellants challenging the acquisition. If they have undertaken some construction during this period they cannot be allowed to take advantage thereof. Therefore, it is difficult to accept the argument of the Appellants based on parity with three villages in respect of which the High Court has given relief by quashing the acquisition.

48. To sum up, following benefits are accorded to the land owners:

48.1- increasing the compensation by 64.7%;

48.2- directing allotment of developed abadi land to the extent of 10% of the land acquired of each of the land owners;

48.3- compensation which is increased at the rate of 64.7% is payable immediately without taking away the rights of the landowners to claim higher compensation under the machinery provided in the Land Acquisition Act wherein the matter would be examined on the basis of the evidence produced to arrive at just and fair market value.

49. This, according to us, provides substantial justice to the Appellants.

Conclusion

50. Keeping in view all these peculiar circumstances, we are of the opinion that these are not the cases where this Court should interfere Under Article 136 of the Constitution. However, we make it clear that directions of the High Court are given in the aforesaid unique and peculiar/specific background and, therefore, it would not form precedent for future cases.

51. We may record that some of the Appellants had tried to point out certain clerical mistakes pertaining to their specific cases. For example, it was argued by one Appellant that his land falls in a village in Noida but wrongly included in Greater Noida. These Appellants, for getting such clerical mistakes rectified, can always approach the High Court.

52. The Full Bench judgment of the High Court is, accordingly, affirmed and all these appeals are disposed of in terms of the said judgment of the Full Bench."

14. Pursuant to the directions issued under paragraph 482 (4) of the judgment

in the case of **Gajraj Singh and others** the respondent authority took a decision in its Board meeting for paying additional compensation to the extent of 64.70% to all land owners whether they had challenged the notifications or not. A decision was also taken not to allot abadi plot to the extent of 10% to those land owners who had not approached the writ court and had not questioned the acquisition proceedings. This decision of the authority was based on the fact that such huge area of developed abadi land was not available so as to allot it to all such persons who did not approach the Court.

15. The contention of the petitioners that irrespective of the fact whether the notifications issued in respect of land acquisition proceedings were under challenge along with the bunch of cases decided by the Full Bench they should be granted the same benefit regarding developed abadi plot as was granted by the Full Bench is liable to be rejected, for the reason that in the case of **Gajraj Singh and others** the Full Bench granted relief to the petitioners and to such persons whose earlier writ petitions challenging the notifications had been dismissed or who had not come to the Court challenging the notifications which were subject matter of challenge in the writ petitions, in view of the peculiar facts of the case having regard to the extensive development which had taken place subsequent to the acquisition proceedings, and also that the Supreme Court in the case of **Savitri Devi** had made it clear that the directions issued by the Full Bench shall not be treated as a precedent in future cases.

16. We may also refer to the case of **Mange @ Mange Ram Vs. State of U.P. and others**, where in a similar set of facts, certain petitioners, whose lands had been acquired under notifications, which were challenged not by the petitioners but by other similarly situate landowners, filed writ petitions in the year 2016 praying that they being similarly situate with those landowners, who had filed writ petitions and challenged the acquisition proceedings, were also entitled to claim the same relief, which had been granted to the writ petitioners in terms of the judgment in the case of **Gajraj Singh and others** and upheld in the case of **Savitri Devi.** The claim raised by the petitioners therein was turned down by this Court after recording a conclusion that the benefit granted by the Full Bench in the case of **Gajraj Singh and others** cannot be extended to the petitioners even though they may be similarly situate and the action of the respondents in not giving additional developed abadi land was neither arbitrary nor discriminatory. The observations made in the judgment are as follows :-

"11. Having heard the learned counsel for the parties and having perused the direction given by the Full Bench in Gajraj's case (supra) as well as the decision of the Supreme Court in **Savitri Devi** (supra), we find that the judgment of the Full Bench was affirmed by the Supreme Court in **Savitri Devi** (supra). While affirming the decision, the direction of the Full Bench in paragraph 484(4) to the authority to consider the case for payment of additional compensation and allotment of developed abadi plot to those land owners, who had not challenged the acquisition proceedings or whose writ petitions were dismissed earlier was also affirmed by the Supreme Court. Based on such direction, the authority took a decision to pay additional compensation to

all the land owners irrespective of the fact as to whether they had challenged the acquisition proceedings or not. But with regard to allotment of developed abadi land, the authority took a decision not to allot to those land owners, who had not approached the writ Court on the ground that they have no developed land to allot to these land owners. The fact that the authority does not have any developed land for allotment has not been disputed as no rejoinder affidavit has been filed nor any evidence has been brought on record. We also find that such decision taken by the Board is neither arbitrary nor discriminatory.

12. The Full Bench in order to save the acquisition proceedings had issued the direction for payment of additional compensation and for allotment of developed abadi plots in the extenuating facts and circumstances of the case. The Supreme Court acceded to the said consideration holding that the Full Bench was justified in issuing such directions in the peculiar facts and circumstances of the case and in order to save the acquisition proceedings from the vice of arbitrariness. The Supreme Court while affirming the decision of the Full Bench categorically held that the said decision would not be treated to form a precedent for future cases. The Supreme Court held:

"50. Keeping in view all these peculiar circumstances, we are of the opinion that these are not the cases where this Court should interfere under Article 136 of the Constitution. However, we make it clear that directions of the High Court are given in the aforesaid unique and peculiar/specific background and, therefore, it would not form precedent for future cases."

13. Thus, we are of the opinion that the ratio decendi of the Full Bench cannot be applied to similarly situated persons. The said benefit given by the Full Bench cannot be extended to the petitioners, even though they may be similarly situated and their land had been acquired under the same notification.

14. We are of the view that the action of the respondents in not giving additional developed abadi land to the petitioners is neither arbitrary nor discriminatory, especially when there is no evidence to dispute the fact that the respondents have no developed land with them for allotment."

17. The aforementioned judgment in the case of **Mange @ Mange Ram Vs. State of U.P. and others** decided along with other connected matters was subjected to challenge before the Supreme Court and came to be decided in terms of the judgment in **Khatoon and others** Vs. State of U.P. and others4.

18. The question as to whether the landowners were entitled to claim benefit of the judgment passed by the Full Bench in the case of **Gajraj Singh and others**, which had been upheld in the case of **Savitri Devi**, insofar as it related to allotment of additional abadi plot was considered by the Supreme Court in aforementioned case of **Khatoon and others** and the contention sought to be raised on the basis of the principles underlying Article 14 of the Constitution was repelled after taking notice of the fact that insofar as allotment of abadi plot is concerned the High Court in the case of **Gajraj Singh and others** had confined the relief only to the petitioners therein and for other landowners the matter was left to discretion of the authority concerned which had declined to extend the said relief. It was held that the appellants had

neither any legal right nor any factual foundation to claim the relief of allotment of additional developed abadi plot. Furthermore, it was taken note of that the relief in the case of Gajraj Singh was granted by the High Court in exercise of its extraordinary jurisdiction under Article 226 and was confined to the petitioners therein, and even the Supreme Court in **Savitri Devi** case held that said directions were not to be treated as precedent and were limited only to the facts obtaining in that case. The relevant observations made in the judgment in the case of **Khatoon and others** are being extracted below :-

"16. In other words, the case of the appellant writ petitioners before the High Court was that the reliefs, which were granted to the landowners by the Full Bench in Gajraj case and affirmed by this Court in Savitri Devi case be also granted to the appellants because their lands were also acquired in the same acquisition proceedings in which the lands of the writ petitioners of Gujraj case was acquired. In effect, the relief was prayed on the principles of parity between the two landowners qua State.

17. It is, however, pertinent to mention that so far as the direction of the High Court to award additional compensation payable @ 64.70% was concerned, the same was already implemented by the State by paying the compensation to all the landowners including the appellants without any contest.

18. In this view of the matter, the only question before the High Court in the appellants' writ petitions that remained for decision was as to whether the appellants are also entitled to claim the relief of allotment of developed abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 Sq.M.in terms of the judgment in Gajraj case and Savitri Devi case.

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36. Therefore, the only question that now survives for consideration in these appeals is whether the appellants are entitled to get the benefit of second direction issued by the High Court in Gajraj, namely, allotment of developed abadi plot to the appellants.

37. In our considered opinion, the appellants are not entitled to get the benefit of the aforementioned second direction and this we say for the following reasons.

38. First, the High Court in Gajraj had, in express terms, granted the relief of allotment of developed abadi plot confining it only to the landowners, who had filed the writ petitions. In other words, the High Court while issuing the aforesaid direction made it clear that the grant of this relief is confined only to the writ petitioners [see conditions 3(a) and (b)].

39. Second, so far as the cases relating to second category of landowners, who had not challenged the acquisition proceedings (like the appellants herein) were concerned, the High Court dealt with their cases separately and accordingly issued directions which are contained in conditions 4(a) and (b) of the order.

40. In conditions 4(a) and (b), the High Court, in express terms, directed the Authority to take a decision on the question as to whether the Authority is willing to extend the benefit of the directions contained in conditions 3(a) and (b) also to second category of landowners or not.

41. In other words, the High Court, in express terms, declined to extend the grant of any relief to the landowners, who had not filed the writ petitions and

instead directed the Authority to decide at their end as to whether they are willing to extend the same benefit to other similarly situated landowners or not.

42. It is, therefore, clear that it was left to the discretion of the Authority to decide the question as to whether they are willing to extend the aforesaid benefits to second category of landowners or not.

43. Third, as mentioned supra, the Authority, in compliance with the directions, decided to extend the benefit in relation to payment of an additional compensation @ 64.70% and accordingly it was paid also. On the other hand, the Authority declined to extend the benefit in relation to allotment of developed abadi plot to such landowners.

44. Fourth, it is not in dispute, being a matter of record, that when the Authority failed to extend the benefit regarding allotment of additional abadi plot to even those landowners in whose favour the directions were issued by the High Court in Gajraj and by this Court in **Savitri Devi**, the landowners filed the contempt petition against the Authority complaining of non-compliance with the directions of this Court but this Court dismissed the contempt petition holding therein that no case of non-compliance was made out.

45. In our view, the appellants have neither any legal right and nor any factual foundation to claim the relief of allotment of additional developed abadi plot. In order to claim any mandamus against the State for claiming such relief, it is necessary for the writ petitioners to plead and prove their legal right, which should be founded on undisputed facts against the State. It is only then the mandamus can be issued against the State for the benefit of writ petitioners. Such is not the case here.

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47. One cannot dispute that the Act does not provide for grant of such reliefs to the landowners under the Act. Similarly, there is no dispute that the State paid all statutory compensation, which is payable under the Act, to every landowner. Not only that every landowner also got additional compensation @ 64.70% over and above what was payable to them under the Act.

48. The reliefs in Gajraj were granted by the High Court by exercising extraordinary jurisdiction under Article 226 of the Constitution and keeping in view the peculiar facts and circumstances arising in the case at hand. They were confined only to the landowners, who had filed the writ petitions. Even this Court in **Savitri Devi** case held that the directions given be not treated as precedent for being adopted to other cases in future and they be treated as confined to that case only.

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51. In our opinion, therefore, there is no case made out by the appellants for grant of any relief much less the relief of allotment of additional developed abadi plot. If we entertain the appellants' plea for granting them the relief then it would amount to passing an order contrary to this Court's directions contained in para 50 of the order passed in **Savitri Devi** case."

19. The question as to whether the benefit of the directions issued by the Full Bench in the case of **Gajraj Singh and others** for providing additional compensation to the extent of 64.70% and developed abadi plot to the extent of 10% of the land acquired was liable to be extended to such tenure holders also whose lands were not acquired in terms of the notifications which were under challenge in the case of **Gajraj Singh and**

others, has also been considered by a coordinate Division Bench of this Court in the case of **Smt. Rameshwari and 3 others Vs. State of U.P. and 2 others** and in terms of judgment dated 3.5.2017, it has been held as follows :-

"A perusal of the Full Bench judgement in the case of Gajraj Singh (Supra) goes to show that in order to save the acquisition proceedings, direction for payment of additional compensation and allotment of developed abadi plot was issued in peculiar facts and circumstances, particularly, the fact that extensive development had taken place even though the Full Bench found that opportunity to file objection under Section 5A Act had been wrongly denied to the tenure holders. However, the benefit extended to the land owners in lieu of saving the acquisition proceedings, even though the same were found to be illegal and liable to be quashed, was restricted to the acquisition proceedings challenged before it.

However, the question of extending the benefits of additional compensation and allotment of developed abadi plot to such land holders whose challenge to the land acquisition notification already stood dismissed or such land holders who did not approach this Court challenging the land acquisition notification though the said notifications were subject matter of challenge before the Full Bench, was left open to be decided by the authority. As already noticed above, in pursuance of the aforesaid directions, the authority took a decision in its Board meeting for making payment of additional compensation to the extent of 64.7% to all land holders whether they had put challenge to the land acquisition notifications or not. However, in respect of allotment of abadi plot to the extent of 10%, the authority took a decision not to extend the benefit to such land holders who had not approached the writ court and had not questioned the acquisition proceedings.

In the case in hand, the petitioners' land was acquired by means of notification dated 09.09.1997. Equally admitted fact is that the petitioners accepted the award and did not come forward to challenge the land acquisition proceedings. Not only that, notification dated 9.9.2017 whereunder an area 1275-18-18 including Gata no. 582 area 6-5-13, 538 area 0-15-6, 609 area 1-2-12 and 615 area 9-10-10 of the petitioners situate at village Tugalpur was acquired was not subject of matter of challenge before the Full Bench.

In view of above facts and discussions, it is clear that the relief which was granted by the Full Bench in the case of Gajraj Singh (Supra) affirmed by the Hon'ble Apex Court in the case of **Savitri Devi** (Supra) cannot be made applicable to the acquisition proceedings which were not assailed and were not subject matter of adjudication before the Full Bench in the case of Gajraj Singh (Supra). Thus, we are of the considered opinion that the ratio dicendi of the Full Bench does not stand attracted in the case of the petitioners and they cannot claim parity with those tenure holders who were before the Full Bench in the case of Gajraj Singh (Supra). The petitioners are thus not entitled to the relief claimed in this petition. The impugned order therefore, does not suffer from any infirmity requiring any interference by this Court under Article 226 of the Constitution of India.

Writ petition fails and accordingly stands dismissed."

20. A similar view has been taken in a recent judgment of this Court in **Ramesh**

and others Vs. State of U.P. and others, wherein it was stated as follows:-

"14.Moreover, the directions issued by the Full Bench in the case of Gajraj Singh and others under para 482 (4) in terms of which the Authority was to take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% was to be given, was confined to those land holders whose writ petitions challenging the notifications had been dismissed earlier and to those who had not approached the court to challenge the notifications which were subject matter of challenge in the writ petitions decided along with the case of Gajraj Singh and others. The directions under para 482 (4) were not in respect of those persons such as the petitioners in the present case whose land had been acquired in terms of notifications which were not subject matter of challenge in the case of Gajraj Singh and others and connected matters."

21. The question as to whether claim for any additional benefit can be raised as a matter of right in lieu of acquisition of land was subject matter of consideration before a Full Bench of this Court in **Ravindra Kumar Vs. District Magistrate, Agra and others**, wherein the claim sought to be raised for appointment in service in lieu of acquisition of land was repelled and it was held that the Land Acquisition Act is a self-contained Code providing the procedure to be followed for acquisition as well as for assessment of the valuation and payment of fair and just compensation to the persons whose land were acquired and in the absence of any statutory provision no other claim can be raised as a matter of right. The observations made in the judgment in this regard are as follows:-

"21. The Land Acquisition Act is a self-contained Code and provides the procedure to be followed for acquisition as well as for assessment of the valuation and payment of fair and just compensation as per market value of the person whose land is acquired. In addition to that market value of the land interest @ 12% is also given from the date of publication of the Notification vide Section 23 (1-A). Besides that, a sum of 30% on such market value is also paid as solatium for distress and for inconvenience or difficulties caused to the person on account of compulsory acquisition of the land vide Section 23 (2) of the Act. Therefore, a person whose land is acquired not only gets adequate compensation as per market value of the land but also gets interest on the amount of compensation (@) 12% from the date of notification under Section 4 of the Act as well as an amount of solatium, which is 30% of the amount of compensation. Neither the Land Acquisition Act nor the regulations provides that in the event of acquisition of the land one of the family members of the landholder shall be given employment in addition to the amount of compensation. Therefore, in the absence of any statutory provision or any promise, the petitioner respondent cannot claim appointment as a matter of right nor can the respondent make such appointment."

22. In view of the foregoing discussion it follows that the directions issued by the Full Bench in the case of **Gajraj Singh and others** for payment of additional compensation and developed abadi plot were in respect of the petitioners in the bunch of writ petitions which were decided by the Full Bench. The question of extending the benefit of additional compensation and allotment of developed abadi plot to such landholders whose writ petitions challenging the

notifications had been dismissed earlier and also those landholders who had not approached the Court challenging the notifications which were subject matter of challenge before the Full Bench, was left open to be decided by the authority.

23. It was in pursuance of the aforesaid directions that the authority took a decision at its board meeting for payment of additional compensation to the extent of 64.70% to all landholders whether they had chosen to challenge the land acquisition notifications or not; however, insofar as allotment of developed abadi plot to the extent of 10% of the acquired land is concerned the authority took a decision not to extend the said benefit to such landholders who had not approached the writ court and had not raised any challenge to the acquisition proceedings.

24. In the present case, the land of the petitioners was acquired in terms of proceedings initiated by means of the notification dated 31.07.2005 issued under Section 4(1)/17(4), and the notification dated 27.07.2006 issued under Section 6/17 (1) of the Act 1894. Admittedly the petitioners did not choose to challenge the land acquisition proceedings and it is also not the case of the petitioners that the notifications in terms of which the land of the petitioners was acquired were subject matter of challenge in the writ petitions which were decided by the Full Bench in the case of **Gajraj Singh and others**.

25. This Court may also take note of the fact that there was no direction in the judgment of the Full Bench for grant of payment of additional compensation or allotment of abadi land or for consideration of the said benefits by the authority in respect of those persons whose land had been acquired in terms of the notifications which were not subject matter of challenge in the case of **Gajraj Singh and Others** and connected bunch of writ petitions.

26. The directions issued by the Full Bench in the case of **Gajraj Singh and others** under paragraph 482 (4) in terms of which the Authority was to take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% was to be given, was confined to those land holders whose writ petitions challenging the notifications had been dismissed earlier and to those who had not approached the court to challenge the notifications which were subject matter of challenge in the writ petitions decided along with the case of **Gajraj Singh and others**. These directions had been made in view of the peculiar facts of the case having regard to the extensive development which had taken place subsequent to the acquisition proceedings and thereafter the Supreme Court in the case of **Savitri Devi** had made it clear that the directions issued by the Full Bench shall not be treated as a precedent in future cases.

27. The directions under paragraph 482 (4) of the judgment aforesaid were not in respect of those persons such as the petitioners in the present case whose land had been acquired in terms of notifications which were not subject matter of challenge in the case of **Gajraj Singh and others** and connected matters. The decision taken by the respondent authority in not giving additional developed abadi land to the persons such as the petitioners thus cannot be held to be either arbitrary or discriminatory, moreso, when the said

decision was based on the reasoning that the authority had no developed land to allot to these landowners.

28. It is admitted to the petitioners that the entire compensation amount as payable in terms of the provisions contained under the Land Acquisition Act, 1894 has been paid to them and over and above that they have also been paid additional compensation at the rate of 64.70%. The additional benefit by way of allotment of 10% developed abadi plot which is sought by the petitioners not being founded on any legally enforceable right no mandamus can be claimed for grant of such benefit.

29. For the aforestated reasons the petitioners are not entitled for the reliefs prayed for.

30. The writ petition lacks merit and is, accordingly, dismissed.

(2020)1ILR 1319

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.
Writ Tax No. 318 of 2016

Ajai Kumar Singh Khandelial ...Petitioner
Versus
Principal Comm. of Income Tax, Gorakhpur & Anr. ...Respondents

Counsel for the Petitioner:
Sri Suyash Agarwal

Counsel for the Respondents:
C.S.C., Sri Praveen Kumar, S.C.

A. Tax – Reassessment - Income Tax Act, 1961: Sections 40A(3), 143(3), 147, 148, 264; Income Tax Rules, 1962: Rule 6DD – The question for consideration before the Court is as to whether the deposit of amount in cash in bank account of beneficiary/supplier can be held to be covered under provisions of Rule 6DD(c)(v) of the Rules, 1962 and for which purpose can it be said to be a payment by use of "electronic clearing system" through bank account.

Transaction by depositing cash directly in the bank account of the beneficiary is not routed through any clearing house nor is the money sent through electronic mode and therefore such a transaction cannot be covered by Rule 6DD(c)(v) and benefit of the provision cannot be given to the petitioner. (Para 20, 26 & 29)

B. Onus is on the assessee to show that he is covered by any of the exception provided in S. 40A(3) or in Rule 6DD of the Rules, 1962 - In the present case the amount was directly deposited in the account of the seller i.e. M/s Jalan Synthetics. The petitioner also could not lead any evidence to show that he had deposited the amount on the instructions of M/s Jalan Synthetics or due to any business exigency. In absence of such evidence, the assessing authority was held to have rightly denied the benefit of exemption to the petitioner. (Para 24, 26, 30 & 31)

C. The application was preferred by petitioner u/s 264, the scope of which is different from that of an appeal u/s 246 – Petitioner challenged the re-assessment order passed u/s 148/148(3) and not the notice u/s 147. The assessing authority duly considered the application and has recorded a finding against the petitioner. It is settled that jurisdiction under Art. 226 is limited to examining the decision -making process and not the decision itself. Therefore, the Court did not interfere as no infirmity was found in the impugned order. (Para 18, 19, 28 & 30)

Writ Petition dismissed. (E-4)

Precedent followed: -

1. Attar Singh Gurmush Singh Vs. Income Tax Officer, 1991 SCR (3) 405 (Para 24)

2. Municipal Council, Neemuch Vs. Mahadeo Real Estate, (2019) 10 SCC 738 (Para 28)

Petition challenges order dated 19.01.2016, passed by Principal Commissioner, Income Tax, Gorakhpur.

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

1. Heard Sri Suyash Agarwal, learned counsel for the petitioner as well as Sri Praveen Kumar, learned counsel for the respondents.

2. The petitioner by means of this writ petition has challenged the order passed by the Principal Commissioner, Income Tax, Gorakhpur thereby he has rejected the application preferred by the petitioner under Section 264 of the Income Tax Act, 1961 (hereinafter referred to as "the Act, 1961").

3. Learned counsel for the petitioner submits that petitioner is proprietor of M/s Purushottam Das Ajai Kumar, Asif Ganj, Azamgarh and is engaged in the business of retail trading of ready made and other clothes in the name of the proprietary concern. For the assessment year 2008-09, the petitioner's firm filed income tax return which included income of Rs.34,912/- earned from the house property besides business income of Rs.1,70,304/-. The petitioner got his firm's accounts audited with net profit of Rs.1,61,012/- showing @ 2.00% and gross profit of Rs.8,67,837/- being 44.33% of the gross receipt.

4. It has been further submitted on behalf of petitioner that he disclosed about the advance given to supplier's account as well as copy of the account of M/s Jalan Synthetics, Varanasi before the assessing authority which clearly demonstrated that on various dates the amount of payment has been deposited by the petitioner in UBI, Varanasi bank on their instructions. It has further been contended that the assessing authority while passing the assessment order for the assessment year 2008-09, did not raise any objection relating to the aggregate amount of Rs.3,40,000/- deposited on various dates in the bank account of M/s Jalan Synthetics.

5. The assessment proceedings were completed in exercise of power under Section 143(3) of the Act, 1961 on the income of Rs.2,80,004/- by order dated 10.11.2010 and giving appeal effect it was revised at Rs.1,99,804/-.

6. The petitioner received a notice dated 30.03.2013, issued under Section 148 of the Act, 1961, stating therein that the authorities had reason to believe that cash payment of Rs.3,40,000/- had been made by the petitioner to M/s Jalan Synthetics for the assessment year 2008-09, in violation to the provisions of Section 40A(3) of the Act, 1961, which is other than by making payment through crossed account payee cheque or crossed bank draft, as such the same is liable to be disallowed and added back to the income of the petitioner.

7. The petitioner objected to the notice issued under Section 148 of the Act, 1961 and submitted that he had truly and faithfully disclosed all the facts necessary. He further stated that payment of Rs.3,40,000/- was genuine and that there is no violation of Section 40(3) of the Act, 1961 read with Rule 6DD of the Income Tax Rules, 1962 *(hereinafter referred to as "the Rules, 1962")* and further that payment of Rs.3,40,000/- in cash to M/s Jalan Synthetics is also reflected in their ledger accounts and therefore, there was

no basis for reopening of the assessment proceedings.

8. The assessing authority not being satisfied by the reply submitted by the petitioner proceeded to make addition of Rs.3,40,000/- in the income of the petitioner and disallowed the benefit/exemption under Section 40A(3) of the Act, 1961 for the reason that payment exceeding Rs.20,000/- was made other than crossed cheque or bank draft.

9. The petitioner being aggrieved by the order dated 14.03.2014, preferred an application under Section 264 of the Act, 1961 before the Principal Commissioner, Income Tax, Gorakhpur on 07.04.2014.

10. By means of impugned order dated 19.01.2016, the Principal Commissioner, Income Tax, Gorakhpur has considered the application of the petitioner and has rejected the same holding that the petitioner had clearly misrepresented in his return as well as audit report with respect to application of Section 40A(3) of the Act, 1961 read with Rule 6DD of the Rules, 1962 and concluded that the payment made to M/s Jalan Synthetics Ltd. is not covered by any exemption. The assessing authority had carried out only limited examination in good faith with respect to the genuineness of the party and believed the assessee and auditor. He has further stated that there is difference between a document and information and despite documents being on record it was on the basis of the fresh information that the petitioner has concealed his income in violation of Section 40A(3) of the Act, 1961. It was within the competence and jurisdiction of the authority to reopen the assessment under Section 148 of the Act, 1961 and therefore up held the order passed by the assessing authority.

11. Assailing the order of the Principal Commissioner, Income Tax, Gorakhpur, the petitioner has urged that the revenue has misinterpreted the provisions of Section 40A(3) of the Act and Rule 6DD of the Rules, 1962 and that the amount of Rs.3,40,000/-, deposited on various dates in the bank account of M/s Jalan Synthetics, would be covered under Rule 6DD(c)(v) of the Rules, 1962 as the same has been done by use of "electronic clearing system" through the Bank. It is further submitted that there was no new information in possession of respondent no. 2 for invoking reassessment under Section 147 of the Act, 1961, as the documents on the basis of which re-assessment has taken place, were already on record at the time of original assessment and same can not be converted as fresh information in the course of examination by the audit party.

12. Sri Praveen Kumar, learned counsel for the respondents on the other hand has submitted that scope of Section 264 of the Act, 1961 is very limited and in exercise of powers the Principal Commissioner, Income Tax, Gorakhpur is empowered to hold limited enquiry into the grounds raised by the assessee and thereupon examining and passing appropriate orders. Power under Section 264 of the Act, 1961 cannot be equated with the power of appeal which lies to the appeal under Section 246 of the Act and in this regard he has submitted that the Principal Commissioner, Income Tax has duly enquired into the allegations made by the assessee and has rejected the application after due consideration of the same and therefore there was no infirmity

in order rejecting the application preferred by the assessee and concluded that the writ petition be dismissed.

13. On merits Sri Praveen Kumar, learned counsel for the respondents submits that the assessee had made misrepresentation in his returns, declaring that no amount was admissible or it is liable under Section 40A(3) of the Act and Rule 6DD of the Rules, 1962 and same was also mentioned in the audit report under Section 44AB of the Act, 1961. he also submitted that only account number of M/s Jalan Synthetics was submitted by the assessee and no proof that the amount of payment had been deposited on their instructions. He further vehemently urged that the assessee had failed to prove that payment to M/s Jalan Synthetics was not made by cheque or bank draft on account of some business exigency, as the cash payment made by the petitioner was in contravention to the provisions of Section 40A(3) of the Act, 1961.

14. With regard to the issue regarding reopening of the assessment under Section 147 of the Act, 1961, he has submitted that the assessing authority had recorded sufficient reasons with regard to the fact that certain items of income though taxable had escaped notice of the assessing authority and therefore the same did not amount to change of opinion and therefore there was no infirmity in the same.

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

16. The petitioner who carries on the business of retail trade in ready made and other clothes had given advance to the suppliers bank account i.e. M/s Jalan Synthetics while depositing total amount of Rs.3,40,000/- on various dates between 12.06.2007 to 01.12.2007, in the UBI Bank, Varanasi in account no. 303505040010515.

17. In the return filed by the assessee he had declared that inadmissible expenses under Section 40A(3) of the Act read with Rule 6DD of the Rules, 1962 were nil and the same was also mentioned in the audit report. The assessing authority having no reason to disbelieve the aforesaid declaration made by the assessee, which was subsequently reopened in exercise of powers contained in Section 148 of the Act, 1947. The assessing authority, after giving opportunity of hearing to the assessee has made re-assessment by means of order dated 14.03.2014 and added Rs.3,40,000/- in the income of the assessee.

18. The application was preferred by the petitioner under Section 264 of the Act, 1961, against re-assessment proceedings and the impugned order passed by the Principal Commissioner, Income Tax also mentions that the assessee has filed application only against the order of assessment.

19. It seems that the issue pertaining to the validity of the order under Section 147 of the Act, 1961 was not raised by the assesseee in his application and his only grievance was with regard to the re-assessment order. In para 22 of the writ petition the petitioner has stated that he is aggrieved by the re-assessment order passed under Section 148/143(3) of the Act, 1961 and the notice under Section 147 of the Act was not challenged.

20. The main question which falls for consideration of this Court is as to

Whether the deposit of amount in cash in the bank account of M/s Jalan Synthetics can be held to be covered under the provisions of Rule 6DD(c)(v) of the Rules, 1962? and for which purpose it can be said to be a payment by use of "electronic clearing system" through bank account.

21. It is relevant to reproduce the provisions of Section 40A(3) of the Act, 1961 and Rule 6DD of the Rules, 1962, which are reproduced herein below :

*"**Section 40A(3)** - Where the assessee incurs any expenditure in respect of which a payment or aggregate of payment made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, or use of electronic clearing system through a bank account, exceeds ten thousand rupees, no deduction shall be allowed in respect of such expenditure."*

*"**Rule 6DD** - No disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3A) of section 40A where a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees in the cases and circumstances specified hereunder, namely :-*

(a) where the payment is made to-

(i) the Reserve Bank of India or any banking company as defined in clause (c) of section 5 of the banking Regulation Act, 1949 (10 of 1949);

(ii) the State bank of India or any subsidiary bank as defined in section 2 of the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959);

(iii) any co-operative bank or land mortgage bank;

(iv) any primary agricultural credit society or any primary credit society as defined under section 56 of the Banking Regulation Act, 1949 (10 of 1949);

(v) the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956);

(b) where the payment is made to the Government and, under the rules framed by it, such payment is required to be made in legal tender;

(c) where the payment is made by -

(i) any letter of credit arrangements through a bank;

(ii) a mail or telegraphic transfer through a bank;

(iii) a book adjustment from any account in a bank to any other account in that or any other bank;

(iv) a bill of exchange made payable only to a bank;

(v) the use of electronic clearing system through a bank account;

(vi) a credit card;

(vii) a debit card.

.....…"

22. Initially Section 40A(3) of the Act, 1961 which requires payment in respect of expenses which exceed Rs.2500/- to be made by means of crossed cheque or crossed bank draft, on failure to do so, payment made were disallowed in computation of income. In order to remove hardship to smaller assessees the ceiling limit was increased to Rs.10,000/- and later on it was increased to Rs.20,000/- by means of Finance Act, 2017 which was made effective on 01.04.2018. Section 40A(3) of the Act, 1961, has a non obstantive clause which has over riding

provision. It operates inspite of any thing to the contrary contained in any other provision of the Act, 1961 relating to computation of income under the head "profits and gains of business or profession", the Legislature as thus made it clear that provisions of Section 40A of the Act, 1961 will apply in place of other contrary provisions of this Act relating to computation of income. Sub Section 3 empowers the assessing authority to disallow deducting any expenditure in respect of which payment is made of any sum exceeding Rs.20,000/- otherwise than by crossed cheque or crossed bank draft.

23. Rule 6DD of the Rules, 1962 refers to cases and circumstances in which payment of sum exceeding Rs.20,000/- made by a mode otherwise than by crossed cheque or by crossed bank draft.

24. A combined reading of Section 40A(3) of the Act alongwith Rule 6DD of the Rules, 1962 would indicate that the provisions have been inserted by Legislature to prevent transactions of above Rs.20,000/-. It is also necessary to mention here that validity of Section 40A of the Act, 1961 has been up held by the Hon'ble Apex Court in the case of Attar Singh Gurmush Singh Vs. Income Tax Officer, 1991 SCR (3) 405, holding that onus is on the assessee to show that he is covered by any of the exception provided or in Rule 6DD of the Rules, 1962 and in the present case the amount was directly deposited in the account of the seller i.e. M/s Jalan Synthetics.

25. The term "use of electronic clearing system through bank account" would necessarily include the transaction of funds by electronic mode through clearing system. Any transfer of funds through use of electronic clearing system through a bank account would mean a transfer of funds through electronic mode of transfer i.e. RTGS, IMPS, NEFT etc., where the funds are transferred through the bank account of one individual into the bank account of beneficiary through electronic means. When the funds are transferred through electronic clearing system then at least two banks or two branches of the same bank have to be involved then only the money is transferred through electronic clearing system between them.

26. In the present case, the question which arises for consideration is that in case, cash is deposited directly in the bank account of the beneficiary, can the benefit of Rule 6DD(c)(v) of the Rules, 1962, can be given to the assessee. Such transaction by depositing cash directly in the bank account of the beneficiary is not routed through any clearing house nor is the money send through electronic mode and therefore such a transaction in my considered opinion cannot be covered by Rue 6DD(c)(v) of the Rules, 1962, and therefore benefit of the provision cannot be given to the petitioner. The petitioner also could not lead any evidence to show that he had deposited the amount on the instructions of M/s Jalan Synthetics or due to any business exigency. In absence of such evidence, the assessing authority rightly denied the benefit of exemption to the petitioner.

27. The impugned order dated 19.01.2016, passed by the Principal Commissioner, Income Tax has considered the reply given by the petitioner and has concluded that in respect to the transfer of funds made by the petitioner, benefit of Rule 6DD of the

Rules, 1962 is not attracted and therefore computation made by the assessing authority has been up held.

28. The jurisdiction of writ Court in exercise of jurisdiction under Article 226 of the Constitution of India is limited to examining the decision making process and not the decision itself. This position of law has been constantly reiterated by the Hon'ble Apex Court in its various pronouncements. The Apex Court in its recent judgment in the case of **Municipal Council, Neemuch v. Mahadeo Real Estate, (2019) 10 SCC 738**, has observed as under :

*"**13**.In the present case, the learned Judges of the Division Bench have arrived at a finding that such a sanction was, in fact, granted. We will examine the correctness of the said finding of fact at a subsequent stage. However, before doing that, we propose to examine the scope of the powers of the High Court of judicial review of an administrative action. Though, there are a catena of judgments of this Court on the said issue, the law laid down by this Court inTata Cellularv.Union of India[Tata Cellularv.Union of India, (1994) 6 SCC 651] lays down the basic principles which still hold the field. Para 77 of the said judgment reads thus:*

"77. The duty of the court is to confine itself to the question of legality.

Its concern should be:

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, inR.v.Secy. of State for Home Department, ex p Brind[R.v.Secy. of State for Home Department, ex p Brind, (1991) 1 AC 696 : (1991) 2 WLR 588 (HL)] , Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases, the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention'."

***14.**It could thus be seen that the scope of judicial review of an administrative action is very limited. Unless the Court comes to a conclusion that the decision-maker has not understood the law correctly that regulates his decision-making power or when it is found that the decision of the decision-maker is vitiated by irrationality and that too on the principle of "Wednesbury unreasonableness" or unless*

it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for the High Court to interfere in the decision-making process. It is also equally well settled that it is not permissible for the Court to examine the validity of the decision but this Court can examine only the correctness of the decision-making process."

29. Applying the above principles to the facts of the present case, it is seen that the reassessment proceedings were initiated on account of the fact that it was discovered that the assessee had misrepresented in his return with regard to the payments made to M/s Jalan Synthetics of Rs.3,40,000/- in cash which were deposited in their bank account and such a transfer was not admissible in the light of provisions of Section 40A(3) of the Act and Rule 6DD of the Rules, 1962, and therefore, in the reassessment proceedings the said amount was added to the income of the assessee.

30. The reassessment order was assailed by moving an application under Section 264 of the Act, 1961. The assessing authority has duly considered the application of the assessee and after considering the same has recorded a finding that the assessee has clearly misrepresented in his return as well as audit report with respect to Section 40A(3) of the Act and Rule 6DD of the Rules, 1962 and therefore the case of the petitioner is not covered by any of the exceptions. No evidence was led by the assessee to demonstrate that the cash was deposited at the instance of M/s Jalan Synthetics, so as to give benefit of Rule 6DD of the Rules, 1962, to the petitioner.

31. Learned counsel for the petitioner-assessee also could not demonstrate that the impugned order is bereft of reasons or that it is perverse or that it has failed to consider the relevant material or document and therefore in absence of any of such infirmity the contention of learned counsel for the petitioner cannot be accepted and the writ petition is liable to be dismissed.

32. In the light of discussion made above, this Court does not find any merit in the contentions raised by the petitioner. The writ petition is accordingly **dismissed.**

(2020)1ILR 1326

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1308 of 2019

M/s Dabur India Ltd. ...Petitioner
Versus
Commissioner Of CGST, Ghaziabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Atul Gupta, Sri Abhishek Kumar Tripathi

Counsel for the Respondents:
A.S.G.I., Sri Ashok Singh

A. Tax – Classification - Central Goods and Services Tax Act, 2017: Section 101; Uttar Pradesh Goods and Services Tax Act, 2017; Customs Tariff Act, 1975: Chapter 38 – Appellate Authority for Advanced Ruling for Goods and Services Tax, has classified the product in question, 'odomos' as mosquito repellant, whereas the petitioner contends it to be a medicament. Holding in favour of Revenue, Court held as follows:

The "Common Parlance test" or the "Market Identity Test" for classification

of the product was satisfied - Appellants pitched the product in their sale material and advertisements as a mosquito repellant. It is matter of common knowledge that public or market identity of the product is as a mosquito repellant. 'Odomos' is not normally prescribed as a medicine by a registered medical practitioner and is available in stores and establishments of all types including 'kirana stores', their sale not being restricted to chemists/druggists alone. (Para 7, 8, 30, 31 & 32)

"Chemical Composition Test" - The mere fact that the ingredients are purified or added with some preservatives does not really alter their character - Active ingredient of the product is NNDB which is the improved version - formula of DEET. The essential quality of DEET is mosquito repelling. The NNDB was introduced to overcome the itchiness caused by the DEET. The basic component of the product is DEET while the quality enhancements are created by the NNDB. There is no scientific or expert evidence that NNDB imparts its essential character to the product. (Para 10, 25, 35 to 38)

B. General Interpretation Rules: Rule 3 – Resort cannot be had to a general entry called "others" or any other heading when the product clearly falls under a specific classification heading -
The description under heading no. 38089191, i.e., "Repellants for insects such as flies, mosquito" is far more specific as compared to the description under the other heading under consideration, i.e., heading no. 30049099 which is "Other". (Para 11, 12, 45 & 46)

C. Constitution of India: Art. 226 - Scope of judicial review – The order of Appellate Authority can be judicially reviewed and not appealed against.

Judicial review is confined to the decision-making process and is not directed against the decision itself. The court in judicial review examines the manner in which the decision was made. Merely because two views are possible, a court sitting in judicial review shall not exercise its discretion in favour of an alternative view to that of the authority. In the facts of the present case, two views are not even possible. (Para 53)

Writ Petition dismissed. (E-4)

Precedent followed: -

1. Oswal Agro Mills Ltd. And others Vs. Collector of Central Excise and others, 1993 Supp (3) SCC 716 (Para 18)

2. Commissioner of Central Excise, Nagpur Vs. Shree Baidyanath Ayurved Bhavan Limited, (2009) 12 SCC 419(Para 19)

3. Dunlop India Ltd. Vs. Union of India and others, (1976) 2 SCC 241 (Para 21)

4. Indian Aluminium Cable Ltd. Vs. Union of India and others, (1985) 3 SCC 284 (Para 22)

5. Reliance Cellulose Products Ltd. Hyderabad V. Collector of Central Excise, Hyderabad-I Division, Hyderabad, (1997) 6 SCC 464 (Para 23)

6. Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, (1996) 9 SCC 402 (Para 24)

7. Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad, (2004) 9 SCC 136 (Para 25)

8. Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur, (2006) 3 SCC 266 (Para 26)

9. Commissioner of Central Excise, New Delhi Vs. Cannaught Plaza Restaurant Private Limited, New Delhi, (2012) 13 SCC 639 (Para 27)

10. Commissioner of Central Excise, Nagpur Vs. Shree Baidyanath Ayurved Bhavan Limited, (2009) 12 SCC 419 (Para 28, 46)

Precedent Distinguished: -

1. M/s Balsara Hygiene Products Limited, 1986 UPTC 367 (All.) (Para 52)

Present petition is against order dated 19.08.2019, passed by the Appellate

Authority for Advance Ruling for Goods and Services Tax, Uttar Pradesh.

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

1. The petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, being aggrieved by the order dated 19.08.2019 passed by the Appellate Authority for Advance Ruling for Goods and Services Tax, Uttar Pradesh. The order assailed in the writ petition dated 19.08.2019 has been passed under Section 101 of the Central Goods and Services Tax Act, 2017 and Uttar Pradesh Goods and Services Tax Act, 2017.

2. By means of the impugned order dated 19.08.2019, in the instant writ petition, the Appellate Authority has upheld the ruling of the Authority for Advance Ruling classifying odomos (product in issue), under HSN 38089191 of Chapter 38 of the Customs Tariff Act, 1975. The petitioner has also prayed that a writ in the nature of mandamus to be issued for classification of the product odomos as medicine under heading no. 3004 of the Customs Tariff Act, 1975.

3. Sri Atul Gupta, learned advocate for the petitioner contends that the product in question odomos is a medicament and has been incorrectly classified as a mosquito repellent. The Appellate Authority misdirected itself in law by overlooking the fact that the product odomos has all characteristics of a medicine and is used as such. He further submits that the chemical composition of the product in question also establishes that the essential character of the product is that of a medicine.

4. Learned advocate for the Revenue on the other hand submits that the product was correctly classified under the appropriate entry / heading by the Authority for Advance Ruling as well as the Appellate Authority under the Act. Learned advocate for the Revenue also pointed out the process of reasoning adopted by the authorities below and the material in the record, to contend that there was no flaw in the decision making process.

5. Heard the learned advocate for the parties.

6. The controversy will be decided by us in the following sequence. The salient findings of the impugned order passed by the Appellate Authority shall be followed by a summarisation of the nature and scope of an enquiry to determine the classification of products under fiscal statutes. The authorities in point shall be detailed thereafter. The narrative shall be taken forward by consideration of the decision making process and the nature of findings by the authority below within limits of judicial review. Finally, the correctness of the order shall be seen in light of such discussion.

7. A perusal of the impugned order dated 19.08.2019 passed by the Appellate Authority, reveals that the line of enquiry made by the Appellate Authority into how the appellant / petitioner identified and sold the product in the market yielded the following results:

"13.6. As stated in preceding paragraphs, the appellant declare prominently on the packing of the goods under reference that it is "mosquito repellent cream". The advertisement and publicity of these goods is also done as a mosquito repellent. It would also not be out of place to mention that the appellant's own websitewww.dabuar.com, describes Odomos

as a 'mosquito repellent'. No doubt, that characteristic of these goods, which aid in prevention of vector borne diseases by preventing mosquito bites, is also mentioned; however, it is a matter of common knowledge that public or market identity of the product is as a mosquito repellent."

8. After investigation into the characteristics of the product as understood in common parlance or as perceived by the common-person or the market and its usage, the Appellate Tribunal set forth the following findings :-

"13.6. ...All of the above to state the common truth that the primary motive of the common person, for using materials like the subject goods, is to save and protect themselves from mosquito bites even if there is no or negligible incidence of mosquito borne diseases in their localities. This is also borne out by the fact that odomos is not normally prescribed as a medicine by a registered medical practitioner and is available in stores and establishments of all types including "kirana stores", their sale not being restricted to chemists/druggists alone. It neither controls the disease for which mosquitoes are carrier nor develops preventive characteristics inside human body to fight against vector borne diseases. Therefore, the market identity in common parlance of the subject goods is as a mosquito repellent and their usefulness in preventing mosquito borne diseases (again derived from their characteristic quality of being a mosquito repellent) is of a subsidiary/supplementary nature."

9. On the foot the aforesaid enquiry, the Appellate Tribunal held as follows:

"13.7. ...However, first of all, as stated hereto before, the primary test of classification is that of common parlance, applying which, we unequivocally arrive at the identity of the product as a mosquito repellent."

10. The Appellate Authority while upholding the conclusions of the Authority for Advance Ruling on the chemical composition of the product in question found as under:

"13.7. ...We also observe, that the appellants have stated that the active ingredient in their product is NNDB which is an improved version/formula of DEET, the active component of many mosquito repellents. The substance DEET is mentioned in the schedule to the "Insecticides Act, 1968" as an insecticide and by corollary, its improved version, i.e., NNDB would also be an insecticide. In this context, it is pertinent that mosquito repellents are classified at heading no. 38089191 of the Customs Tariff as a sub-category of insecticides."

11. Coming to the final and the decisive issue of the correct classification, the Appellate Authority looked to the previous classification of the product under the Central Excise regime. Further in view of the unaltered composition & unchanged of the product decided the issue thus:

"13.4. We observe that the applicant was clearing the same goods i.e. 'Odomos' as mosquito repellent under Chapter heading 3808 before the advent of GST, i.e., under the Central Excise regime. Further, there is no change in the composition or intended usage of these goods after the introduction of GST and the packing thereof bears a clear declaration that the product therein is a mosquito repellent cream."

12. The Appellate Authority invalidated the argument to classify the product under heading no. 3004909 under Heading No.3004 in the following terms:

"13.4. ...Undoubtedly, the description under heading no. 38089191, i.e., "Repellents for insects such as flies, mosquito" is far more specific as compared to the description under the other heading under consideration, i.e., heading no.30049099 which is "Other" (meaning medicaments other than all those explicitly specified in the other sub-headings of heading no.3004)."

13. Finally, in the wake of the aforesaid reasoning, the Appellate Authority conclusively ruled as follows :-

"In view of the foregoing discussions and findings we hereby uphold the Ruling in Order No.25 dated 20.02.2019 of the Authority for Advance Ruling that "Odomos is well covered under Chapter 38 of Customs Tariff Act and is classified under HSN 38089191."

14. The contours of an enquiry into classification of goods, have been delineated by the authority. The judicial pronouncements on the subject are consistent and have laid down the law with clarity.

15. The revenue raising intent of the taxing statute for which the products are differently classified is the guiding philosophy of such enquiry. Consequently, the understanding of the product in popular parlance / commercial language and its usage in the market are adopted, while scientific and technical meanings of the terms and expressions used are eschewed.

16. In case the scientific and technical meanings attached to the products stand at variance to the popular understanding or perception of the product, the former will yield to the latter. The manner in which the consumers use the product and perceive its nature, is a step in furtherance of the enquiry. The object, characteristics and composition of the product are also factored in determining the classification of the product.

17. The narrative will now be reinforced with good authority.

18. The general rules of interpretation of taxing statutes provide the setting for construing the tariff entries and will guide the judgment of this Court. In ***Oswal Agro Mills Ltd. and others v. Collector of Central Excise and others***, reported at ***1993 Supp (3) SCC 716***, the Hon'ble Supreme Court summarized the canons of interpretation of taxing statutes thus:

"4. The provisions of the tariff do not determine the relevant entity of the goods. They deal whether and under what entry, the identified entity attracts duty. The goods are to be identified and then to find the appropriate heading, sub-heading under which the identified goods/products would be classified. To find the appropriate classification description employed in the tariff nomenclature should be appreciated having regard to the terms of the headings read with the relevant provisions or statutory rules or interpretation put up thereon. For exigibility to excise duty the entity must be specified in positive terms under a particular tariff entry. In its absence it must be deduced from a proper

construction of the tariff entry. There is neither intendment nor equity in a taxing statute. Nothing is implied. Neither can we insert nor can we delete anything but it should be interpreted and construed as per the words the legislature has chosen to employ in the Act or rules. There is no room for assumption or presumptions. The object of Parliament has to be gathered from the language used in the statute. ... Therefore, one has to gather its meaning in the legal setting to discover the object which the Act seeks to serve and the purpose of the amendment brought about. The task of interpretation of the statute is not a mechanical one. It is more than mere reading of mathematical formula. It is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts. It is also idle to expect that the draftsman drafted it with divine prescience and perfect and unequivocal clarity. Therefore, court would endeavour to eschew literal construction if it produces manifest absurdity or unjust result. In Manmohan Das v. Bishun Das a Constitution Bench held as follows:

".. The ordinary rule of construction is that a provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as, where a literal construction would reduce the provision to absurdity or prevent the manifest intention of the legislature from being carried out."

19. The Hon'ble Supreme Court also noticed the purpose of fiscal statutes while undertaking the exercise to determine the classification of products under the Customs Tariff Act, 1975 in ***Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhavan Limited,*** reported at ***(2009) 12 SCC 419*** as under:

"49. The primary object of the Excise Act is to raise revenue for which various products are differently classified in the new Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used. The approach of the consumer or user towards the product, thus, assumes significance. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user's understanding is a strong factor in determination of classification of the products."

20. The Courts have consistently adopted the "common parlance test" as the most reliable standard for interpreting terms and entries in taxing statutes. This is ofcourse subject to various exceptions where the statutory text is completely contrary to the "common parlance" context. The common parlance test is also considered an extension of the established canons of statutory interpretation of taxing statutes.

21. The common parlance test was summarized and adopted by the Hon'ble Supreme Court in ***Dunlop India Ltd. v. Union of India and others***, reported at ***(1976) 2 SCC 241***, wherein it was observed as under:

"29. It is well established that in interpreting the meaning of words in a taxing statute, the acceptation of a

particular word by the trade and its popular meaning should commend itself to the authority.

34. We are, however, unable to accept the submission. It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put under a distinct entry, the basis of the classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry."

22. The issue whether the commercial idiom used in the trade by the dealer and the consumer alike provided a definitive guide to understanding the nature of the entry fell for consideration before the Hon'ble Supreme Court in ***Indian Aluminium Cables Ltd. v. Union of India and others***, reported at ***(1985) 3 SCC 284***. The Hon'ble Supreme Court in ***Indian Aluminium Cables Ltd. (supra)*** ruled thus :-

"12.... This Court has consistently taken the view that, in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well settled is that those words and expressions should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and, it is the sense in which they understand it which constitutes the definitive index of the legislative intention."

23. The absurdity of adopting the technical meanings over "common parlance" in fiscal statutes was highlighted by the Hon'ble Supreme Court in ***Reliance Cellulose Products Ltd. Hyderabad v. Collector of Central Excise, Hyderabad-I Division, Hyderabad*** reported at ***(1997) 6 SCC 464*** by holding as under:

"20. In other words, if the word used in a fiscal statute is understood in common parlance or in the commercial world in a particular sense, it must be taken that the Excise Act has used that word in the commonly understood sense. That sense cannot be taken away by attributing a technical meaning to the word. But if the legislature itself has adopted a technical term, then that technical term has to be understood in the technical sense. In other words, if in the fiscal statute, the article in question falls within the ambit of a technical term used under a particular entry, then that article cannot be taken away from that entry and placed under the residuary entry on the pretext that the article, even though it comes within the ambit of the technical term used in a particular entry, has acquired some other meaning in market parlance. For example, if a type of explosive (RDX) is known in the market as *Kala Sabun* by a section of the people who uses these explosives, the manufacturer or importer of these explosives cannot claim that the explosives must be classified as soap and not as explosive."

24. Similarly, the Hon'ble Supreme Court in ***Shree Baidyanath Ayurved Bhavan Ltd. v. Collector of Central Excise, Nagpur***, reported at ***(1996) 9 SCC 402*** applied the common parlance test to classify the product *"Dant Lal Manjan"*,

which was in issue. The Hon'ble Supreme Court held that *"Dant Lal Manjan"* did not qualify as a medicament under the Central Excise Act, by setting forth the following reasons:

"3.... The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."

25. The twin test of common parlance and the ingredients contained in the product were succinctly summed up by the Hon'ble Supreme Court for the purpose of classification of products enumerated in tariff schedules in **Naturalle Health Products (P) Ltd. v. Collector of Central Excise, Hyderabad**, reported at **(2004) 9 SCC 136**, by holding as follows:

"42. We are also of the opinion that when there is no definition of any kind in the relevant taxing statute, the articles enumerated in the tariff schedules must be construed as far as possible in their ordinary or popular sense, that is, how the common man and persons dealing with it understand it. If the customers and the practitioners of Ayurvedic medicine, the dealers and the licensing officials treat the products in question as Ayurvedic medicines and not as Allopathic medicines, that fact gives an indication that they are exclusively Ayurvedic medicines or that they are used in Ayurvedic system of medicine, though it is a patented medicine. This is especially so when all the ingredients used are mentioned in the authoritative books on Ayurveda. As rightly contended by the counsel for the appellants, the essential character of the medicine and the primary function of the medicine is derived from the active ingredients contained therein and it has certainly a bearing on the determination of classification under the Central Excise Act. As held inAmrutanjan case[*Amrutanjan Ltd.v.CCE*, (1996) 9 SCC 413 : (1995) 77 ELT 500] , the mere fact that the ingredients are purified or added with some preservatives does not really alter their character."

26. The twin test method evolved by the Hon'ble Supreme Court was applied to determine the classification of a product as a cosmetic or medicament in ***Puma Ayurvedic Herbal (P) Ltd. v. Commissioner, Central Excise, Nagpur***, reported at ***(2006) 3 SCC 266.*** The two classification determining tests created by the Hon'ble Supreme Court in ***Puma Ayurvedic Herbal (supra)*** are as under:

"2. ... In order to determine whether a product is a cosmetic or a medicament a twin test has found favour with the courts. The test has approval of this Court also vide*CCE v.Richardson Hindustan Ltd.*[(2004) 9 SCC 156] There is no dispute about this as even the Revenue accepts that the test is determinative for the issue involved. The tests are:

I. Whether the item is commonly understood as a medicament which is called the common parlance test. For this

test it will have to be seen whether in common parlance the item is accepted as a medicament. If a product falls in the category of medicament it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer towards the product is very material. One may buy any of the ordinary soaps available in the market. But if one has a skin problem, he may have to buy a medicated soap. Such a soap will not be an ordinary cosmetic. It will be medicament falling in Chapter 30 of the Tariff Act.

II. Are the ingredients used in the product mentioned in the authoritative textbooks on Ayurveda?"

27. The Hon'ble Supreme Court in ***Commissioner of Central Excise, New Delhi v. Cannaught Plaza Restaurant Private Limited, New Delhi*** reported at ***(2012) 13 SCC 639***, declined to import conditions or restrictions contemplated in statutes with different objects and purposes to fiscal statutes by finding as under:

"46. We are unable to persuade ourselves to agree with the submission. It is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. As aforesaid, the object of the Excise Act is to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of excise duty, thereby causing a loss of revenue. [See Medley Pharmaceuticals Ltd. v. CCE and Customs (SCC p. 614, para 31) and CCE v. Shree Baidyanath Ayurved Bhavan Ltd.] The provisions of PFA, dedicated to food adulteration, would require a technical and scientific understanding of "ice-cream". These provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the Tariff Act. These provisions are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and subject of which is completely different."

28. The definitions of terms in statutes having different objectives, purposes and schemes cannot be applied mechanically to fiscal statutes. The Hon'ble Supreme Court in ***Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhavan Limited,*** reported at ***(2009) 12 SCC 419*** held thus:

"55. True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines "Ayurvedic, siddha or unani drug" but that definition is not necessary to be imported in the new Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute. As stated above, the object of the Excise Act is to raise revenue for which various products are differently classified in the new Tariff Act."

29. The stage is set to return to the facts of the case.

30. The materials in the records before the authorities below corroborate the fact that the petitioners pitched the product in their sale material and

advertisements as a mosquito repellent. Various mosquito repelling qualities are identified as defining characteristics of the subject goods in the market.

31. The product is not normally prescribed as a medicine by medical practitioner as a drug. There is no restriction on sales. The product is sold on demand at the counters in shops and establishments. Sales are not restricted to chemists/druggists alone.

32. The product is a mosquito repellent by virtue of its mosquito repelling characteristics and is so understood in common parlance. The dealers identify and sell the product as a mosquito repellent. Customers purchase the same and use it in the like manner.

33. These facts were conclusively established before the authorities below. In the wake of the said findings the common parlance test or the market identity test for classification of the product was satisfied. The conclusion that the product is a mosquito repellent is a logical sequitor of the above process of reasoning.

34. The said findings of the authorities below are consistent with the law laid down by the Hon'ble Supreme Court in successive judicial pronouncements discussed earlier.

35. The Appellate Authority while finding for the Revenue has observed that the active ingredient of the product is NNDB which is the improved version - formula of DEET. The essential quality of DEET is mosquito repelling. The NNDB was introduced to overcome the itchiness caused by the DEET. The basic component of the product is DEET while the quality enhancements are created by the NNDB.

36. Mosquito repellent quality of DEET is the dominant chemical characteristic of the product, the hallmark of its identity, and also the defining usage feature of the product.

37. There is no scientific or expert evidence in the record to support the pleading or the case of the assessee / respondent that the NNDB imparts its essential character to the product.

38. No material / supporting scientific evidence from the record was shown to this court to establish that the creation of NNDB denudes the essential mosquito repellent quality of DEET in the product. The material in the record supports the conclusion by the authority below that the mosquito repellent characteristic of DEET is retained in the final product and forms its essence. The Appellate Authority also opined that DEET is a pesticide.

39. The plea of the assessee is a bald defence raised after the revenue had discharged its burden regarding the composition and nature of the product.

40. The holding of the Appellate Authority that the active component of the product is DEET and that NNDB is its improved version cannot be called perverse. The chemical composition test created by the Hon'ble Supreme Court, has been correctly applied by the Appellate Authority to construe the product as a mosquito repellent. For like reasons, contention of the respondent / assessee cannot be viewed with favour by this Court.

41. The interpretation of various entries and headings relating to classification of goods is guided both by the rules framed in that regard and judicial authority in point.

42. The entry being adopted by the revenue and under which the product has been classified by the authorities below is extracted hereunder:

"3.45 The relevant entries under Heading 3808 of the Customs Tariff Act are as under:

Tariff Item	**Description of goods**
3808	Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products
3808 91 91	- - - Repellents for insects such as flies and - mosquitoes

43. The tariff/heading being favoured by the respondent - assessee is reproduced hereunder:

3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal adminstration systems) or in forms or packings for retail sale
3004 90 99	--- Other

44. The General Rules For Interpretation of Import Tariff which guided the Appellate Authority in determination of the classification of the goods, will also aid this discussion. The relevant rules are set out hereunder for ease of reference :-

"3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

45. Under rule 3 of the general interpretation rules, resort cannot be had to a general entry called "others" or any other heading when the product clearly falls under a specific classification heading.

46. In ***Commissioner of Central Excise, Nagpur v. Shree Baidyanath***

Ayurved Bhavan Limited, reported at ***(2009) 12 SCC 419***, the Hon'ble Supreme Court while interpreting the Rule 3 (a) of the aforesaid Rules held as under:

"56. There is no doubt that a specific entry must prevail over a general entry. This is reflected from Rule 3(a) of the general Rules of interpretation that states that Heading which provides the most specific description shall be preferred to Headings providing a more general description."

47. A perusal of the classification heading no. 38089191 shows that the product in question is a neat fit into the description of products laid down therein. No laboured process of reasoning is required since the heading no.38089191, is clear as daylight.

48. The conclusion of the Appellate Authority in this regard are consistent with the Rules of interpretation and judicial authority in point.

49. The invocation of the general entry called "others" by the petitioner is clearly misconceived, since the product in question is covered by a specific description in the heading under which the product has been classified.

50. This Court is not persuaded to take a different view in the light of the preceding discussion.

51. The preceding discussion establishes that all attributes of mosquito repellents relevant for a judicial enquiry of this nature are found in the product in question.

52. The reliance placed by the petitioner / asseessee on the judgment of this Court rendered in the case of ***M/s Balsara Hygiene Products Limited*** reported at ***1986 UPTC 367 (All.)*** is misplaced. The entry which was under consideration before this Court in ***M/s Balsara Hygiene Products Limited (supra)*** issued under Section 3 of the Uttar Pradesh Sales Tax, 1948 and read as "Medicines and pharmaceutical preparations including insecticides and pesticides". The said entry included insecticides and pesticides within the broader category of medicines and pharmaceutical preparations. This is in complete contradistinction to the entry under the tariff heading no.3808 which is in issue in this writ petition. The rival classifications of medicament vs mosquito repellent were not examined by this Court in the case of ***M/s Balsara Hygiene Products Limited (supra)*** while the same are directly in issue in the instant writ petition.

53. Before proceeding to the last part of the discussion, the scope and limitation of judicial review, which guide the exercise of discretionary jurisdiction under Article 226 of the Constitution of India may be stated. Judicial review is confined to the decision making process and is not directed against the decision itself. The court of judicial review examines the manner in which the decision was made. In judicial review the Court scrutinizes the correctness of the decision making process and not the decision itself. The concern of the Court exercising powers of judicial review is procedural propriety in the decision making process. While exercising powers of judicial review the Court has to find whether the decision making authority acted within its jurisdictional limits, committed errors of law, adhered to the principles of natural justice or acted in breach thereof, and whether the decision is

perverse or not. The powers of judicial review are thus distinct from powers of an appellate court. The order of Appellate Authority can be judicially reviewed and not appealed against.

54. The courts exercising judicial review do not ordinarily substitute the decision of the authority by their judgment. Merely because two views are possible, a court sitting in judicial review shall not exercise its discretion in favour of an alternative view to that of the authority.

55. From the records pleadings and the arguments of the learned counsel for both the parties, this Court finds that the petitioners were given full opportunity of hearing before the authorities below. The Appellate Authority as well as Original Authority have adhered to the principles of natural justice while deciding the controversy. The order of the Appellate Authority assailed in the instant writ petition reflects due application of mind to the relevant facts and material in the record. The order is supported with cogent reasons. No arbitrariness or perversity in the findings of the Appellate Authority could be pointed out during the course of arguments. In fact two views are not even possible in the facts of this case. The Appellate Authority as well as the Original Authority have observed full procedural propriety.

56. This is not a fit case to judicially review the impugned order. Consequently, we decline to exercise our discretionary jurisdiction under Article 226 of the Constitution of India in favour of the petitioner.

57. In the wake of the preceding discussion, we find that there is no palpable infirmity in the classification of the product in the order passed by the Appellate Authority. The order passed by the Appellate Authority is liable to be upheld and stands affirmed accordingly.

58. The writ petition is misconceived and is liable to be dismissed and is accordingly dismissed.

(2020)1ILR 1338

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1313 of 2019

Mr. Deepak Gupta ...Petitioner
Versus
Assistant Commissioner Income Tax Noida & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.R. Agarwal, Sri Suyash Agarwal

Counsel for the Respondents:
S.S.C.

A. Tax – Income Tax Act, 1961: Section 131, 142(1), 147, 148, 151 - Scope of the expression 'reason to believe' discussed.
The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income has escaped assessment, it can be said to have reason to believe the same. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. (Para 19)

The objections of the petitioner were dealt with on a point to point basis. In order dated 26.11.2019 it was found that necessary pre-requisite of S.147 that "there should be

escapement of income" stood fulfilled. The reasons recorded in that regard are found to be valid. Due approval u/s 151 was taken from the competent authority. (Para 25, 28)

B. Income Tax Act, 1961: Section 151 – Approval u/s 151, prior to initiation of proceedings u/s 148 is a jurisdictional pre-requisite and is not liable to be interfered with in the light of insufficient pleadings. Not appending approval along with objection is not sufficient to decline the presumption of correctness in favour of authorities. However, the assessee is fully entitled to a copy of the order passed u/s 151 and correspondingly, the Assessing Officer is obliged to hand-over a copy of the same, as and when the assessee seeks for it. (Para 9, 10, 28, 29)
Petition disposed of. Reassessment proceedings are not interfered with.

Precedent followed:

1. Assistant Commissioner of Income Tax Vs Rajesh Jhaveri Stock Brokers (P) Ltd., (2007) 291 ITR 500 (Para 19)

2. Prashant S. Joshi Vs Income Tax Officer, Ward 19 (2) (4), (2010) 324 ITR 154 (Para 20)

3. N.D. Bhatt, IAC Vs I.B.M. World Trading Corporation, (1995) 216 ITR 811 (Para 21)

4. Hindustan Lever Ltd. Vs R.B. Wadkar, (2004) 268 ITR 332 (Para 22)

Present petition is against the notice dated 22.10.2019, 'reasons to believe' recorded on 22.03.2019 and orders dated 28.10.2019 and 26.11.2019.

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

1. The Revenue drew proceedings against the petitioner-assessee for reassessment of income which had allegedly escaped assessment for the Assessment Year 2012-13. The petitioner has assailed various orders taken out by the Revenue at different stages in pursuance of the reassessment proceedings initiated under the relevant provisions of the Income Tax Act, 1961 (hereafter referred to as (I.T. Act, 1961)

2. The petitioner has assailed the notice issued under Section 142 (1) of the I.T. Act, 1961 dated 22.10.2019 requiring the petitioner to furnish details, documents and accounts which were necessary to process the case under the relevant provisions of law. The petitioner has also impugned the "reasons to believe" recorded on 22.03.2019 by the assessing officer to support the formation of opinion of the Revenue as required under Section 147 of the I.T. Act, 1961. Lastly the petitioner has laid a challenge to the orders dated 28.10.2019 and 26.11.2019 disposing of the objections of the petitioner against the issuance of the notice under Section 148 of the I.T. Act, 1961 for the Assessment Year 2012-13.

3. Sri R.R. Agarwal, learned Senior Counsel assisted by Sri Suyash Agarwal, learned counsel for the petitioner contends that the only submission made on behalf of the petitioner is that the mandatory prior approval required under Section 151 of the I.T. Act, 1961 from the Principal Commissioner, Income Tax, Noida, was not obtained before initiation of the aforesaid reassessment proceedings. In the absence of such approval under Section 151 of the I.T. Act, 1961 from the competent authority the proceedings against the petitioner which are assailed in the instant writ petition, have no legs to stand on and are devoid of jurisdiction. This is the sole submission made by the learned Senior Counsel for the petitioner.

4. Per contra, learned counsel for the Revenue, Sri Subham Agarwal calls attention to various assertions made in the

orders impugned dated 28.10.2019 and 26.11.2019 to contend that the requisite approval from the competent authority under Section 151 of the I.T. Act, 1961 was taken prior to the initiation of the proceedings in the manner contemplated by law. He further contends to the material on the basis of which the satisfaction was arrived at by the authorities to come to the conclusion that income of the petitioner had escaped assessment for the Assessment Year 2012-13 was credible and duly considered by the Revenue before initiating reassessment proceedings.

5. Heard learned counsel for the parties.

6. The sole contention of the petitioner-assessee that prior approval required from the competent authority under Section 151 of the I.T. Act, 1961 was not obtained before issuing notice under Section 148 of the I.T. Act, 1961 will be considered first. The objection in this regard was also taken by the assessee before the authorities below. It was raised in the objections against issuance of notice under Section 148 of the I.T. Act, 1961.

7. The assessing authority dealt with the aforesaid objection regarding grant of prior approval by the competent authority under Section 151 of the I.T. Act, 1961 before issuance of notice under Section 148 of the I.T. Act, 1961. The assessing authority in its order dated 28.10.2019 specifically recorded "Further, the notice u/s 148 was issued after taking prior approval u/s 151 from the Ld. Pr. Commissioner of Income Tax, Noida."

8. Similarly the order dated 19.11.2019 disposing of the self same objection of the petitioner-assessee against the issuance of notice under Section 148 of the I.T. Act, 1961 stated as follows:

"In this regard, please find the copy of approval taken from higher authorities and copy of statement of Shri Ashok Kumar Kayan."

9. The findings returned by the authorities in the orders disposing of the objections of the petitioner under Section 148 of the I.T. Act, 1961 are official acts and hence attract the presumption of correctness in their favour. This legal presumption of correctness is the prop and the pillar of legitimacy of all official acts. The presumption is rebuttable. However, the burden lies upon the petitioner to rebut the presumption. The petitioner on his part has taken the following plea in the writ petition to rebut the said presumption:

"That the order of the respondent no.1, dated 28.10.2019 in para 3.2 as stated that it is supplying the copy of the approval of the respondent no. 2, granted u/s 151 (1) of the Act, after accepting the objection of the petitioner relating to the decision of Sabh Infrastructure Ltd. (Supra) & Godawari Saraf (Supra) but no such approval was appended along with the objection dated 26.11.2019, as such the petitioner has reason to believe that no such mandatory approval as provided u/s 151 (1) of the Act, has been granted by the respondent no. 2, in pursuance of the guidelines of Sabh Infrastructure Ltd. (supra)."

10. We are afraid the aforesaid pleading is deficient and does not at all discharge the burden of proof which lay squarely upon the petitioner to reverse the presumption of correctness of the findings in the orders passed by the revisional

authorities in discharge of their official duties. There is no reason or basis to decline the presumption of correctness in favour of the said findings so recorded in the orders passed by the revisional authorities regarding approval under Section 151 of I.T. Act, 1961 before initiation of proceedings under Section 148 of the I.T. Act, 1961. This Court has not been shown any reason or material to doubt the correctness of the finding recorded in the orders dated 28.10.2019 and 26.11.2019 that the notice under Section 148 of the I.T. Act, 1961 was issued after taking prior approval under Section 151 of the I.T. Act, 1961 from the Ld. Pr. Commissioner of Income Tax, Noida. This finding has not been shown to be perverse in any manner and is not liable to be interfered with by this Court. The argument on behalf of the petitioner is accordingly rejected.

11. There is more to the controversy.

12. The "reasons to believe" of the Assessing Officer that income had escaped assessment have been recorded in meticulous detail on 22.03.2019 by the assessing authority. The material on which such "reasons to believe" were founded are also disclosed in the order. The order dated 22.03.2019 passed by the Deputy Commissioner of Income Tax, Circle-1, Noida, regarding sufficiency of "reasons to believe" on which foot the proceedings under Section 147 of the I.T. Act, 1961 are liable to be initiated, contains a recital regarding information from credible sources regarding tax fraud in the case of M/s DLS Exports Pvt. Ltd. and related beneficiaries.

13. The enquiry made in pursuance of the aforesaid information revealed that one Devesh Upadhyay a well known Kolkata based entry operator admitted that he used the bank accounts of the companies which were under his sole control and management for layering the funds and providing accommodation entries in the form of bogus Share Capital/Premium, bogus LTCG/STCG. Statements of Ashok Kayan, Bikash Surekha and Sunil Kayan were also recorded on oath under Section 131 of the I.T. Act, 1961. The said persons in their statements admitted that their bank accounts were used for layering funds and providing accommodation entries in the form of bogus Share Capital/Premium, bogus LTCG/STCG to several beneficiaries. The name of the petitioner appeared in the list of the beneficiaries.

14. In the face of such statements and evidences it was recommended that during assessment proceedings the Assessing Officer is required to record the statements again for corroborating the evidences so collected.

15. In the wake of such material emanating from the said enquiry the Deputy Commissioner of Income Tax, Circle-1, Noida recorded his satisfaction and set forth his "reasons to believe" regarding the escapement of tax in the following manner:

" I have perused the above information and it is seen that the name of assessee Shri Deepak Gupta is appearing at Sr. No. 125 and it is seen that the assessee is one of the beneficiaries and received Rs. 49,10,240/- from the sale proceeds of the shares of M/s DLS Exports Pvt. Ltd. From the enquiries conducted, it has been established that M/s DLS Exports Pvt. Ltd, was involved in layering of funds

and providing accommodation entries in the form of bogus LTCG/STCL to several beneficiaries and assessee is one of them. I have analysed the details from the return filed by the assessee for A.Y. 2012-13 and it is seen that the assessee has not declared any Capital Gain in his return of income. It is clear from the details available on record that the assessee has concealed the capital gain of Rs. 40,10,240/- has escaped assessment for AY 2012-13 with the meaning of provisions of Section 147 of the I.T. Act, 1961."

16. Accordingly proceedings under Section 147 of the I.T. Act, 1961 were initiated to assess the escaped income for Assessment Year 2012-13.

17. At this stage it would be apposite to reflect on some relevant aspects of the statements given by Ashok Kumar Kayan under Section 131 of the I.T. Act, 1961 under oath before the income tax authority at Kolkata which was part of the investigations which led to unearthing of the surreptitious transactions which facilitated the escapement of assessment. In the telling of the said Ashok Kumar Kayan under oath the modus of operandi of the parties to the bogus transactions to facilitate escapement of income was thus described:

"Q.7 Please state the modus of operandi in respect to providing bogus LTCG/STCL through Penny Stock.

Ans. I would like to state that there was a syndicate working in Penny Stock. At first level, client with unaccounted cash approach to the entry operators for getting LTCG. The entry operator in turn approach a set of broker who are in their network. The brokers work in co-ordination with each other so that trades are time synchronised and the scrips remains with cartel of broker and entry operator only. The share prices are rigged so that a penny stock gets a high value over a period of one year. Once, the scrips are retain beyond a period of one year in the clients accounts they are sold to some jammakharchi company which are operated by the same set of entry operator so the client get LTCG. Further, since the jammakharchi client has purchased the scrips at the higher rate, the rates are lowered over a period of time so that they get capital losses which they can claim in their return of income. Hence, while the individual clients incur long term capital gain, the jamma kharchi company clients earns short term capital loss and there is tax evasion at both the levels."

18. A perusal of the "reasons to believe" required under Section 147 of the I.T. Act, 1961 and stated in the order dated 22.03.2019 establishes the fact that the escapement of the income of the petitioner from assessment for the relevant assessment years was part of a larger network which facilitated defrauding of the Revenue on an organised and systematic basis. The authority had credible material before it to come to this conclusion. Further the authority while recording its reasons under Section 147 of the I.T. Act, 1961 on 22.03.2019 duly applied its mind to all the relevant materials in the record.

19. The scope of the expression "reason to believe" and the nature of the belief formed by the assessing officer that the income for any assessment year has escaped assessment arose for consideration before the Hon'ble Supreme Court in **Assistant Commissioner of Income Tax Vs Rajesh Jhaveri Stock Brokers (P)**

Ltd. reported at **(2007) 291 ITR 500**. The Hon'ble Supreme Court in **Asstt. CIT Vs Rajesh Jhaveri Stock Brokers (P) Ltd (supra)** held thus:

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion.....At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction."

20. Dealing with the scheme of Section 147 to 163 in a composite fashion was considered by the Hon'ble Bombay High Court in **Prashant S. Joshi Vs Income Tax Officer, Ward 19 (2)(4)**, reported at **(2010) 324 ITR 154**. The Hon'ble Bombay High Court elucidated the scope of the provisions as under:

"9. Section 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of Sections 148-163, assess or reassess such income and also any other income chargeable to tax, which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The first proviso to Section 147 has no application in the facts of this case. The basic postulate which underlines Section 147 is the formation of the belief by the Assessing Officer that any income chargeable to tax has escaped assessment for any assessment year. The Assessing Officer must have reason to believe that such is the case before he proceeds to issue a notice under Section 147. The reasons which are recorded by the Assessing Officer for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well settled that the question as to whether there was reason to believe, within the meaning of Section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded cannot be supplemented by affidavits. The imposition

of that requirement ensures against an arbitrary exercise of powers under Section 148."

21. Similarly the Division Bench of the Hon'ble Bombay High Court in **N.D. Bhatt, IAC Vs I.B.M. World Trading Corporation** reported at **(1995) 216 ITR 811**, construed the ambit of Section 148 and observed as under:

" It is also well settled that the reasons for reopening are required to be recorded by the assessing authority before issuing any notice under section 148 by virtue of the provisions of section 148 (2) at the relevant time. Only the reason so recorded can be looked at for sustaining or setting aside a notice issued under section 148. In the case of Equitable Investment Co. (P.) Ltd. vs. ITO [1988] 174 ITR 714 a Division Bench of the Calcutta High Court has held that where a notice issued under section 148 of the IT Act, 1961, after obtaining the sanction of the CIT, is challenged, the only document to be looked into for determining the validity of the notice is the report on the basis of which the sanction of the CIT has been obtained. The IT Department cannot rely on any other material apart from the report."

22. The same principal was reiterated in another Division Bench judgment of the Hon'ble Bombay High Court in **Hindustan Lever Ltd. Vs R.B. Wadkar** reported at **(2004) 268 ITR 332.**

"...the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose an open his mind through reasons recorded by him. He has to speak through his reasons.... The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons must be able to justify the same based on material available on record.... That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit of making oral submission, otherwise, the reasons which are lacking in material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced."

23. In the light of the facts found in the earlier part of the judgment and the position of law distilled in the immediately preceding paragraphs, this Court finds that the satisfaction arrived at by the authority satisfies all the requirements of law as contemplated under Section 147 of the I.T. Act, 1961 and explained by judicial pronouncements in that regard.

24. The petitioner was granted full opportunity to state his case before the authorities in his objections against the issuance of notice under Section 148 of the I.T. Act, 1961 for the Assessment Year 2012-13. The petitioner duly availed the aforesaid remedy. The authorities while

deciding the objections of the petitioner passed detailed speaking orders which again reflect due application of mind on the facts and material in the record.

25. The Deputy Commissioner of Income Tax, Circle-5(1) (1), Gautam Buddh Nagar while disposing of the aforesaid objection of the petitioner against issuance of the notice under Section 148 in its order dated 26.11.2019 considered the objections of the petitioner. The objections of the petitioner were dealt with on a point to point basis. While passing the order dated 26.11.2019 the competent Revenue Authority found that necessary pre-requisite of Section 147 that **"there should be an escapement of income"** stood fulfilled. The reasons recorded in that regard were found to be valid. The authority also noticed the admission of the assessee that he had "incurred Long Term Capital Gain of Rs. 47,43,264/- during Financial Year 2011-12, however, the same has not been disclosed in his ITR."

26. The validity of the refusal of the request of the petitioner to cross examine Ashok Kumar Kayan, Sunil Kumar Kayan, Devesh Kumar Kayan whose statements were part of the material, was also affirmed in the following terms;

" In this regard, it is clarified that the undersigned cannot compel any other person for such cross examination as all these persons are not residing within 200 km. From the office of the undersigned. Therefore they cannot be summoned/called upon for such cross examination. The Income Tax Act, 1961 does not have any provision which may empower the undersigned to enforce the cross examination of a third party by the assessee. However, the statements of Shri Ashok Kumar Kayan are being provided to the assessee for ready reference."

27. No provision was pointed out during the course of the argument which could compel us to take a differing view from that of the authority passing the order dated 26.11.2019.

28. Before parting, we would like to deal with another issue in the interest of justice. We have already found as a matter of fact that the recital in the order dated 28.10.2019 as well as order dated 26.11.2019 that the due approval under Section 151 of the I.T. Act, 1961 was taken from the competent authority is not liable to be interfered with in light of the insufficient pleadings. However, the nature of right of the assessee to be provided a copy of the order of prior approval under Section 151 of the I.T. Act, 1961 as understood by the authority passing the order dated 28.10.2019 has to be adverted to. The authority denied a copy of the approval granted by the competent authority under Section 151 of the I.T. Act, 1961 to the petitioner for the following reasons:

" However, the AR of the assessee has contested that the copy of approval was not provided with the reasons recorded. In this regard, it is informed that the approvals taken from higher authorities are internal matter of the department for communication hence, the same cannot be provided. Further, the assessee has cited case law of Hon'ble Delhi High Court in support of his claim. It is hereby clarified that the case law of Hon'ble Delhi High Court is not binding on the undersigned. However, if the assessee has case laws of jurisdictional

High Court or Hon'ble Supreme Court, the same may be communicated accordingly. Therefore, the above ground of the assessee is not acceptable hence rejected."

29. The aforesaid finding of the Revenue authority is unsustainable in law. Approval under Section 151 of the I.T. Act, 1961, prior to initiation of proceedings under Section 148 of the I.T. Act, 1961 is a jurisdictional pre-requisite. In the absence of such approval the proceedings would fall to the ground for want of jurisdiction. As such, the assessee is fully entitled to a copy of the order passed under section 151 of the I.T. Act, 1961 and correspondingly, the Assessing Officer is obliged to hand-over a copy of the same, as and when the assessee seeks for it.

30. There is no infirmity in the reassessment proceedings and the same are not liable to be interfered with.

31. The writ petition is accordingly disposed of finally.

32. Let a copy of this judgment and order be transmitted by the Registry to the Principal Commissioner of Income Tax, Uttar Pradesh, for circulation.

(2020)1ILR 1346

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.01.2020

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Appeal U/S 37 Of Arbitration And Conciliation Act 1996 No. 2 of 2020

M/s D.H.B. Narendra Construction (J.V.) ...Appellant

Versus

Union of India & Ors. ...Respondents

Counsel for the Appellant:
Sri Manoj Kumar Tewari

Counsel for the Respondents:

A. Arbitration and Conciliation Act, 1996 - Section 37 - challenge to- application u/s 9 of the Act-restraining the Railways from cancelling the work contract and from forfeiting security-relief sought is not granted-no evidence to establish that the layout and design were not handed over to the appellant in time-an injunction could not be granted. (Para 4, 5 & 6)

As a first principle of law, in case of breach of a contract which could be compensated in terms of money, the relief for specific performance could not be granted. Any injunction order restraining the respondents from not terminating the contract, extending the time limit under which contract was to be executed and restraining the respondents from interfering in the execution of the work by the appellant, is nothing but an order by the Court directing specific performance of the contract and that too on terms varied by it. such an injunction could not be granted.

Appeal U/S 37 Of Arbitration & Conciliation Act 1996 dismissed. (E-6)

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

1. The instant appeal under Section 37 of the Arbitration and Conciliation Act 1996 has been filed challenging the order passed by District Judge, Ballia dated 18.12.2019, in Misc. Case No. 15 of 2019, rejecting the application filed by the appellant under Section 9 of the said Act.

2. In brief, the facts giving rise to the instant appeal are that the appellant was awarded a work order on 26.12.2018 by the Railways for construction of platforms,

gate lodge, signal and station building, foot-over bridge and other miscellaneous works between Ballia and Karimuddinpur, in connection with doubling work of the railway line. The case of the appellant is that the Railways did not provide design for certain sectors to the appellant. Consequently, the work could not be started in those sectors. In other sectors, where layout design was provided to the appellant, it claims to have executed substantial part of the work. The appellant was served with a notice dated 24.7.2019, requiring it to show cause as to why the contract be not terminated for not being able to execute it within time. The appellant apprehending that in pursuance of the said show cause notice, its contract would be cancelled, approached the Court under Section 9, seeking an injunction restraining the Railways from cancelling the work contract dated 26.12.2018, or from forfeiting security tendered in respect thereof and for a further direction that the time under the contract be extended till March 2020 and the Railways be restrained from interfering in the execution of the remaining work by the appellant.

3. The Railways contested the application and asserted that the appellant had failed to abide by the terms of the work order dated 26.12.2018. The work layout was duly handed over to the appellant on 1.11.2018, but the appellant failed to execute the work. The work to be executed is of public importance. Delay on the part of the appellant in execution thereof has resulted in escalation of the cost. The appellant is not entitled to any injunction.

4. The court below after considering the pleadings and evidence led before it, held that there was no evidence on record to establish that the designs and layouts were not handed over to the appellant in time. It is also held that work under the contract was of special significance and any delay would have serious adverse consequence. Thus, the appellant was not found to be having any prima facie case in its favour, nor balance of convenience lies with it.

5. Counsel for the appellant submitted that the appellant had a strong prima facie case as the designs and layouts were not made available to it in time. Consequently the appellant cannot be held liable for delay. It is also submitted that the layout plan was handed over to the appellant during monsoon period when there was flood in the area where work was to be executed. Consequently, there was no default on the part of the appellant and the show cause notice issued to the appellant in relation to termination of contract, is wholly illegal.

6. The relief which the appellant had sought by filing application under Section 9 of the Act, if granted, would amount to an order by Court specifically enforcing the work contract between the parties. As a first principle of law, in case of breach of a contract which could be compensated in terms of money, the relief for specific performance could not be granted. Any injunction order restraining the respondents from not terminating the contract, extending the time limit under which contract was to be executed and restraining the respondents from interfering in the execution of the work by the appellant, is nothing but an order by the Court directing specific performance of the contract and that too on terms varied by it. In considered opinion of this Court, such an injunction could not be granted.

7. This Court therefore finds no illegality in the impugned order to warrant interference. The appeal lacks merit and is dismissed.

(2020)1ILR 1348

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.10.2019

BEFORE
THE HON'BLE KARUNESH SINGH PAWAR, J.

Contempt No. 1153 of 2018

Santosh Kumar Maurya ...Applicant
Versus
Sri Alok Kumar ...Opposite Party

Counsel for the Applicant:
Ramesh Kumar Srivastava

Counsel for the Opposite Party:
Puneet Chandra

A. Contempt of Courts Act, 1971 - Section 2(b) - challenge to-wilful disobedience of opposite party in deciding the representation of the petitioner-chairman decided the representation by a reasoned and speaking order-hence, rejecting the petitioner representation stating that he was not an employee of Nagar Nigam at the time of transfer from Firoz Gandhi Unchahar Thermal Power Project. (Para 4)

It is ordinarily true that in contempt jurisdiction a Judge cannot exercise writ jurisdiction. In contempt jurisdiction either the Judge can punish for contempt or discharge the contemnor. However, in exceptional circumstances, the court can issue directives in contempt jurisdiction in order to secure the ends of justice. (Para 2)

B. Doctrine of Stare decisis - In contempt jurisdiction, a Judge cannot exercise a writ jurisdiction and therefore, prayer of the petitioner for issuing certain directions is refused. Even otherwise, under Article 141 of the Constitution, the law declared by the Hon'ble Supreme Court being the law of the land is binding on all Courts and Tribunals and authorities in India including this Court. (Par 10)

Contempt Petition dismissed. (E-6)

List of cases cited: -

1. U.P. Nursing Home Association & Ors. Vs. Rajesh Kumar Srivastava & Ors. (2004) (2) UPLBEC 1404 para 7

2. Abida Begam Vs. RCEO (Supra)

3. Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation Limited & Ors. (2014)

3 SCC 373 para 19

4. Ashok Kumar & Ors. Vs. Depinder Singh Dhesi & Ors. (2019) 8 SCC 280 paras 16 and 17

5. J.S. Parihar Vs. Ganpat Duggar & Ors. MANU/SC/0037/1997: (1996) 6 SCC 291

6. Dr. Ravindra Kumar Goel & Ors. Vs. St. of U.P. & Anr. decided on 27.4.2004 in Special Appeal No.320 of 2004

7. Narendra Singh Vs. St. of Punjab reported in AIR 2014 SC 1839 (Supp.)

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Shri Rakesh Srivastava, learned counsel for the petitioner, Shri Manish Kumar, Senior Advocate, assisted by Shri Puneet Chandra, learned counsel appearing for contemnor-opposite party.

2. Contention of learned counsel for petitioner is that writ court vide order dated 08.05.2017, permitted the petitioner to make detailed representation to opposite party no.1 and in case such a representation is made by the petitioner,

the same was to be decided by the Chairman, opposite party no.1 with a reasoned and speaking order within a period of three months from the date a certified copy of the order is placed before him. It has further been submitted by learned counsel for petitioner that opposite party has full knowledge of the judgment and order passed by the writ court but has not decided the representation of the petitioner. Next submission of learned counsel for petitioner is that the land of the petitioner and various other persons were taken by opposite party and 166 candidates have been granted appointment by the opposite party. However, arbitrarily, the opposite party has not provided appointment to the petitioner although he was bound to appoint him. In support of his contention, learned counsel for the petitioner has relied on the judgment of this Court reported in **(2004) (2) UPLBEC 1404 U.P. Nursing Home Association and others vs. Rajesh Kumar Srivastava and others** wherein para 7, the court has held as under:

*"No doubt it is ordinarily true that in contempt jurisdiction a Judge cannot exercise writ jurisdiction. In contempt jurisdiction either the Judge can punish for contempt or discharge the contemnor. However, in exceptional circumstances as we have held in **Dr. Ravindra Kumar Goel's case (supra)**, the court can issue directives in contempt jurisdiction in order to secure the ends of justice. The view was taken by the Division Bench decision of this Court in **Abida Begam vs. RCEO (Supra)**, and we reiterated it in **Dr. Ravindra Kumar Goel's case (Supra)**."*

3. Thus, it is submitted that in view of the law laid down by the Division Bench of this Court, directions can be issued in the contempt jurisdiction to secure the ends of justice to the petitioner and opposite party may be directed to provide appointment to the petitioner.

4. Per contra, Shri Manish Kumar, learned counsel for contemnor submitted that in compliance of the order passed by the writ court, the representation of the petitioner has been considered and decided by a reasoned and speaking order dated 7.9.2019 and reasons have been stated in detail and while rejecting the representation of the petitioner, finding has been given that petitioner was not an employee of Nagar Nigam at the time of transfer from Firoz Gandhi Unchahar Thermal Power Project.

5. Learned counsel further submitted that it has been categorically mentioned in the rejection order that petitioner had continued his job since 31.7.1987 and had been confirmed as peon w.e.f. 01.02.1992 as such the petitioner was regular employee of DAV Public School since 01.02.1992 and has accepted the job of peon in DAV Public School and is working as regular employee since 1992 therefore, nothing more is required to be done by the authority. In support, he has relied upon the judgment reported in **(2014) 3 SCC 373 Sudhir Vasudeva, Chairman and Managing Director, Oil and Natural Gas Corporation Limited and others**. The relevant para no.19 is reproduced as under :-

"The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected,

could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self-determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. The Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self -evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or willful violation of the same. Decided issues cannot be reopened; nor can the plea of equities be considered. The Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate, in other jurisdictions vested in the Court, as noticed above."

6. It is thus submitted by learned counsel for the contemnor that direction of the court was only to decide the representation of the petitioner by a reasoned and speaking order, the same has been done, the contemnor has passed a well reasoned order.

7. He submitted that in view of the law laid down by the Hon'ble Supreme Court in the aforesaid case **Sudhir Vasudeva**, (Supra) this Court being a contempt court cannot travel beyond its jurisdiction. He has also relied on judgment of the Hon'ble Supreme Court in the case of **(2019) 8 SCC 280 Ashok Kumar and others vs. Depinder Singh Dhesi and others**. Relevant paras 16 and 17 are reproduced as hereunder::

"16. In the present case, serious objection has been raised on behalf of Department that the concerned candidates had enrolled themselves in courses leading to Degrees in Engineering through Distance Education Mode without express permission of the Department and/or the Department did not recognise the Degrees in Engineering awarded through Distance Education Mode or that the concerned candidates were not granted any study leave to pursue such courses. If the Degrees were so obtained in violation of the norms and parameters laid down by the concerned Department, the matter assumes completely different complexion. The directions issued by this Court in the judgment and the Order never directed to confer such advantages which the candidates were otherwise not enjoying on the date when the judgment and clarificatory Order were passed. If there was serious infirmity in the Degrees so obtained by the candidates, the matter ought to be sorted out either through representation or through properly instituted challenge in that behalf. If the promotion was not granted and was not being enjoyed as on the day, when the judgment was passed, there was no violation of any direction issued by this Court. As is evident, the representations made by the Contempt Petitioner claimed conferral of certain status and benefits which they were not enjoying earlier. If

there be any grievance on that front, the entitlement needs to be established in proceedings other than a Contempt Petition.

17. Mr. Maninder Singh, learned Senior Advocate, was, therefore completely justified in relying upon the following observations passed by this Court in ***J.S. Parihar v. Ganpat Duggar and Ors. MANU/SC/0037/1997 : (1996) 6 SCC 291:***

"6. The question then is whether the Division Bench was right in setting aside the direction issued by the learned Single Judge to redraw the seniority list. It is contended by Mr. S.K. Jain, the learned Counsel appearing for the Appellant, that unless the learned Judge goes into the correctness of the decision taken by the Government in preparation of the seniority list in the light of the law laid down by three Benches, the learned Judge cannot come to a conclusion whether or not the Respondent had willfully or deliberately disobeyed the orders of the Court as defined Under Section 2(b) of the Act. Therefore, the learned Single Judge of the High Court necessarily has to go into the merits of that question. We do not find that the contention is well founded. It is seen that, admittedly, the Respondents had prepared the seniority list on 2-7-1991. Subsequently promotions came to be made. The question is whether seniority list is open to review in the contempt proceedings to find out whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the wilful violation of the order. After re-exercising the judicial review in contempt proceedings, a fresh direction by the learned Single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible Under Section 12 of the Act. Therefore, the Division Bench has exercised the power Under Section 18 of the Rajasthan High Court Ordinance being a judgment or order of the Single Judge; the Division Bench corrected the mistake committed by the learned Single Judge. Therefore, it may not be necessary for the State to file an appeal in this Court against the judgment of the learned Single Judge when the matter was already seized of the Division Bench."

8. Having considered the rival submissions of learned counsel for parties, this Court has noticed that writ Court vide its order dated 08.05.2017, directed the contemnor to decide the representation of the petitioner by a reasoned and speaking order.

9. The contemnor vide its order dated 07.09.2019, has decided the representation of the petitioner by a reasoned and speaking order therefore, the direction issued by the writ court has been duly complied in its letter and spirit by the contemnor and no willful disobedience can be alleged on the contemnor in view of the law laid down by Hon'ble Supreme Court in the case of **Ashok Kumar and others** and in case of **Sudhir Vasudeva (Supra).**

10. So far as the argument of learned counsel for petitioner regarding law laid

down by the Division Bench of this Court in **UP Nursing Home Association and others** (Supra) is concerned, in that case this Court has reiterated the views expressed by it in the case of **Dr. Ravindra Kumar Goel and others vs. State of U.P. and another** decided on 27.4.2004 in Special Appeal No.320 of 2004, there were peculiar facts and particularly background in which the directions were issued to secure the ends of justice while exercising the contempt jurisdiction. The directions issued were under exceptional circumstance, otherwise, in para 7 of the judgment in **U.P. Nursing Home Association (Supra)**, the Division Bench has reiterated the view that in contempt jurisdiction, a Judge cannot exercise a writ jurisdiction and therefore, prayer of the petitioner for issuing certain directions is refused. Even otherwise, under Article 141 of the Constitution, the law declared by the Hon'ble Supreme Court being the law of the land is binding on all Courts and Tribunals and authorities in India including this Court. The Hon'ble Supreme Court in **Narendra Singh vs. State of Punjab reported in AIR 2014 SC 1839 (Supp.)** has again held that the law declared by the Supreme Court in the form of judgment became binding precedent upon the High Courts and subordinate Courts and has to be followed under Article 141 of the Constitution of India. Therefore, in view of the law laid down by Hon'ble Supreme Court in the case of **Sudhir Vasudeva (Supra)** and **Ashok Kumar and others (Supra)** as well as keeping in view the significant characteristics of the doctrine of *stare decisis*, the contempt petition is dismissed.

11. Consigned to record.

(2020)1ILR 1352

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 67 of 2014

Niyamullah & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Sumit Gupta, Sri Abhishek Srivastava, Sri Satish Trivedi, Sri Sheshadri Trivedi, Sri Ajay Kumar Pandey, Sri Syed Wajid Ali

Counsel for the Respondent:
A.G.A., Sri K.K. Rao

Criminal Law - Indian Penal Code - Sections 147, 304/149, 504, 506 - Appeal against conviction.

In present case the injury on the person of deceased were not on vital part. Rather over upper and lower limbs with back and trial has concluded that it was not with intention to cause death or to cause such bodily injury as is likely to cause death. Though, those injuries were grievous, resulting fracture as well as death of injured on the same day of occurrence. (para 10)

On the basis of facts and evidence placed on record, prosecution was successful to prove its case against appellants. (para 9)

The argument is for quantum of section it was apparently of ten years rigorous imprisonment with fine, which seems to be not in proportion to degree of offence, because each of the convicts appellants are of no criminal antecedent. They remained in prison since last more than six years in this case crime number. On the facts and circumstances and balancing the societal need of punishment with their chance of reformation for bringing them in

main stream of society, sentence of eight years rigorous imprisonment with fine, as above, seems to suffice the cause of justice. (para 10)

The appeal is partly allowed. (E-2)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal under Section 374(2) of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') has been filed by Niyamullah, Mahendra, Sahendar, Wakeel, Naushad, Kalimullah, Anaruddin and Enmul Huda @ Dugru against judgment of conviction and sentence made therein in Sessions Trial No. 163 of 2004 (State Vs. Niyamullah and others), arising out of Case Crime No. 151 of 2004, under Sections 147, 304/149, 504, 506 I.P.C., Police Station Kolhuee, District Maharajganj with connected Sessions Trial No. 31 of 2005 (State Vs. Anaruddin) and Sessions Trial No. 92 of 2005 (State Vs. Enmul Huda @ Dugru) by Additional Sessions Judge, Court No. 1, Maharajganj, whereby each of the convicts-appellants were convicted for offences punishable under Section 304 Part-I read with 149, 147, 504, 506 I.P.C. and they have been sentenced with ten years rigorous imprisonment and fine of Rs.10,000/- each under Section 304 Part-I read with 149 I.P.C., one year rigorous imprisonment under Section 147 I.P.C., six months rigorous imprisonment under Section 504 I.P.C. and six months rigorous imprisonment under Section 506 I.P.C. In case of default in making fine, each of the convicts-appellants were to undergo one year rigorous imprisonment. There was direction for concurrent running of sentences and adjournment of previous imprisonment, if any.

2. Memo of appeal contends that learned trial court failed to appreciate facts and law placed on record. The convicts-appellants No. 5 and 8 were not named in first information report, which was lodged by first informant himself, wherein PW-2 Izhar Ali was shown to be the eyewitness, accompanying the first informant, but subsequently, they were added. It itself shows that both these witnesses of fact were not with clean hands. Rather, they have falsely implicated convicts-appellants due to their personal enmity. PW-3 Nandlal and PW-4 Jumrat Ali were also not shown to be the eyewitness account in first information report, but subsequently introduced as eyewitness account. There was no intention to cause death of deceased. Rather, the only said intention was, though not admitted, for offence punishable under Section 325 I.P.C. Hence, the conviction of appellants under Section 304 Part-I I.P.C. was unsustainable and was against the evidence on record. X-ray report of deceased has not not been proved by the prosecution or any witness. On the score of this too, finding was erroneous. A general allegations against appellants, except appellant nos. 5 and 8, was levelled with no disclosure as to who had caused the stone injury on the lower back of deceased. It seems that the said injury, which could be a reason for the death of deceased, situated on the left lower back, was due to falling down from a height into a pit hole, in which he got his limbs and lower back injured, but subsequently due to previous enmity, this false implication occurred. Appellants are in jail since 20.12.2013. The conviction and sentence of appellants is contrary to law, on the point of sentencing too. The same is not proportionate to offence. Rather, it is too severe. Hence, this appeal is liable to be allowed. Accordingly, this appeal be allowed and judgment of conviction and

sentence made therein be set aside. Further, appellants be acquitted from the charges levelled against them.

3. From the very perusal of record of trial court and impugned judgment, it is apparent that first information report (Ext.Ka-3) was got lodged by way of presenting a written report, signed by informant Mahboob Alam at Police Station Kolhuee, District Maharajganj on 25.09.2004 at 21.50 P.M. against Anaruddin, Kalimullah, Niyamullah, Wakeel, Mahendra and Sahendar, all R/o Saakinaan Kamharia Bujurg, Tola Bargadhia, P.S. Kolhuee, Maharajganj, for offences punishable under Sections 147, 308, 325 I.P.C. for an occurrence, which took place at about 4 P.M. on the same day i.e. 25.09.2004, within the area of village Kamharia Bujurg, with this contention that informant Mahboob Ali along with his cousin Izhar Ali, was on his way to their home from 'Eksadawa Chauraha' on 25.09.2004 and when about 4 P.M. they reached near wooden bridge, they found that Anaruddin, S/o Ali Hasan, Kalimullah, S/o Jafar, Niyamullah, S/o Jafar, Wakeel, S/o Furd, Mahendra and Sahendar, S/o Chinni Lal, were beating informant's brother Mashoor Alam, by lathi, who was lying on ground and shouting for help. Upon this noise, he and his cousin along with Yogender, S/o Sundar rushed on spot. They intended to save injured, but accused persons, while seeing those persons, reaching on spot, ran towards river. His brother was unconscious, having fracture over both upper and lower limbs. This assault was owing to previous enmity. Injured was taken to Bankati, Farenda Hospital from where doctor opined for taking to Sadar Hospital, Gorakhpur, where he was got admitted and this information was submitted for taking legal recourse. Injured was medically examined at District Hospital, Gorakhpur and medico legal report (Ext.Ka-16) was got prepared by Dr. Hiralal of District Hospital, Gorakhpur. Injured was having following injuries:-

1. Traumatic swelling 9cm x all around on upper part of right forearm just below elbow joint. K.U.O. Advised X-ray right forearm.

2. Traumatic swelling on upper part of left forearm 9cm x all around just below left elbow. K.U.D. Advised X-ray left forearm.

3. Lacerated wound 1cm x 0.5cm x muscle deep on anterior aspect of right lower leg just below the right knee joint.

4. Lacerated wound 3cm x 2cm x bone deep traumatic swelling all around the leg, 5cm above the right ankle joint. K.U.O. Advised X-ray right lower leg.

5. Lacerated wound 1cm x 0.5cm on front of left lower leg, 7cm below the left knee joint.

6. Lacerated wound 2cm x 1cm x bone deep in front of left lower leg traumatic swelling all around leg. K.U.O. Advised X-ray left lower leg.

7. Abrasion 2cm x 2cm on lateral aspect of left lower leg. 7cm above the left ankle joint.

Owing to above injuries, while being under treatment, injured succumbed and this information was transmitted at above police station, whereupon inquest proceeding was got conduced by Investigating Officer at District Hospital, Gorakhpur on 26.09.2004 at 12.30 P.M., wherein witness of inquest opined death owing to above anti mortem injuries, for which he was under treatment. Accordingly, documents, connected with

inquest proceeding i.e. letter to C.M.O., letter to Range Inspector, Police Form No. 13, Photo Dead Body, Specimen Seal, by which this dead body was sealed after wrapping in a cloth, were got prepared. This dead body along with those documents were sent for its autopsy examination, which was got conducted at mortuary of District Hospital, Gorakhpur on 26.09.2004 by Dr. R.P. Prasad, wherein autopsy examination report (Ext. Ka-4) was got prepared. The anti mortem injuries, found on the person of deceased, were as follows:-

1 Contused traumatic swelling 10cm x 5cm deformity on right upper arm on cutting underlying bone fractured.

2. Contused traumatic swelling 12cm x 6cm deformity on left forearm on cutting underneath both bone fractured.

3. Lacerated wound 1cm x 1cm x muscle deep on the back of left upper arm on lower end.

4. Stitched wound 6cm long having two stitches on the left lower leg outer aspect on cutting wound is muscle deep.

5. Lacerated wound 3cm x 1cm x muscle deep on outer aspect of left leg.

6. Stitched wound 4 cm long having 1 stitched on upper part of medial aspect leg on cutting wound is bone deep underlying bone fractured.

7. Stitched wound 6cm long having stitches on the right lower leg, wound is deep, on cutting underlying bone fractured.

8. Contusion 15 x 2cm on this left lower back.

4. Investigating Officer visited spot, prepared site map, took statements under Section 161 of Cr.P.C., thereafter, filed charge sheet against Niyamullah, Mahendra, Sahendar, Wakeel, Naushad and Kalimullah, who were apprehended and Enmul Huda @ Dugru, as absconder, for offences punishable under Sections 147, 304, 504, 506 I.P.C., whereupon Magistrate took cognizance. Subsequently, charge sheet for other absconding accused persons were filed, over which cognizance was taken. Firstly, Sessions Trial No. 163 of 2004, was committed to court of Sessions Judge by Court of C.J.M., Maharajganj, for accused Niyamullah, Mahendra, Sahendar, Wakeel, Kalimullah and Naushad. Subsequently file of Anaruddin was committed and this was Sessions Trial No. 31 of 2005. Thereafter, file of Enmul Huda @ Dugru was committed to court of Sessions, which was Sessions Trial No. 92 of 2005. As all these three sessions trial were arising out of one and common Case Crime No. 151 of 2004 of Police Station Kolhuee for one and same offences, punishable under Sections 147, 304/149, 504, 506 I.P.C., hence, Additional Sessions Judge consolidated all these three sessions trial by making leading Session Trial No. 163 of 2004 (State Vs. Niyamullah and 5 others), wherein evidence were recorded. After hearing learned counsel for both sides, charges were framed in all those three sessions trial against those accused persons for offences, as above, and it was read over and explained, whereupon accused persons pleaded not guilty and claimed for trial. Prosecution examined PW-1 Mahboob Alam, PW-2 Izhar Ali, PW-3 Nandlal, PW-4 Jumrat Ali, PW-5 Constable Ramanand Bharti, PW-6 Dr. R.P. Prasad, PW-7 S.I. Nirahuram, PW-8 S.I. Dilip Kumar Bind, PW-9 Constable Ramdas Bharti, PW-10 Arun Kumar Srivastava, Pharmacist, PW-11 Dr. Harilal. Thereafter, for having explanation, if any, of accused over incriminating evidence

furnished by prosecution and getting version of defence, statement under Section 313 of Cr.P.C., were got recorded, wherein each of the accused persons said that the entire evidence of prosecution was false, nobody was eyewitness of the occurrence, name of Naushad and Enmul Huda @ Dugru was not there in first information report and it was subsequently added, prosecution witness Nos. 3 and 4 were not eyewitness account of occurrence, rather they were inimical witness, against whom there had been so many cases, both in civil and criminal side and it was admitted by these witnesses in their statements. The injuries found on the person of deceased were not with intention to cause death or cause such bodily injuries, as was likely to cause death. Rather, it was fracture of both upper and lower limbs by some other reason by some other person in above time of occurrence of night, wherein false implication was made. The factual investigation was also erroneous. Charge sheet was filed on dishonest investigation. In defence, documentary evidence for showing previous litigation in between were filed. After hearing learned public prosecutor and learned counsel for defence impugned judgment of conviction, whereby all eight accused persons were convicted for offences levelled against them and after hearing over quantum of sentence, sentence as above, were imposed by impugned judgment. Against this judgment, this appeal was filed wherein Enmul Huda @ Dugru and Naushad were enlarged on bail under Section 389(1) Cr.P.C. But bail to rest of convicts-appellants were rejected. Though, they were on bail during trial and it was never misused by any of them. They have been taken in custody on date of judgment dated 19.12.2013 and since then for these six years they are languishing in jail.

5. The convict-appellant Mahendra died during appeal. Hence his appeal stood abated. Now, the appeal of seven convicts-appellants is pending.

6. Learned counsel for convicts-appellants argued that none of the injuries, found over the person of deceased, were on vital part. Rather, they all were on upper and lower limbs as well as back and they all were caused by lathi that is not a dangerous weapon. The assault of stone was said by PW-1. No injury over abdomen caused by stone was held by Medical Officer in its medical examination. PW-10 Arun Kumar Srivastava is pharmacist, who in his statement has proved Ext. Ka-15 regarding injuries sustained by Mahboob Alam and entry of same in EOPD register (from 19.09.2004 to 09.10.2004) on 25.09.2004 at serial no. 32/11682, wherein he was entered to be attended by Medical Officer at 7.30 PM and this information of his death was entered to be transmitted at 8.15 PM of the date. This entry of register has bee proved as Ext. Ka-15 and statement of PW-11 Dr. Harilal is of this fact that all injuries i.e. seven in number, found by him, were by hard blunt object and were simple in nature, other than six injuries no. 1 to 4 and 6, for which X-ray was advised and matter was referred for Ortho specialist. Medico legal report (Ext.Ka-16) was got prepared by this witness under his handwriting and signature and all these injuries were not on vital party of deceased. Hence, there was no intention to cause death or bodily injury likely to cause death or with knowledge that by such injury death is likely to occur. Rather injuries were of lathi-danda. They were seven in medico legal report and eight in autopsy examination report. All were over upper and lower limbs, resulting fracture of them and no injury was over the head, brain, chest and ribs. Hence, this was in maximum a case punishable under Section 325 I.P.C. or under Section 304 Part-II I.P.C. The witness of fact PW-1 Mahboob Alam and PW-2 Izhar Ali were with material contradiction regarding place of

occurrence, sequence of occurrence and mode of occurrence. Initially, report was got lodged against six persons, but during recording of statements, it was added that two accused persons were making exhortation for assaulting for fracture of upper and lower limbs of deceased and rest were assaulting, whereas no such contention was there in first information report. PW-3 Nandlal and PW-4 Jumrat Ali were highly inimical and interested witnesses. There were vast contradiction in their testimony with regard to testimony of PW-1 Mahboob Alam and PW-2 Izhar Ali. Hence, for Naushad and Enmul Huda @ Dugru, no case was made out. Vicarious liability under Section 149 I.P.C may also be not fastened against them because the only testimony is that they were given exhortation, but no such recital was there in F.I.R.. Rather, this was embellishment and exaggeration. For other appellants, maximum accusation said to be proved by prosecution was for offences punishable under Section 304 Part II I.P.C. But trial court has convicted for offence punishable under Section 304 Part-I I.P.C. wherein maximum sentence of ten years with fine of Rs.10,000/- had been awarded to each of them. Whereas they are languishing in jail since last six years, after the date of judgment, and were also in jail before their bail. Hence, this was sufficient and cogent sentence. Hence, they be maximum sentenced with above period undergone and those two convicts-appellants, for whom there is embellishment and exaggeration, be acquitted of the charges.

7. Learned A.G.A. as well as learned counsel for informant Sri K.K. Rao has vehemently opposed the contention of learned counsel for appellants that this poor victim in young age was badly beaten by convicts-appellants, resulting eight injuries of such dimension causing fracture over both upper and lower limbs and owing to it, he succumbed during treatment on that very day. Hence, it was a brutal homicide requiring no leniency. Learned Sessions Judge had appreciated facts and law placed on record and had passed impugned judgment of conviction and thereafter, impugned sentencing was made commensurate to nature and degree of offence. Hence, this appeal be dismissed.

8. Chik F.I.R. (Ext.Ka-3) was got registered upon the written report (Ext.Ka-1), having signature of informant Mahboob Alam, wherein accusation of assault was assigned against Anaruddin, Kalimullah, Niyamullah, Wakeel, Mahendra and Sahendar and it was said to be witnessed by Yogender and informant Mahboob Alam i.e. no recital of any exhortation made by Naushad or Enmul Huda @ Dugru was there. This report was got lodged after injured was admitted at District Hospital, Gorakhpur. This condition was settled that it was not registered under anxiety or any hurry or by other person other than informant, who had rushed on spot instantly and who is real brother of deceased. While being examined as PW-1 in examination-in-chief, the same contention has been made by this witness Mahboob Alam "जब कठवा के पुल के आगे पूरब पहुंचे तो देखे की मेरे ही गांव के अन्नारुद्दीन कलीमुल्लाह व नियामुल्ला व महेंद्र सहेंद्र वकील मार रहे थे ।ट मेरे भाई मशहूर आलम को लाठी डंडा से मार रहे थे ।ट मेरे भाई गिर गए थे बेहोश हो गए थे चिल्ला भी रहे थे।ट" Subsequently, in other lines, this has been said that Enmul Huda and Naushad were making exhortation for

fracture of both upper and lower limbs of his brother, which were made by accused persons and they all ran towards field. But this story of giving exhortation was not said in first information report, which was got registered by this PW-1. When asked as to why this was not written in first information report, in cross-examination, this witness has said "जब मैंने मजरूब अपने भाई को देखा उस समय वह बोलने के हालत में थे चिल्ला रहे थे कि मेरी उनसे बात हुई थी वह कहे कि अमुक.अमुक आदमी हमको मार कर भाग गए है ट मैंने उनके कहने पर उन आदमियों को दौड़ाने का कोई प्रयास नहीं किया मेरे बाद वहा पर पहुंचने वाले योगेंद्र नन्दलाल व मेरे चाचा का लड़का बसूलल्लाह थेट". Meaning thereby, this witness could gather information from his injured brother, who was under conscious at that time and subsequently he became unconscious and died during treatment. He could not disclose or converse subsequently, but he told who had beaten him, but the names of those two exhorters were not there. The cross-examination at page 11 reveals that when this informant rushed on spot, he found that his brother was lying at the northern side of road having injuries i.e. beginning of the quarrel or assault was not witnessed by any of the witnesses of fact. Rather after hearing rescue call, they all rushed there and found above occurrence, wherein names of Naushad and Enmul Huda were not said either to I.O. under Section 161 Cr.P.C. or in first information report and it was subsequently developed. PW-2 Izhar Ali is the next alleged eyewitness account, who was accompanying informant and was son of deceased. He too has narrated in examination-in-chief that while he heard hue and cry, he along with his uncle rushed on spot and found that two persons were making exhortation. They were Enmul Huda @ Dugru and Naushad. They were saying for fracture of upper and lower limbs of his father and this was witnessed by this witness whereas Anaruddin, Niyamullah, Kalimullah, Wakeel, Mahendra and Sahendar were giving assault by lathi-danda over his father, who had fallen thereat. Meaning thereby no assault was being made by Enmul Huda @ Dugru and Naushad, but name of those two were not in first information report or in the statement given under Section 161 Cr.P.C. In further development, in cross-examination, this witness has said that when his father gained sense he narrated "मेरे पिता को होश हुआ तो बताये कि हमें अनरुद्दीन नियामुल्ला कलीमुल्लाह सहेंद्र महेंद्र वकील यह लोग मार रहे थे तुम लोग अब तक कहा थे दो आदमी ललकार रहे थे इनामुलहुदा उर्फ़ डुगरु और नौशाद यह भी पिता जी ने बताया थे पिताजी ने यह भी बताया कि थाने पर जाकर उपरोक्त नाम बताकर रपट दर्ज कर दोट" Meaning thereby, this witness was not eyewitness account of alleged assault. Rather, he gained information from his father, who directed for getting case lodged at police station. Even then, names of these Enmul Huda @ Dugru and Naushad were not written in Ext.Ka-1 or said in statement recorded under Section 161 Cr.P.C. Though, this witness has categorically said "जब मैं घटना वाले जगह पर पंहुचा उस समय मेरे पिता बेहोश थे वहा कुछ लोग इकठ्ठा हो गए थे" Meaning thereby, while this witness reached on spot injured was unconscious and few others were gathered on spot, then this story that informant

along with his nephew rushed on spot and found such occurrence goes away. This witness has further said "जब तक हम लोग घटना वाली जगह पर अपने पिता के साथ रहे तब तक मेरे पिता बोलने के हालत में नहीं थे एकसड़वा से पहले बोले थे और उन्होंने मुल्जिमान का नाम हमसे बताया था॰ उस समय मेरे चाचा मेरे साथ नहीं थे ॰ मुल्जिमान कि नाम के बारे में मेरे पिता केवल हमें बता दिए थे और कहा था कि थाने जाकर इन मुल्जिमान का नाम दर्ज करना किसी हालत में न छोड़ना ॰" Meaning thereby, even after direction by injured to his son, who was all alone at that time, and direction to informant by his son, names of these accused were not entered in Ext.Ka-1. According to this version, this PW-2 was not present on spot at the time of occurrence. Rather, he could know about occurrence and names of assailants through his father. PW-3 Nandlal and PW-4 Jumrat Ali, admittedly are the witnesses against whom there had been criminal and civil litigation from accused appellants side and even their father and other family members were with conviction in those litigation. Hence, they are proved to be inimical witness and for appreciation of their testimony a great caution and precaution is to be taken. PW-3 has categorically said in examination-in-chief that when he saw and found that those named persons assaulting injured by lathi-danda, Naushad and Enmul Huda were making exhortation for breaking the upper and lower limbs of deceased. But, this was not mentioned in first information report (Ext.Ka-1). Rather, it was subsequently developed. The same is the situation with PW-4 that when he reached on spot there were 15-20 person on spot i.e. he too was not the first hand perceiver of the facts. The testimony of these two witnesses regarding their presence on spot is inconsistent with statement of PW-1 and PW-2. Hence, certainly accusation against Enmul Huda @ Dugru and Naushad becomes doubtful. They were not named in the first information report nor instantly said by injured nor were given in statement, but in subsequent development their names were added, but they were not making any assault. Rather, they were said to giving exhortation. Hence, their conviction was with failure of appreciation of facts and law on record. They deserve to be given benefit of doubt and their conviction seems to be set aside. Accordingly, their appeal merits to be allowed.

9. Regarding, Mahendra appeal has been abated, but regarding Niyamullah, Sahendar, Wakeel, Kalimullah and Anaruddin, the argument is for quantum of sentence, whereas on the basis of facts and evidence placed on record, prosecution was successful to prove its case against them. Their names was there in the instantly reported F.I.R. It has been proved by witnesses PW-1 and PW-2 coupled with formal witnesses with no evidence in defence.

10. Regarding quantum of sentence Section 304 Part-I provides for imprisonment for life, or imprisonment for ten yeas and fine and Section 304 Part-II provides for imprisonment for ten years, or fine or both. Section 304 i.e. punishment for culpable homicide not amounting to murder provides that whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may

extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death. In present case the injury on the person of deceased were not on vital part. Rather over upper and lower limbs with back and trial has concluded that it was not with intention to cause death or to cause such bodily injury as is likely to cause death. Though, those injuries were grievous, resulting fracture as well as death of injured on the same day of occurrence. Hence, conviction under Section 304 Part-1 was justified, but regarding sentence it was apparently of ten years rigorous imprisonment with fine, which seems to be not in proportion to degree of offence, because each of the convicts-appellants are of no criminal antecedent. They remained in prison since last more than six years in this case crime number. On the facts and circumstances and balancing the societal need of punishment with their chance of reformation for bringing them in main stream of society, sentence of eight years rigorous imprisonment with fine, as above, seems to suffice the cause of justice.

11. Accordingly, this appeal succeeds and is allowed for convicts-appellants Naushad and Enmul Huda @ Dugru. The impugned judgment and order of conviction dated 20.12.2013, passed by the Trial Court, is hereby set aside and the appellants Naushad and Enmul Huda @ Dugru are acquitted of all the charges. They are on bail. They need not to surrender. Their sureties are discharged.

12. Keeping in view the provisions of section 437-A Cr.P.C. appellants Naushad and Enmul Huda @ Dugru are directed to forthwith furnish a personal bond and two reliable sureties each in the like amount to the satisfaction of trial Court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

13. The conviction of convicts-appellants Niyamullah, Sahendar, Wakeel, Kalimullah and Anaruddin are confirmed. Their appeal is being partly allowed on the point of quantum and their imprisonment of ten years and fine under Section 304 Part-I/149 I.P.C. is being substituted by eight years rigorous imprisonment with fine of Rs.10,000/-. For rest of sentences, they shall remain, as such, and intact.

14. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate change of warrant of sentence, as above, and follow up.

(2020)1ILR 1360

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.01.2020

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 126 of 2018

Vishwas Pandey ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Vaibhav Kalia, A.P. Mishra, Amol Kumar, Bal Keshwar Srivastava, Laltaprasad Misra, Vaibhav Kalia

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code - Sections 147, 304/149, 504 & 506 - Appeal against conviction.

Unequivocally provide that no teacher can be dismissed or removed, neither his services can be terminated without conducting full-fledged disciplinary proceedings against him for any lapse or misconduct, though requirement of conducting full-fledged disciplinary inquiry proceeding has an exception as provided in Statue of the First Statues and under this exception requirement of conducting disciplinary proceedings can be dispensed with in case services of teacher are to be terminated in case of conviction of a teacher for offence involving moral turpitude. (para 28)

For terminating the service of teacher on the ground of his conviction for any offence involving moral turpitude, the employer needs to determine that the teacher concerned has been convicted for offence involving moral turpitude. (para 37)

We do not find any substance in the prayer made in the application seeking suspension of order of conviction. (para 39)

The application is, thus, rejected. (E-2)

List of cases cited: -

1. Rama Narang Vs. Ramesh Narang & ors., (1995) 2 SCC 513

2. Ravikant S. Patil Vs. Sarvabhouma S. Bagali, (2007) 1 SCC 673

3. Navjot Singh Sidhu Vs. St. of Punj. & anr., (2007) 2 SCC 574

4. K.C.Sareen Vs. CBI, Chandigarh (2001) 6 SCC 584

5. Irfan & ors. Vs. St. of U.P. 2009 (66) ACC 413

6. St. of Raj. Vs. Salman Salim Khan, (2015) 15 SCC 666

7. Shyam Narain Pandey Vs. St. of U.P, (2014) 8 SCC 909

8. St. of Mah. through C.B.I. Vs. Bala Krishna Dattatrya Kumbhar (2012) 12 SCC 384

9. Sanjay Dutt Vs. St. of Mah. (2009) 5 SCC 787

10. St. of Mah. Vs. Gajanan & anr. (2003) 12 SCC 432

11. U.O.I. Vs. Attar Singh & anr. (2003) 12 SCC 424

12. Deputy Director of Collegiate Education Vs. S. Nagoor Meera (1995) 3 SCC 377

13. Dattukulangara Madhavan Vs. Majeed & ors., (2017) 2 JIC 380 (SC)

14. Masalti Vs. St. of U.P., AIR 1965 SC 202.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. This application by the applicant-appellant-Vishwas Pandey has been moved with the prayer to suspend the operation of the order appealed against i.e. the judgment and order of conviction dated 18.01.2018 passed by the Additional Sessions Judge/Special Judge (E.C.Act), Gonda in Sessions Trial No.264 of 2012 which had emanated from Case Crime No.559 of 2012, under Sections 147, 148, 149, 323, 504, 506, 307, 302 IPC and Section 27/30 Arms Act, Police Station Kotwali Nagar, District Gonda whereby he has been convicted of the offences under Sections 147, 304/149, 504 and 506, IPC and has accordingly been sentenced.

2. The applicant-appellant at present is enlarged on bail pursuant to the order dated 17.05.2018 as corrected vide order dated 21.05.2018 passed by this Court in Criminal Appeal No.126 of 2018.

3. The appellant is an Assistant Professor in Shia P.G. College, Lucknow having been appointed in the said capacity in the year 2017. Shia P.G. College is affiliated to Lucknow University and accordingly conditions of service of the applicant-appellant are governed by the provisions of U.P. State Universities Act and the First Statutes of Lucknow University.

4. It has been submitted on behalf of the applicant-appellant that pursuant to the order passed by this Court enlarging him on bail, he was released from jail on 26.05.2018 and soon thereafter he received a show cause notice dated 12.05.2018 issued to him by the Hony Joint Secretary/Manager of the College whereby he has been informed that Managing Committee of the College in its meeting held on 11.05.2018 passed a resolution to issue notice to the applicant-appellant seeking his clarification and explanation as to why has he been absent from the college without any information since 15.02.2018.

5. It has been averred in the instant application that reply to this notice was submitted by the applicant-appellant on 28.05.2018 to the Manager of the College whereby he requested permission of the college authorities to allow him to join his duties and further that his absence from duty with effect from 16.01.2018 may be condoned.

6. The show cause notice dated 12.05.2018 and reply submitted by the applicant-appellant to the said notice are available on record as annexure nos. 2 and 3 respectively with the application. In his reply submitted on 28.05.2018, it has been stated by the applicant-appellant that he had applied for one month's leave without pay from 16.01.2018, however, in the meantime the applicant-appellant was convicted vide judgment and order of the trial court dated 18.01.2018 for the offences under Sections 147, 304/149, 504 and 506, IPC. It has further been averred in the said reply that the applicant-appellant has preferred an appeal challenging the judgment and order of conviction which has been admitted by this Court and vide order dated 17.05.2018 he has been enlarged on bail and that after being released on bail, the applicant-appellant has been contacting the college authorities, however, he has not been allowed to join his duties in view of the show cause notice dated 12.05.2018. Narrating these facts the applicant-appellant vide his reply dated 28.05.2018 has prayed that he may be permitted to join his duties.

7. It has further been averred in the instant application that another show cause notice dated 13.08.2018 has again been issued by the Hony Joint Secretary of the College Management informing the applicant-appellant that in the meeting of Managing Committee of the College held on 18.07.2018, it was resolved to give the applicant-appellant last chance to clarify as to why and on what grounds his services may not be terminated.

8. In the background of aforesaid two notices issued by the College, the one dated 12.05.2018 and the other dated 13.08.2018, this application has been moved by the applicant-appellant with the prayer to suspend the operation of the judgment and order of conviction so that he can submit his joining and he may give adequate reply to the show cause notice so that the applicant-appellant is not faced with a situation where his services from

employment of the College shall get terminated.

9. Lengthy arguments have been raised by Dr. L.P.Misra and the Sri Vaibhav Kalia, learned counsel for applicant-appellant, Sri H.G.S. Parihar, learned Senior Advocate assisted by Sri A.P. Misra, learned counsel for complainant and Sri Madan Mohan Pandey, learned Additional Advocate General for the State.

10. We have given our anxious consideration to rival submissions made by learned counsel representing the respective parties and have also perused the material available on record.

11. It has been submitted by Dr. L.P. Misra, learned counsel for the applicant-appellant, that under Section 389 of Code of Criminal Procedure this Court is well within its jurisdiction to pass an order suspending not only execution of sentence but the judgment and order of conviction as well during pendency of this appeal. He has further submitted that the incident on the basis of which the trial against the applicant-appellant was held wherein he has been convicted, started on a sudden quarrel and since there was a fight between two groups of persons, it is significant to determine as to who was the aggressor and further that merely on the basis of presence of applicant-appellant at the time and place of occurrence, he could not have been convicted. It has further been argued on behalf of the applicant-appellant that mere presence on the place of occurrence without any motive or *mens rea* on his part would not have resulted in his conviction. He has drawn attention of the Court to certain paragraphs of the judgment and order of conviction passed by the trial court and has submitted that it is proved from the evidence available on record that it was the complainant and not the accused persons who were aggressors.

12. Dr. L.P Misra, learned counsel for applicant-appellant has further taken us to that portion of the judgment and order of conviction where trial court has opined that incident had happened unfortunately. It has thus been argued by learned counsel for applicant-appellant that appeal is likely to be allowed ultimately and that such possibility is a relevant factor which may be taken into account while considering any prayer for suspending the order of conviction.

13. On behalf of the applicant-appellant, judgment of Hon'ble Supreme Court in the case of ***Rama Narang vs. Ramesh Narang and others, reported in (1995) 2 SCC 513*** has been relied upon where Hon'ble Apex Court has held that scope of Section 389 Cr.P.C. extends to conferring power on the appellate court to stay the operation of the order of conviction as well in case the order of conviction is to result in some disqualification. The judgment in the case of ***Ravikant S. Patil vs. Sarvabhouma S. Bagali, reported in (2007) 1 SCC 673***, has also been relied upon by the applicant-appellant to buttress the submission that in certain situations the order of conviction may become executable inasmuch as it may result in incurring of some disqualification under other enactments and that in such cases it is permissible to invoke the power under Section 389 (1) of the Code for staying the conviction as well. Reliance has also been placed by learned counsel for applicant-appellant on the case of ***Navjot Singh Sidhu vs. State of Punjab and another, reported in***

(2007) 2 SCC 574 where legal position in respect of power of appellate court to suspend an order of conviction under Section 389 of Code of Criminal Procedure has been summarized and reiterated, according to which the appellate court can suspend or grant stay of order of conviction, however, the person seeking suspension of conviction is to draw attention of the appellate court to the consequences that may arise if the conviction is not stayed.

14. We may hasten to note that ***Rama Narang (supra)*** was a case relating to disqualification under Section 267 of the Companies Act, 1956 which provided that Managing Director of a Company shall incur disqualification if he is found to have committed an offence involving moral turpitude. Similarly, ***Ravikant S. Patil (supra) and Navjot Singh Sidhu (supra)*** relate to disqualification under Representation of the People Act, 1951.

15. Referring to judgment in the case of ***K.C.Sareen vs. CBI, Chandigarh reported in (2001) 6 SCC 584***, submission has been made by learned counsel representing the applicant-appellant that the law laid down by Hon'ble Supreme Court in the said case does not have any application in this case for the reason that in ***K.C.Sareen (supra)*** suspension of conviction was sought by a Bank Officer who was convicted under Section 13 (2) of Prevention of Corruption Act and it is in this background that Hon'ble Supreme Court upheld the order of High Court wherein the High Court had refused to suspend the conviction under the Prevention of Corruption Act.

16. Taking the Court to various paragraphs of this judgment, it has been stated by learned counsel for applicant-appellant that it may not be appropriate to pass an order by the appellate court suspending the conviction in a situation where conviction is under Prevention of Corruption Act for the reason that when public servant convicted of corruption is allowed to continue to hold public office, it may have demoralizing effect on other employees and consequently the same may result in erosion of the confidence of the people in public institutions. However, in the same breathe, it has been submitted on behalf of the applicant-appellant that the present case does not involve conviction of the applicant-appellant for either corruption or for any offence involving moral turpitude and accordingly since the applicant-appellant is faced with a situation where his services as Assistant Professor in the college may get terminated, it will be appropriate and is warranted in the facts of the case that the judgment and order of conviction may be suspended/stayed.

17. Per contra, relying upon a judgment of a Division Bench of this Court in the case of ***Irfan and others vs. State of U.P. reported in 2009 (66) ACC 413***, it has been argued by Sri H.G.S.Parihar, Senior Advocate assisted by Sri A.P.Misra, learned counsel representing the complainant that considering the facts and circumstances of the case it would be highly improper to suspend the order of conviction.

18. Sri Madan Mohan Pandey, learned Additional Advocate General appearing for the State has vehemently opposed the prayer for suspension of conviction though he does not dispute the jurisdiction of this Court to pass an order suspending the conviction as well, in an

appropriate case under Section 389 of the Code of Criminal Procedure. He has further stated that the power of suspension of conviction should be exercised only in exceptional circumstances only where failure to stay conviction may lead to irreversible consequences and not in any other case. In support of his submission Sri Pandey has made reference to the judgments of Hon'ble Supreme Court in the cases of ***State of Rajasthan vs. Salman Salim Khan, (2015) 15 SCC 666, Shyam Narain Pandey vs. State of U.P, (2014) 8 SCC 909, State of Maharashtra through C.B.I. vs. Bala Krishna Dattatrya Kumbhar (2012) 12 SCC 384, Sanjay Dutt vs. State of Maharashtra (2009) 5 SCC 787, State of Maharashatra vs. Gajanan and another (2003) 12 SCC 432, Union of India vs. Attar Singh and another (2003) 12 SCC 424, Deputy Director of Collegiate Education vs. S. Nagoor Meera (1995) 3 SCC 377, Dattukulangara Madhavan vs. Majeed and others, (2017) 2 JIC 380 (SC) and Masalti vs. State of U.P., AIR 1965 SC 202***. He has further argued that the Court while considering the prayer for suspension of conviction is required to take into consideration seriousness of offence for which the applicant-appellant has been punished and if it is found that convict is involved in crime which is outrageous and if conviction is stayed, it would have serious impact on the public perception then in such circumstances stay of conviction would be impermissible. Drawing attention of the Court to paragraph 15 of the judgment of the apex Court in the case of ***State of Maharastra vs. Bala Krishna Dattatrya Kumbhar (supra)*** he has argued that relief of staying the operation of conviction cannot be granted only on the ground that an employee may lose his job if conviction is not suspended. Paragraph 15 in the case of ***State of Maharastra vs. Bala Krishna Dattatrya Kumbhar (supra)*** is as follows:

"15. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that the appellate court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

19. In his submission, Sri Pandey has thus stated that merely because applicant-appellant is faced with some action against him at the hand of the management of the College, the prayer for suspension of conviction may not be granted.

20. Having heard learned counsel for the parties and perused the record available before us, what we find is that it is the two notices dated 12.05.2018 and 13.08.2018 issued by the Manager of the College to the applicant-appellant which has prompted him to file the instant application.

21. There is no quarrel on the legal principle that in appropriate case this Court has been vested with the jurisdiction

and authority under Section 389 of Code of Criminal Procedure to suspend the order appealed against that is to say to suspend the conviction as well along with the sentence. The question, however, which falls for our consideration is as to whether two notices dated 12.05.2018 and 13.08.2018 issued by the Management of the College to the applicant-appellant can be construed to form any cause of action to the applicant-appellant to seek the prayer made in this application for suspension of conviction. Though it has been contended on behalf of the applicant-appellant that by issuing aforesaid two notices, specially the subsequent notice dated 13.08.2018, the Management of the College, where applicant-appellant is presently employed as Assistant Professor, intends to terminate his services on the ground of his conviction by the judgment and order which is under appeal herein, however, a careful reading of the aforesaid two show cause notice and the relevant provisions contained in the First Statues of Lucknow University governing Conditions of Services of Teachers of Associated Colleges lead us to conclude that the present application is misconceived.

22. Conditions of Service of Teachers of Associated College of Lucknow University are governed by the provisions contained in Part-I of Chapter XVII of the First Statues of Lucknow University which have been framed under U.P. State University Act and as such the same have statutory force.

23. Statue 17.04 is relevant for the purpose of appropriately appreciating the issue involved herein which is quoted herein below:-

"17.04. (1) A teacher of an associated college (other than a Principal) may be dismissed or removed or his services terminated on one or more of the following grounds:

(a) willful neglect of duty;

(b) misconduct, including disobedience to the orders of the Principal;

(c) breach of any of the terms of contract of service;

(d) dishonesty connected with the University or College examination;

(e) scandalous conduct or conviction for an offence involving moral turpitude;

(f) physical or mental unfitness;

(g) incompetence;

(h) abolition of the post with the prior approval of the Vice-Chancellor.

(2) A Principal of an associated college may be dismissed or removed, or his services terminated on grounds mentioned in clause (1) or on the ground of continued mismanagement of the college.

(3) Except as provided by clause (4), not less than three months' notice (or whose notice is given after the month of October, then three months' notice or notice ending with the close of the session whichever if longer) shall be given on either side for terminating the contract, or in lieu of such notice, salary for three months (or longer period as aforesaid) shall be paid:

Provided that where the Management dismisses or removes or terminates the services of a teacher, under clause (1) or clause (2) or when the teacher terminates the contract for breach of any of its terms by the Management, no such notice shall be necessary;

Provided further that parties will be free to waive the condition of notice, in whole or in part by mutual agreement.

(4) In the case of any other teacher appointed in a temporary or

officiating capacity his services shall be terminable, by one months' notice or on payment of salary in lieu thereof on either side".

25. According to the aforequoted Statue 17.04 of the First Statutes a teacher of an associated college may be dismissed or removed or his services can be terminated on one or more grounds given in sub-clause (1) of Statue 17.04.

26. Statue 17.06 is also relevant which reads as under:-

"17.06. (1) No order dismissing removing or terminating the services of a teacher on any ground mentioned in clause (1) or clause (2) of Statue 17.04 (except in the case of a conviction for an offence involving moral turpitude or of abolition of post) shall be passed unless a charge has been framed against the teacher and communicated to him with a statement of the grounds on which it is proposed to take action and he has been given adequate opportunity.

(i) of submitting a written statement of his defense;

(ii) of being heard in person, if he so chooses; and

(iii) of calling and examining such witness in his defense as he may wish;

Provided that the Management or the officer authorized by it to conduct to inquiry may for sufficient reasons to be recorded in writing, refuse to call any witness.

(2) The Management may, at any time ordinarily within two months' from the date of the Inquiry Officer's report pass a resolution dismissing or removing the teacher concerned from service, or terminating his services mentioning the grounds of such dismissal, removal or termination.

(3) The resolution shall forthwith be communicated to the teacher concerned and also be reported to the Vice - Chancellor for approval and shall not be operative unless to approved by the Vice-Chancellor.

(4) The Management may, instead of dismissing removing or terminating the services of the teacher, pass a resolution inflicting a lesser punishment by reducing the pay of the teacher for a specified period or by stopping increments of his salary for a specified period not exceeding three years and or may deprive the teacher of his pay during the period, if any, of his suspension. The resolution by the Management inflicting such punishment shall be reported to the Vice-Chancellor and shall be operative only when and to the extent approved by the Vice-Chancellor."

27. According to Statue 17.06, an order of dismissal or removal of a teacher cannot be passed on any ground mentioned in clause (1) of Statue 17.04 unless a charge has been framed against the teacher and communicated to him and appropriate disciplinary proceedings are drawn and conducted by providing adequate opportunity to the teacher, of contesting the charges except in case of conviction for offence involving moral turpitude or in case of abolition of post.

28. The provisions contained in Statue 17.04 read with Statue 17.06, thus, unequivocally provide that no teacher can be dismissed or removed, neither his services can be terminated without conducting full-fledged disciplinary proceedings against him for any lapse or

misconduct, though requirement of conducting full-fledged disciplinary inquiry proceeding has an exception as provided in Statue 17.06 (1) of the First Statues and under this exception requirement of conducting disciplinary proceedings can be dispensed with in case services of teacher are to be terminated in case of conviction of a teacher for offence involving moral turpitude.

29. In the light of the aforequoted Statues 17.04 and 17.06, we will now examine the nature of show cause notices issued by the Management of the College to the applicant-appellant.

30. The first show cause notice issued on 12.05.2018 only states that the Managing Committee of the College has passed resolution on 11.05.2018 observing therein that the applicant-appellant has been absent from the College without information since 15.02.2018 and therefore the Committee has decided to issue notice seeking his clarification and explanation. This show cause notice makes a mention of unauthorized absence from duty which may or may not be a misconduct or lapse on the part of the applicant-appellant leading to either his dismissal or removal from service. It certainly is not a notice requiring explanation from him as to why his services may not be terminated for his conviction for an offence involving moral turpitude as has been mentioned in Statue 17.04 (1) (e) of the First Statues.

31. We further observe that notice dated 12.05.2018 cannot be said to be charge sheet for alleged misconduct or lapse on the part of the applicant-appellant for his unauthorized absence from duty. Thus, by issuing the said notice dated 12.05.2018, it cannot be inferred that any disciplinary proceeding in respect of charge or lapse relating to unauthorized absence from duty against the applicant-appellant is pending which may create an impression in his mind that he may be faced with a situation where he may be dismissed or removed from service.

32. So far as the second show cause notice dated 13.08.2018 is concerned, this again makes a mention of the decision taken by the Management of the College on 18.07.2018 and informs the applicant-appellant that the Committee of Management has decided to give him last chance to clarify as to why his services may not be terminated. This notice cannot be construed to be a notice for termination of service of the applicant-appellant on the ground of his conviction for an offence involving moral turpitude for the reason that it does not indicate the resolve or decision of the Managing Committee of the college to terminate services of the applicant-appellant on the said ground. It is further observed that before issuing any show cause notice seeking termination of service of a teacher under Statue 17.04 (1) (e) of the First Statues, it is imperative for the Committee of the Management of the College to determine that teacher concerned has been convicted for offence involving moral turpitude. No such determination from the show cause notice dated 13.08.2018 is reflected.

33. To the contrary, if the show cause notice dated 13.08.2018 is read in juxtaposition with the show cause notice dated 12.05.2018, what transpires is that the college authorities intend to take some action for the alleged unauthorized absence from the duty. The show cause notice dated 13.08.2018 is accompanied

by the decision of the Managing Committee taken in its meeting held on 18.07.2018 which mentions about the application submitted by the applicant-appellant seeking leave without pay and also reply dated 28.05.2018 furnished by him to the show cause notice dated 12.05.2018.

34. Resolution dated 18.07.2018 further states that the Managing Committee cannot allow the applicant-appellant to join his duties till he gets the order of conviction quashed by the High Court. Mentioning these background facts, the resolution further states that one more show cause notice be given to the applicant-appellant to clarify the current position and further that if no change is reported then his services will be terminated. This resolution however does not make a mention of conviction of the applicant-appellant for an offence involving moral turpitude.

35. As to whether the Committee of Management has denied the applicant-appellant joining his duties in the College is not the subject matter of this case, hence we refrain ourselves from giving any finding on this issue.

36. As observed above, for taking action leading to termination of services of a teacher of an associated college under Statue 17.04 (1) (e) of the First Statues, determination that teacher concerned is convicted for offence involving moral turpitude appears to be *sine qua non*. Neither the notices dated 12.05.2018 and 13.08.2018 nor the resolution of the Managing Committee of the College, dated 18.07.2018 reflect any such determination. We have no reason to believe that the Managing Committee of the College will not act in accordance with the requirement of law as per Statues 17.04 and 17.06 of the First Statues which *inter alia* provide that in case of misconduct or lapse a teacher can be dismissed or removed or his services can be terminated only after conducting disciplinary proceedings except in case of conviction for an offence involving moral turpitude. For terminating the service of teacher on the ground of his conviction for any offence involving moral turpitude, the employer (in this case, Management of the College) needs to determine that the teacher concerned has been convicted for offence involving moral turpitude.

38. In absence of any such determination in the show cause notices dated 12.05.2018 and 13.08.2018 and also in the resolution of the Managing Committee, dated 18.07.2018, we are not persuaded to infer that applicant-appellant is faced with any irreversible consequences because of non suspension of judgment and order of conviction which is under challenge in appeal.

39. For the discussion made and reasons given above, we do not find any substance in the prayer made in the application seeking suspension of order of conviction. The application is, thus, **rejected**.

(2020)1ILR 1369

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2020

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 1517 of 2007

&
Criminal Appeal No. 1606 of 2007

Ranjit ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Virendra Mohan, Arvind Kumar, Brajendra Singh, Mahesh Chandra Verma, Maneesh Kumar Singh, Shrawan Kumar, Soniya Mishra

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code - Sections 302 IPC, 307/34 - SC/St Act,1989- Section 3(2) (V) - Appeal against conviction.

Section 134 of Evidence Act does not require any particular number of witnesses to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent. It is not the quantity but quality which matters. Therefore, if the testimony of a witness is found reliable on the touch stone of credibility, accused can be convicted on the basis of testimony of even single witness. (para 28)

It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. (para 41)

The testimony of an injured eye-witness needs corroboration from the so-called independent witness(es). When the statement of injured eye-witness is found trustworthy and reliable, the conviction on that basis could always be recorded, of course, having regard to all the facts and surrounding factors. (para 42)

To discard the testimony of injured person very strong and cogent reasons are required and no such major contradictions are present in the evidence of injured witness P.W.-3. (para 44)

P.W.-3 is an injured witness and his testimony has also been corroborated by medical evidence, therefore we do not have any reason to doubt the trustworthiness and acceptability of the evidence of this witness. (para 44)

If this one piece of evidence is not proved, it does not mean that the entire case of prosecution would be discarded on that point alone. If the remaining pieces of evidence available on record achieve the requisite standard i.e., proof beyond reasonable doubt against appellant/ accused, they can safely be convicted. (para 45)

The appeals rejected. (E-2)

List of cases cited: -

1. Smt. Gargi Vs. St. of Hary., AIR 2019 SC 1086

2. Sudarshan & ors. Vs. St. of Mah., 2014 (12) SCC 312

3. Hira Lal Yadav Vs. St. of Jharkhand, 2013 SCW 2278

4. Shiv Lal & ors. Vs. St. of Chhatisgarh, 2011 (9) SCC 561

5. Anand Mohan Vs. St. of Bihar, 2012 (7) SCC 225

6. A. Shankar Vs. St. of Karnatka, 2011 (6) SCC 279

7. Vadivelu Thevar Vs St. of Madras; AIR 1957 SC 614

8. Lallu Manjhi Vs. St. of Jharkhand, AIR 2003 SC 854

9. Sucha singh Vs. St. of Punj. AIR 2003 SC 3617

10. Masalti & ors. Vs. St. of U.P. MANU/SC/0074/1964

11. St. of Punj. Vs. Jagir Singh, AIR 1973 SC 2407

12. Lehna Vs. St. of Haryana (2002 (3) SCC 76)

13. Krishna Mochi & ors. Vs. St. of Bihar etc. (2002 (4) JT (SC) 186)

14. Molu & ors. Vs. St. of Haryana AIR 1976 SC 2499

15. Praful Sudhakar Parab Vs. St. of Mah., AIR 2016 SC 3107

16. Ravinder Kumar & anr. Vs. St. of Punj., 2001 (7) SCC 690 (AIR 2001 SC 3570)

17. Krishna Mochi & ors. Vs. St. of Bihar, MANU/SC/0327/2002

18. Gangabhavani Vs. Rayapati Venkat Reddy & ors., MANU/SC/0897/2013

19. St. of U.P. Vs. Naresh MANU/SC/0228/2011: (2011) 4 SCC 324

20. Tehsildar Singh & anr. Vs. St. of U.P. MANU/SC/0053/1959: AIR 1959 SC 1012

21. Pudhu Raja & anr. Vs. State, Rep. by Inspector of Police MANU/SC/0761/2012: JT 2012 (9) SC 252

22. Lal Bahadur Vs. State (NCT of Delhi) MANU/SC/0333/2013: (2013) 4 SCC 557)

23. Bharwada Bhoginbhai Hirjibhai Vs. St. of Guj. AIR 1983, 753, MANU/SC/0090/1983

24. Paramjeet Singh alias Pamma Vs. St. of Uttarakhand, (2010) 10 SCC 439

25. Ramesh Bhagwan Manjrekar & ors.. Vs. St. of Maharashtra, MANU/MH/0161/1996

26. Mohar & ors. Vs. St. of U.P., MANU/SC/0808/2002

27. Akhtar & ors. Vs. St. of Uttaranchal, MANU/SC/0556/2009

28. Krishan Vs. St. of Har. 2006 (12) SCC 459

29. Jarnail Singh & ors. Vs. St. of Punj., MANU/SC/1584 /2009

30. Abdul Sayeed Vs. St. of M.P., MANU/SC/0702/2010

31. Manjit Singh Vs. The St. of Punj., MANU/SC/1195/2019

32. Ramkant Rai Vs. Madan Rai and Ors. MANU/SC/0780/2003: 2004CriLJ36

33. Gangadhar Behera & ors. Vs. St. of Orissa, MANU/SC/0875/2002

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Shri Shrawan Kumar, learned counsel for the appellant - Ranjit and Shri Diwakar Singh, Advocate, learned Amicus Curiae for the appellant - Lallu @ Lala Ram as well as learned AGA for the State and perused the record.

2. These criminal appeals have been preferred by appellants against the judgment and order dated 26.5.2007, passed by Additional Sessions Judge, Kheri in Sessions Trial No. 852 of 2005, arising out of Crime No. 387 of 2005, under Sections 302 IPC, 307/34 IPC and Section 3(2) (V) SC/ST Act, relating to Police Station Pasgawan, District Kheri, whereby appellant Ranjit has been convicted and sentenced under Section 302 IPC for Life imprisonment and fine of Rs. 1000/-, under Section 307 IPC read with Section 34 IPC for a period of ten yeas and fine of Rs. 5000/- and also in default of payment of fine the appellant is sentenced for six months imprisonment and appellant Lallu @ Lala Ram has been convicted and sentenced under Section 302 IPC for life imprisonment and fine of Rs. 1000/- and under Section 307 IPC read with Section 34 IPC for a period of ten yeas and fine of Rs. 5000/- and also in default of payment of fine the appellant is sentenced for six months imprisonment.

3. Brief facts necessary for disposal of these appeals are that informant Sher Singh son of Badri Yadav, R/o Village Kashipur, District Kheri submitted a

written information on 4.4.2005 at 4.10 A.M. at Police Station Pasgawan, District Kheri stating therein that he is a resident of village Kashipur, Police Station Pasgawan and in the intervening night of 3/4.4.2005 his father Badri Yadav was sleeping in a "Baggar'(A room usually situated in the outer portion of the house for multifarious activities) along with one Dal Chand Raidas. His two sons Pushpendra and Manoj were also sleeping in the same "Baggar' at a short distance from Badri Yadav and he was sleeping on the roof of the house. It is further stated that his father, namely, Badri Yadav on 18-19 March had executed a sale deed in his favour pertaining to land admeasuring 7 Bighas and he was residing with him since long. His brothers Lallu @ Lala Ram (Appellant), Sarnam and Devi were angry with him on this score. It was further stated that litigation pertaining to the same land was also pending in between Dalchand and Ram Kali and appellant Ranjit was doing pairvi of that case on behalf of Ram Kali. His father also testified in favour of Dal Chand in that case and due to this reason appellant Ranjit was having enmity with his father.In the intervening night of 3/4.4.2005 at about 12.00 O' clock his brother Lallu @ Lala Ram, Ranjit and Gajram committed murder of his father Badri Yadav by assaulting him with 'Banka' and by firing from country made pistol. It was also stated that Dalchand also sustained fire-arm injuries in the incident and on hearing the sound of Gun shots he, his sons as well as Ram Autar had seen accused persons committing the crime and running away, in the light of torches.Ranjit was armed with 'Banka' and other accused persons were armed with 'country made pistols'.

4. On the basis of the aforementioned written information an FIR was registered at Police Station Pasgawan, District Kheri on 4.4.2005 at 4.10 A.M. against Lallu @ Lala Ram, Ranjit and Gajram under Sections 302/307 IPC at Case Crime No. 387 of 2005 and the investigation of the crime was entrusted to Shri Ram Pradeep Yadav, S.H.O., Police Station Pasgawan.

5. The Investigating Officer of the crime, namely, Ram Pradeep Yadav after taking over the investigation of the case proceeded to the place of occurrence and inspected the spot on the pointing of informant and prepared the site plan (Ext. Ka-20) of the scene of occurrence. He also got the inquest report (Ext. Ka-14) of the body of the deceased and other necessary papers prepared for the purpose of post mortem of the body of the deceased i.e. sample seal (Ext. Ka-15) Challan Lash (Ext. Ka-16), photo lash (Ext. Ka-17), Chitthi R.I. (Ext. Ka-18), Chitthi C.M.O. (Ext. Ka-19). He also collected the simple and blood stained soil, blood stained piece of quilt and cushion (Gadda) from the spot and prepared a memo of the same as (Ext. Ka-8). He also inspected the torch presented by informant Sher Singh and also prepared a seizure memo of the same (Ext. Ka-9).The Investigating Officer also inspected the "ladder' which was stated to have been used by the informant for sleeping on the roof of the house and after inspecting the same he prepared a memo (Ext. Ka-10) of the same and placed the same in the custody of informant.

6. The postmortem on the body of deceased Badri Yadav was performed by P.W.6- Dr. Akhilesh Khare on 5.8.2005 at 3.00 P.M. at District Hospital, Kheri He found the body of deceased of about 65 years, a person of average built, rigor mortis had passed from both the upper and lower extremities and postmortem staining was present on the back. The skin was

pealed off at places of abdomen and distended. On internal examination, 2nd and 3rd ribs of right side were found fractured. The small intestine was found containing gases while faecal matter and gases were found in large intestine. The gallbladder was half full and spleen and kidneys were found pale.

Following ante-mortem injuries were found on the body of the deceased:-

(i) Incised wound 8 cms. x 2 cms. x bone deep over left angle of mouth and face underlying muscles vessels upper and lower jaw found cut.

(ii) Incised wound 10 cms. x 1 cm. x bone deep over chin, 1cm. behind tooth cut underlying lower jaw found cut.

(iii) Incised wound 6 cms. x 1 cms. x bone deep over chin 1.5 cm. below Inj. No.2 underlying lower jaw found cut.

(iv) Multiple incised wound in an area of 10 cms. x 5 cms. vertebra deep over front and left side of neck 4 cms. below chin underlying muscles, vessels, trachea, occiphagus and 2nd central vertebra, spinal cord found cut.

(v) Incised wound 4 cms. x 1 cm. x bone deep over back of ring finger and little finger.

(vi) Fire-arm wound of entry 1 cm. x 1 cm. x chest cavity deep on left side back of chest 2 cms. below left angle of scapula, and 5 cms. away from mid-line on back, margins inverted, irregular, echymosed.

(vii) Fire-arm wound of exit 2 cms. x 2 cms. x chest cavity deep on upper part of right side of chest 8 cms. above right nipple at 12 O' clock position, margins inverted, irregular echymosed, on dissection underlying both pleura, both lung found lacerated and 1.5 Lt. Clotted and fluid blood present in chest cavity and injury no.7 communicating to Injury No. 6 through and through.

The cause of death of the deceased was found to be shock and hemorrhage which was the result of ante-mortem injuries.

7. The injuries sustained by injured Dal Chand were examined on 4.4.2005 at 5.45 A.M. by Dr. Ranjendra Prasad (P.W.7) who was posted as Medical Officer at District Hospital Kheri. Following injuries were found on the person of Dal Chand:-

(i) Fire-arm wound of entry 1.0 cm. x 0.8 cm. x depth not probed on upper part of chest just below medial end of right cervical, clotted blood present, margins inverted, echymosed. KUO advised x-ray.

(ii) Fire-arm wound of exit 2.00 cms. x 1.00 cm. x depth not probed on right side of chest 7 cms. away from right nipple, clotted blood present, margin everted, KUO advised x-ray.

X-Ray was advised for both the injuries. The injuries were stated to have been caused by fire-arm weapons and duration of both the injuries were described fresh. The x-ray report dated 4.4.2005 available on record as Ext. Ka-2 reveals that heterogeneous opacity was noticed in right lung (upper and middle zone) of the injured.

8. The investigation officer also caused the arrest of the appellant Lallu @ Lala Ram and recovered a country made pistol and cartridgeson his pointing out, from his house which was allegedly used by him in the commission of offence and also prepared a recovery memo of the same.

9. The second Investigating Officer of the crime, Shri Shiv Ram Yadav recorded the statement of the witnesses and also took the police custody remand of

accused Ranjit and a 'Banka' was recovered from his pointing, which was concealed by him in the southern room of his house. The 'Banka', so recovered was sealed and a recovery memo of the same (Ext. Ka-11) was prepared. The Investigating Officer after collecting sufficient evidence submitted charge sheet against accused Lallu @ Lala Ram, Ranjit and Gajram under Sections 302, 307/34 IPC and Section 3(2) 5 SC/ST Act.

10. The case being triable by the Sessions Court was committed to the Court of Session and charges under Sections 302, 307/34 IPC were framed against appellants. Both appellants denied the charges and claimed trial.

11. The prosecution in order to prove its case before the trial court produced following documentary evidence:-

(i) Written Information **(Ext. Ka-1)**

(ii) X-ray report pertaining to injured Dal Chand **(Ext. Ka-2).**

(iii) Site plan **(Ext. Ka-3)**

(iv) Site plan **(Ext. Ka-4)**

(v) Charge sheet **(Ext. Ka-5)**

(vi) Postmortem report of deceased Badri **(Ext. Ka-6)**

(vii) Chemical analysis report **(Ext. Ka-7)**

(viii) Memo of seizure of plain and blood stained soil **(Ext. Ka-8)**

(ix) Memo of seizure of chart **(Ext. Ka-9)**

(x) Memo of seizure of ladder and Gobar Gas bulb **(Ext. Ka-10)**

(xi) Memo of recovery of Banka **(Ext. Ka-11)**

(xii) Chick FIR **(Ext. Ka-12)**

(xiii) G.D. Kayami **(Ext. Ka-13)**

(xiv) Inquest Report **(Ext. Ka-14)**

(xv) Sample of seal **(Ext. Ka-15)**

(xvi) Chalian Lash **(Ext. Ka-16)**

(xvii) Photo Lash **(Ext. Ka-17)**

(xviii) Chitthi R.I. **(Ext. Ka-18)**

(xix) Chitthi CMO **(Ext. Ka-19)**

(xx) Site plan of the place from where Banka is recovered**(Ext. Ka- 20)**

12. Apart from the above mentioned documentary evidence the prosecution also relied on the testimony of following witnesses:-

(i) P.W.1- Sher Singh **(informant)**

(ii) P.W.2- Pushpendra **(Eye witness)**

(iii) P.W.3-Dal Chand **(injured witness)**

(iv) P.W.4- Dr. V.K. Verma **(radiologist)**

(v) P.W.5- Shiv Ram Yadav **(Investigating Officer)**

(vi) P.W.6- Dr. Akhilesh Khare **(who conducted postmortem)**

(vii) P.W.7- Dr. Rajendra Prasad **(who examined injuries of injured PW-3 Dal Chand)**

(viii) P.W.8- Ram Autar **(Eye witness)**

(ix) P.W.9- Head Constable-Ram Prakash **(Scribe of Chick FIR and G.D.)**

(x) P.W.10- Ram Autar Singh-Sub Inspector **(who prepared inquest report)**

(xi) P.W.11- S.I. Ram Pradeep Yadav **(Investigating Officer)**

(xii) P.W.12- S.I. B.D. Arun **(who caused recovery of Banka)**

After completion of evidence of prosecution the statement of appellants was recorded under Section 313 of Cr.P.C.

wherein both appellants have stated that they have been falsely implicated in the case on the basis of enmity and false recoveries on their pointing have been shown by the police. They claimed that they are innocent and have been framed on the basis of enmity and party-bandi. The accused persons in their defence have placed before the trial court certified copy of a judgment (Ext. Kha-1) dated 12.2.2007 passed by Consolidation Officer Salya in Case No. 2869/31/04-05, under Section 9 Ka (2) of Consolidation Act, Pargana Pasgawan, Tehsil Mohammadi, District Kheri in Dal Chand Vs. State. Certified copy of objections (Ext. Kha-2) filed by Smt. Bitana w/o Bhikhari filed in the above mentioned case and certified copy of statement of witness Ram Autar s/o Chokhe Lal R/o Village Kashipur, P.S. Pasgawan, District Kheri recorded in Crl. Case No. 772/05 under Section 25(1)-B Arms Act, Police Station Mohammadi, District Kheri (Ext. Kha-3) were also submitted by them.

13. Trial court after considering the evidence tendered by the prosecution and accused persons and after appreciating the same came to the concussion that the prosecution has proved its case beyond reasonable doubt against appellants Lallu @ Lala Ram and Ranjit and thereby convicted both of them under Sections 302 IPC and 307 IPC read with Section 34 IPC in the manner recorded in the second paragraph of this judgment. The trial Court did not find accused Gajram guilty of any offence and therefore acquitted him of all the charges. The trial court also did not find the charges under Section 3(2) (V) of SC/ST Act proved against all accused persons.

14. Learned counsels for the appellants have submitted that the trial court in utter disregard to the evidence available on record has convicted the appellants for the offence which they have not committed and the findings of the trial court pertaining to the guilt of the appellants are not based on evidence available on record.

It is overwhelmingly submitted that the main eye witnesses of the crime, namely P.W.1- Sher Singh and P.W. 2- Pushpendra have not supported the case of the prosecution, but the trial Court, even in absence of any reliable evidence, has convicted the appellants on the basis of unreliable testimony of P.W.3- Dal Chand and P.W.8- Ram Autar, while it was evident on record that Dal Chand and Ram Autar are brothers and are interested in conviction of the appellants on the basis of enmity.

It is next submitted that FIR in the matter has been lodged ante-time and the trial court has ignored this glaring fact, which was itself sufficient to discard the prosecution case. P.W.3 Dal Chand is stated to be the prime witness of the incident and is stated to have sustained fire-arm injuries but even if the incident as narrated by P.W.3- Dal Chand is believed then it was impossible for P.W.3- Dal Chand to have recognized the real assailants in absence of any source of light. The theory of prosecution that gobar gas lamp was lighting in the baggar could not be believed in the back ground facts and evidence on record. The prosecution story pertaining to the presence of P.W.3 in the baggar owned by deceased Badri is also not believable as no quilt or cushion of P.W.3- Dal Chand was recovered by the Investigating Officer, while the quilt and "Gadda' (Cushion) which at the time of incident was being used by the deceased Badri Yadav was recovered by the Investigating Officer. The above factual

matrix completely rules out the presence of P.W.3- Dal Chand at the spot at the time of incident.

It is next submitted that the ocular evidence has also not been supported by the medical evidence and keeping in view that the informant of the case, namely, P.W.1- Sher Singh and eye witness P.W.2- Pushpendra have not supported the case of the prosecution the trial Court has materially erred in convicting the appellant. The recovery of Banka and country made pistol at the instance of appellant Ranjit and appellant Lallu @ Lala Ram is highly doubtful. The testimony of P.W.8- Ram Autar who is brother of P.W.3- Dal Chand is also not acceptable and there is no reason shown by the prosecution as to why he was shown to be the witness of both recoveries and therefore in absence of any independent witness of the above mentioned recoveries the evidence of P.W.-8 pertaining to the recovery could not be accepted.

Learned Amicus Curiae relied on following case laws in support of his contention.

(i) **Smt. Gargi Vs. State of Haryana,** AIR 2019 SC 1086.

(ii) **Sudarshan and others Vs. State of Maharastra,** 2014 (12) SCC 312.

(iii) **Hira Lal Yadav Vs. State of Jharkhand,** 2013 SCW 2278.

(iv) **Shiv Lal and others Vs. State of Chhatisgarh,** 2011 (9) SCC 561.

(v) **Anand Mohan Vs. State of Bihar,** 2012 (7) SCC 225.

(vi) **A. Shankar Vs. State of Karnatka,** 2011 (6) SCC 279.

15. Per contra learned AGA submits that the prosecution has been able to prove its case before the trial court beyond all reasonable doubts and the court below has appreciated the evidence of the prosecution witness keeping in view the established principles of appreciation of evidence. P.W.3- Dal Chand is an injured witness of the incident and he has sustained grievous fire-arm injuries, which could not be self inflicted. His presence on the spot is proved beyond all reasonable doubt as he was a close friend of deceased Badri. The role of firing with a country made pistol has been assigned by the injured witness P.W.3- Dal Chand to the appellant Lallu @ Lala Ram while the role of inflicting injuries to deceased Badri Yadav by a "Banka' has been attributed to appellant Ranjit. The injuries of fire-arm has been found on the person of P.W.3- Dal Chand as well as on the person of deceased Badri Yadav. While injuires which can be sustained by "Banka' has been found on the person of deceased Badri Yadav. The Investigating officer has also collected the piece of quilt and cushion and also the blood stained and plain soil from the baggar wherein the incident had happened.

It is next submitted that the instant case is based on direct evidence of eye witnesses and therefore though the motive is not of any significance but the prosecution has been able to successfully prove that the deceased Badri executed a sale deed of his agriculture land admeasuring 7-8 Bighas in favour of P.W.1- Sher Singh and due to this his other sons including appellant Lallu @ Lala Ram were angry with him. The aforesaid sale deed in favour of P.W.1- Sher Singh is stated to have been executed on 18-19 of March, 2005, while the incident had occurred in its close proximity on 4.4.2005. It has been also proved that P.W.3- Dal Chand and P.W.8- Ram Autar were having litigation with a

woman, named, Ram Kali who was claiming herself to be the wife of their uncle Bhikhari and was also demanding share in his land. The said litigation was pending in the revenue court. Therefore, there was sufficient motive and opportunity available to the appellants to commit the crime.

It is further submitted that keeping in view the quality of evidence available on record, the trial court has rightly convicted the appellants and therefore, no interference is warranted in the same and the appeal is liable to be dismissed.

16. We have considered the submissions of learned counsels for the appellants as well as of learned AGA. Perusal of evidence available on record would reveal that P.W.1, namely, Sher Singh is the informant of the First Information Report. He has stated in his statement, recorded before the trial court, that in the night of the occurrence his father Badri Yadav was sleeping in the baggar(Room) along with Dal Chand and at some distance from him his sons Pushpendra and Manoj were sleeping on their cots, while he was sleeping on the roof of the house. He further stated that his father some days before the incident had executed a sale-deed of his land in his favour . He denied to have seen appellants committing the crime in the light of torch and the bulb lighting in the baggar. He stated that when he reached in the baggar, he did not see any one. He acknowledged to have lodged the FIR but in the same breath has stated that the FIR was lodged by him on the information provided by the villagers and he only put his signatures on the application which was not read over to him. After being declared hostile this witness denied to have given any statement to the Investigating Officer under Section 161 of the Cr.P.C.. However, he has admitted that accused Gajram is a witness of sale deed executed in his favour and he is having very good relations with him.

17. P.W.2- Pushpendra, who is the son of P.W.1- Sher Singh has stated that on the fateful night he was sleeping in the baggar at some distance from the deceased. He denied to have any knowledge with regard to any litigation pending in between P.W.3- Dal Chand and Ram Kali and also that in this case parivi on behalf of Ram Kali was being done by the appellant- Ranjit. He also denied to have witnessed the crime being committed by the appellants as according to him there was complete darkness. He admitted that the incident occurred at about 12.00 O' clock in the night and P.W.3- Dal Chand as well as his brother Manoj was also lying in the "baggar' along with deceased Badri Yadav. This witness after being declared hostile has denied to have given any statement under Section 161 of the Cr.P.C to the Investigating Officer.

18. P.W.3- Dal Chand is the injured witness of the case. He stated that on the night of the occurrence he was sleeping in the baggar with deceased Badri as they were very close friends. He after taking his dinner used to come to the house of Badri and used to have a talk with him about the village. This witness has further stated that some days before the incident, deceased Badri Yadav had executed a sale deed of his 7 bighas agricultural land in favour of P.W.2- Sher Singh and due to this other sons of Badri Yadav, namely, Lallu @ Lala Ram, Sarnam and Devi were angry with him. A litigation with Ram Kali, pertaining to the land of his uncle Bhikhari, was also pending in a revenue

Court and appellant Ranjit was doing pairvi in that case on behalf of Ram Kali and he was also annoyed with him.

Narrating the incident he has stated that at the time of incident a gobar gas bulb was lighting in the "baggar' and two grand sons of Badri Yadav, namely, Pushpendra and Manoj were lying in the baggar at some distance from him. Sher Singh was sleeping on the roof of the house and he and Badri were lying on the ground of baggar. At about 12.00 O, clock in the night a gun shot was fired. He made an attempt to stand up, however, at the same time second Gun shot was fired which hit him in his chest. At the same time Sher Singh put on his "Torch' from the roof and he in that light as well as in the light of the bulb of the Gobar gas saw Lallu @ Lala Ram as the person who was firing. He also saw that Ranjit of his village was assaulting Badri Yadav with a Banka and Lala Ram was having a country made pistol in his hand by which he fired at him and Badri Yadav. On a hue and cry made by them many villagers assembled at the scene of crime and the accused persons fled away from there.

19. P.W.4- Dr. V.K. Verma, who at the time of incident was posted as radiologist in District Hospital, Lakhimpur Kheri and had performed x-ray of the injured Dal Chand and prepared x-ray report on the basis of x-ray plates has proved X-ray report as Ext. Ka-2 and x-ray plates as material Ext. 1&2 and stated that in the x-ray of injured Dal Chand, heterogeneous opacity was found in the right lung.

20. P.W.5-Shri Shiv Ram Yadav was posted as Circle Officer, Police at the relevant point of time and stated to have recorded the statement of accused Gajram, Scribe of FIR Ganesh Chandra Pandey, Mahesh Chandra, S.I. Ram Autar Singh, Pushpendra. Manoj and Ram Autar. He also inspected the place of recovery of country made pistol and also prepared the site plan, Ext. Ka-3. He also stated to have recorded the statement of witness of inquest report and also of injured Dal Chand. He after recording statement of appellant Ranjit took him on Police custody remand and a "Banka' has been recovered on his pointing out from a room of his house. This witness has proved the recovery memo of Banka as also the site plan of the place of recovery of Banka as Ext. Ka-4.

21. P.W.6- Dr. Akhilesh Khare, who was posted as a Medical Officer in District Hospital on 5.8.2005 is stated to have performed the postmortem on the same day at 3.00 P.M. on the body of the deceased Badri Yadav. He proved the postmortem report (Ext. Ka-6) to have been prepared in his hand writing and signatures . The details of the postmortem report has been elaborately given in paragraph 6 this judgment. He opined that death of the deceased Badri Yadav had occured due to excessive bleeding and shock due to ante-mortem injures and also that the injuries caused to Badri Yadav were caused by fire-arm and sharp-edged weapon like "Banka'.

22. P.W.7- Dr. Rajendra Prasad has stated to have medically examined P.W.3-Dal Chand on 4.4.2005 at 5.45 A.M. who was brought to him by police constable Rajendra Prasad Yadav. He noticed one fire-arm injury of entry and one fire-arm wound of exit on his person and has proved the injury report (Ext. Ka-7) under his signatures and writing . According to him the above injuries were caused by

fire-arm (country made pistol). Both the doctors, namely, P.W.6- Dr. Akhilesh Khare and P.W.7- Dr. Rajendra Prasad have stated that injuries on the person of deceased and injured might have been inflicted at 12.00 O' clock in the intervening night of 3-4.4.2005. Injury report of P.W.3-Dal Chand has been dealt with elaborately in para 7 of this judgment.

23. P.W.8- Ram Autar is stated to have heard a sound of gun shot fired at about 12.00 O' clock in the intervening night of 3-4.4.2005 and stated to have come out of his house and saw that appellant Lallu @ Lala Ram armed with country made pistol of .315 bore and appellant Ranjit armed with Banka were emerging out from the baggar of Badri Yadav. He claimed to have seen the appellants in the light of bulb which was lighting in the baggar. When he went in side he saw that Badri Yadav was lying dead after sustaining fire-arm and Banka injuries while his brother Dal Chand was lying in injured condition. He brought Dal Chand to the Police Station from a tractor-trolley along with Sher Singh and Tule Ram and the FIR of the incident was lodged by P.W.1- Sher Singh . He also stated that Badri Yadav had executed a sale deed of his land in favour of his son Sher Singh and other sons of Badri Yadav including Lallu @ Lala Ram were angry with Badri Yadav on this score and a revenue case was also pending between Dal Chand and his aunt Ram Kali wherein appellant Ranjit was doing pairvi on behalf of Ram Kali. He also stated that one Sub-Inspector of Police came to the place of occurrence after the incident and collected plain and blood stained soil and also inspected torch, ladder, Gobar gas apparatus from which a bulb was lighting and also that a memo of the above proceedings was prepared as Ext. Ka-8, Ka-9 and Ka-10. He also stated to be a witness of the recovery of a country made pistol of .315 bore and one empty and 2 live cartridges on the pointing out of appellant Lallu @ Lala Ram. He further stated to be a witness of the recovery of a Banka from the house of Ranjit at his pointing out and proved the recovery memo (Ext. Ka-11) prepared with regard to this recovery.

24. P.W.9- Head Constable Ram Prakash has proved the chick FIR and G.D. Kayami to be written in his hand writing as (Ext. Ka-12) and (Ext. Ka-13).

25. P.W.10- S.I. Ram Autar Singh has stated to have prepared the inquest report (Ext. Ka-14) of the body of Badri Yadav on the direction of the Station House Officer and also the necessary papers i.e. specimen seal (Ext. Ka-15), Chalan lash (Ext. Ka-16), photo lash (Ext. Ka-17), letter R.I. (Ext. Ka-118), letter C.M.O. (Ext. Ka-19) in his signatures and hand writing and also to have prepared the memo (Ext. Ka-8) of seizing blood stained and plain soil and piece of quilt and cushion. He also stated to have inspected the torch of Sher Singh, ladder, Gobar gas bulb and also to have prepared memo Ext. Ka-9 and Ext. Ka-10 in this respect. On being re-examined he proved material Ext, blood stained and plain soil, blood stained cushion and blood stained quilt as material Ext. No.s 3,4,5 and 6, respectively.

26. P.W.11- S.I. Ram Pradeep Yadav has stated that he prepared site plan of the place of occurrence on the pointing out of Sher Singh and proved the same as Exit. Ka-20 and also that the inquest report was prepared under his direction. He stated to have arrested the appellant Lallu @ Lala

Ram and to have recovered one country made pistol, one empty and two live cartridges on his pointing. He also claimed to have prepared the recovery memo of country made pistol and cartridges.

27. P.W. 12- S.I. B.D. Arun has stated to have taken appellant Ranjit on police custody remand and a Banka is stated to have recovered on his pointing from a room of his house pertaining to which a recovery memo (Ext. Ka-11) was prepared by him. The "Banka' has also been exhibited as material Ext. 7.

28. Having perused evidence available on record we are of the considered view that there cannot be any doubt in the proposition that Section 134 of Evidence Act does not require any particular number of witnesses to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent,. It is not the quantity but quality which matters. Therefore, if the testimony of a witness is found reliable on the touch stone of credibility, accused can be convicted on the basis of testimony of even single witness. This principle was highlighted in **Vadivelu Thevar V/s state of Madras; AIR 1957 SC 614,** wherein it is held by Hon,ble Apex Court that

"On a consideration of the relevant authorities and the provisions of the Indian Evidence Act, the following propositions may be safely stated as firmly established :

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

"The contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated."

"The Indian Legislature has not insisted on laying down any such exceptions to the general Rule recognized in Section 134 quoted above. The Section enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

"It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The

matter thus must depend upon the circumstance of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution."

"Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony."

29. In **Lallu Manjhi vs. State of Jharkhand, AIR 2003 SC 854** Hon,ble Supreme Court held in Para 10 of the report, that *"The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness."*

30. In **AIR 2003 SUPREME COURT 3617, Sucha singh v/s State of Punjab** Honble Apex Court after considering **Masalti and others vs. State of U.P. MANU/SC/0074/1964, State of Punjab v. Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76)**, opined as under:- *"Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found*

to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that, it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Ali v. State of Uttar Pradesh (AIR 1957 SC 366). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurcharan Singh and another v. (AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and another v. State of Madhya Pradesh, 1972 3 SCC 751) and Ugar Ahir and others v. State of Bihar (AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and others v.state of punjab (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and another (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and

horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in ***Krishna Mochi and others v. State of Bihar etc. (2002 (4) JT (SC) 186)."***

31. A perusal of the evidence in the background of the legal position mentioned herein-above would reveal that P.W. 1- Sher Singh who is the informant of the case and his son P.W.2- Pushpendra who claimed to be eye witness of the crime have not supported the case of the prosecution in the court. Both these witnesses have only supported a part of the prosecution version with regard to the fact that few days before the incident Badri Yadav had executed a sale deed of 7-8 Bighas of his land in favour of P.W. 1- Sher Singh. It is also admitted by these witnesses that the incident had actually occurred in the intervening night of 3-4.4.2005 and at that point of time P.W.3- Dal Chand was inside the "baggar' with deceased Badri Yadav and two sons of P.W.1- Sher Singh, namely, Pushpendra and Manoj were also inside the baggar. It is to be recalled at this juncture that it is a peculiar case where a son (Lala Ram @ Lallu) has been charged with committing the murder of his father Badri Yadav and the informant of the crime is also another son of the deceased Sher Singh, meaning thereby that informant P.W.1- Sher Singh is the real brother of appellant Lallu @ Lala Ram and P.W.-2 Pushpendra is the real nephew of the appellant Lallu @ Lala Ram. Therefore it is evident on record that these two witnesses, namely, P.W. 1- Sher Singh and P.W. 2- Pushpendra have resiled from their statements given under Section 161 of Cr.P.C. only to save appellant Lallu @ Lala Ram.

A three Judges Bench Of Hon'ble Supreme Court in **Molu and others v. State of Haryana AIR 1976 SUPREME COURT 2499** has opined as under :-

"11. Finally it was argued by the appellants, following the reasons given by the Sessions Judge, that there was no adequate motive for the accused to commit murder of two persons and to cause injuries to others. It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes. however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of the eye-witnesses is credit-worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant. For these reasons, therefore, we agree with the High Court that the prosecution has been able to prove the case against the appellants beyond reasonable doubt."

32. Keeping in view the above mentioned legal position as well as the statement of P.W.1- Sher Singh and P.W.2- Pushpendra this much portion of their evidence is reliable that in the intervening night of 3-4.4.2005 at 12.00 O' clock deceased Badri Yadav, P.W.3- Dal Chand, Pushpendra and Manoj were sleeping inside the baggar and P.W.1- Sher Singh was sleeping on the roof of the house and at that time Gun shots were

fired and Badri Yadav died of Banka and fire-arm injuries while Dal Chand sustained fire-arm injuries and few days before incident deceased Badri Yadav had executed sale deed of his agricultural land in favour of Sher Singh.

33. It is also apparent on record that appellant Lallu @ Lala Ram is the son of deceased Badri Yadav. In the FIR it has been stated that on 18-19 March Badri yadav executed a sale deed of 7 Bighas of land in favour of P.W.1- Sher Singh, due to which appellant Lalla ram@ Lallu was angry with him along with his two other brothers- Sarnam and Devi. It is also stated in the FIR that litigation pertaining to some agricultural land was also pending in a revenue court in between Dal Chand and Ram Kali. The appellant Ranjit was allegedly doing pairvi in that case on behalf of Ramn Kali and the father of Sher Singh namely Badri Yadav had also testified in favour of Dal Chand and on this score Ranjit was having enmity with Badri Yadav also. It is also mentioned in the FIR that due to the aforesaid reasons deceased Badri was living with informant - Sher Singh. We have already discussed the testimony of P.W.1- Sher Singh, P.W.2- Pushpendra, who are hostile witness and we have also reached to a conclusion as to which part of their testimony is reliable and can be acted upon.

So far as the necessity of prosecution to prove motive of crime is concerned, in **Praful Sudhakar Parab v. State of Maharashtra, AIR 2016 SUPREME COURT 3107** Hon'ble Supreme Court has held as under :-

"16. .....Motive for committing a crime is something which is hidden in the mind of accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person. This Court in ***Ravinder Kumar and another v. State of Punjab, 2001 (7) SCC 690 : (AIR 2001 SC 3570),*** *has laid down following in paragraph 18:*

"18.....It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we deem it useful to refer to the observations of this Court in State of Himachal Pradesh v. Jeet Singh {1999 (4) SCC 370 : (AIR 1999 SC 1293)}:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

Keeping in view the above legal position we are of considered opinion that the prosecution is not obliged to prove those facts which are either impossible for the prosecution to prove or which are locked up in the mind of the accused person(s) i.e. as to what tempted them to commit the crime. Therefore, the cases which are based on direct evidence of the

eye witnesses should be decided on the basis of the quality and probative value of the evidence of such eye witnesses.

34. Coming to the testimony of P.W.3- Dal Chand, who is stated to be a close friend of deceased Badri Yadav , it is evident that he has supported the version of the First Information Report in his testimony and has also stated about the execution of the sale deed by Badri Yadav pertaining to 7-8 Bighas in favour of P.W.1- Sher Singh and also that his other sons including appellant Lallu @ Lala Ram were having enmity with him on this score. This witness is also stated about the pendency of a litigation with regard to the agricultural land between him and Ram Kali and also that appellant Ranjit was doing pairvi on behalf of Ram Kali in that case. P.W.3- Dal Chand has also stated in his cross- examination that Ram Kali was claiming herself to be the wife of his uncle Bhikhari and this litigation was pertaining to the agricultural land of Bhikhari. It is further stated by him that he was claiming the said land on the basis of a Will. However, their Will was not upheld by Revenue Court. It is also stated by him that whereabouts of his uncle Bhikhari was not known for 10-12 years prior to the incident and also that the appellant Ranjit is nephew of his uncle Bhikhari on the basis of village relations.

It is further stated by P.W.3- Dal Chand that the deceased Badri Yadav was his close friend and villagers used to ask Badri Yadav as to why he had given more than half share of his land to his one son Sher Singh.

35. P.W.8- Ram Autar has also corroborated the version of FIR pertaining to the execution of sale deed of his agriculture land by the deceased Badri in favour of his son Sher Singh with regard to 7-8 Bighas of land and also that his other sons, namely, Sarnam, Lallu @ Lala Ram and Devi were angry with him. He also corroborated the fact of pendency of a litigation between Dal Chand and Ram Kali wherein the appellant Ranjit was doing pairvi on behalf of Ram Kali. In his cross examination he maintained that he was also a party in that litigation and Ranjit was procuring the witnesses in that case for Ram Kali.

36. Perusal of record would further reveal that the appellants have also filed documentary evidence in the shape of a certified copy of the judgment of Consolidation Officer, dated 15.10.2004 (Ext. Kha-17) passed in Case No. 2869/31/04-05 Dal Chand and others Vs. State. This case was started on an application moved by one Smt. Bitana, who claimed herself to be the wife of Bhikhari. P.W.3- Dal Chand and P.W. 8- Ram Autar were also parties in this case. Ext. Kha-2 is a certified copy of the objections filed by Smt. Bitana, wife of Bhikhari and Ext. Kha-3 is a certified copy of the statement of Ram Autar recorded in Criminal Case No. 77205 under Section 25 Arms Act. Though it is not clear whether Smt. Bitana and Smt. Ram Kali are one and same person or whether Smt. Bitana was also known as Smt. Ram Kali, but the evidence available on record sufficiently proves this fact that the appellant Lallu @ Lala Ram was annoyed by the execution of the sale deed of 7-8 Bighas of agricultural land by his father (deceased Badri yadav) in favour of his real brother P.W.1- Sher Singh and also that Ranjit was also keeping enmity with Dal Chand. Moreover instant case is based on the testimony of the eye witnesses who have seen the crime being committed by the

appellants. Therefore the motive in this case is not of much importance. Nevertheless, the prosecution has been successful in proving that there was sufficient motive with the appellants to commit offence.

37. Coming to the next submission of learned counsel pertaining to the non availability of any source of light at the spot and that in absence of any source of light it was not possible for any one to witness the real assailants, it it may be noticed that the case of the prosecution is consistent on the point that the incident occurred at about 12.00 O' clock in the mid night and the witnesses have seen the occurrence in the light of torch and the light which was emanating from a bulb lighted from the Gobar gas/ cell, which was lighting at the time of incident in the baggar. P.W.3- Dal Chand and P.W.8- Ram Autar (who was residing adjacent to the scene of occurrence) have stated that at the time of occurrence a Gobar gas bulb was lighting in the baggar and the same was fitted with the Gobar gas apparatus. Investigating Officer, who arrived at the spot after the incident has also found a bulb fitted with Gobar gas apparatus in side the baggar where the deceased and Dal Chand were sleeping. The Investigating Officer has also prepared a memo Ext. Ka-10 pertaining to the seizure of the bulb and apparatus and also a memo of torch of Sher Singh. The place where the bulb was lighting has also been shown by the Investigating Officer in the site plan (Ext. Ka-3) by the word "E". Therefore it is evident and proved on record that though the incident had occurred in the night but there was sufficient light in and around the place of occurrence and P.W.1- Sher Singh was also having a torch with him, in the light of which appellants could easily be identified. Moreover, appellant Lallu @ Lala Ram is the son of the deceased Badri Yadav and Ranjit was doing the pairvi in a case against Dal Chand and both these persons were well known to the witnesses, therefore there is no possibility of any error so far as identification of the appellants as the perpetrators of the crime is concerned. Hence, we do not find any force in this submission of learned counsel for the appellants.

38. It is further argued by learned counsel for the appellants that P.W.3- Dal Chand was not in a position to see as to who had committed the crime. He could only see with his one eye and on this score his evidence could not be relied on.

In **Krishna Mochi and Ors. vs. State of Bihar, MANU/SC/0327/2002** Hon,ble Supreme Court held as under :-

"As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : 1981CriLJ1012 , normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. Accusations have been established against accused-appellants in the case at hand."

In **Gangabhavani vs. Rayapati Venkat Reddy and Ors.** Reported in

MANU/SC/0897/2013 it has been held as under:-

*"In **State of U.P. v. Naresh MANU/SC/0228/2011 : (2011) 4 SCC 324,** this Court after considering a large number of its earlier judgments held: In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.*

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

*A similar view has been reiterated by this Court in **Tehsildar Singh and Anr. v. State of U.P. MANU/SC/0053/1959 : AIR 1959 SC 1012; Pudhu Raja and Anr. v. State, Rep. by Inspector of Police MANU/SC/0761/2012 : JT 2012 (9) SC 252; and Lal Bahadur v. State (NCT of Delhi) MANU/SC/0333/2013 : (2013) 4 SCC 557).***

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence."

39. Honble Apex Court long back in the matter of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat as reported in AIR 1983, 753, MANU/SC/0090/1983** in para-5, observed and settled following principles for appreciation of evidence without entering into re-appraisal or re-appreciation of the evidence in the context of minor discrepancies. The principles laid down are as under:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed an the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element

of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

40. Perusal, of the evidence on record in the back ground of submissions of Ld. Counsel for appellants if tested on the touchstone of the above mentioned legal position, would reveal that P.W.1- Sher Singh in his statement has stated that he after hearing the sound of a gun shot did not see the appellants running away from the scene and when he reached the spot no assailant was present there. As has been observed herein before that P.W.1- Sher Singh has chosen not to support the prosecution case due to the fact that appellant Lallu Ram @ Lala Ram is his real brother but his malafide is apparent on the face of his evidence when he has stated that he could not see the assailants and he lodged the First Information Report against the appellants on the basis of information provided by the villagers and he only put his signatures on the written application without having any knowledge of the contents of the same. He has also stated that he only know to make signatures and he is an illiterate person. A perusal of FIR would reveal that P.W.1- Sher Singh has claimed himself to be an eye witness of the incident. In his cross examination he has stated that co-accused Gajram was a witness of the sale deed executed by Badri in his favour and he is having very cordial relations with him. P.W.2- Pushpendra is the son of Sher Singh, therefore there is no doubt that both these witnesses have turned hostile only to sheild their brother and uncle Lallu @ Lala Ram and they have been actually won over.

41. In **Paramjeet Singh alias Pamma vs. State of Uttarakhand (2010) 10 SCC 439**, it was held as under:-

"16. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony. (Vide State of Rajasthan v. Bhawani (2003) 7 SCC 291.)

17. This Court while deciding the issue in Radha Mohan Singh v. State of U.P. (2006) 2 SCC 450 observed as under: (SCC p. 457, para 7)

"7. ... It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof."

18. In Mahesh v. State of Maharashtra (2008) 13 SCC 271, this Court considered the value of the deposition of a hostile witness and held as under: (SCC p. 289, para 49)

"49. ... If PW 1 the maker of the complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness for no plausible and tenable reasons pointed out on record, will give rise to doubt the testimony of the investigating officer who had sincerely and honestly conducted the entire investigation of the case. In these circumstances, we are of the view that PW 1 has tried to conceal the material truth from the Court with the sole purpose of shielding and protecting the appellant for reasons best known to the witness and therefore, no benefit could be given to the appellant for unfavourable conduct of this witness to the prosecution."

19. In Rajendra v. State of U.P. (2009) 13 SCC 480, this Court observed that merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. This Court reiterated a similar view in Govindappa v. State of Karnataka (2010) 6 SCC 533 observing that the deposition of a hostile witness can be relied upon at least up to the extent he supported the case of the prosecution.

20. In view of the above, it is evident that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."

Both P.W.1- Sher Singh and P.W.2- Pushpendra have stated that Dal Chand at the time of incident was in baggar with deceased Badri Yadav and the incident had occurred at about 12.00 O'clock in the night. Perusal of the testimony of P.W.1- Sher Singh would further reveal that he has admitted the presence of sufficient light and he was also holding a torch in his hand at the time of incident. P.W.3- Dal Chand had also stated that at the fateful night he talked with Badri till late in the night and two sons of Badri, namely, Pushpendra and Manoj were also sleeping in the same room while Sher Singh was sleeping on the roof of the house.

According to him Badri and he were lying on the ground and at midnight a gun shot was fired where-after he tried to get up but at the same time second gun shot was fired which hit him on his chest and P.W.1- Sher Singh put on his torch and in the light of his torch and of gobar gas bulb he saw the assailants as Lallu @ Lal Ram who fired at them and Ranjit who was assaulting deceased Badri Yadav with Banka. He further stated that at the time of incident he was not sleeping and his eyes had blinked for a moment.

42. Referring to a portion of his evidence, it has been submitted that this witness could not see with his one eye and therefore he could not have witnessed the incident. We are unable to concur with this submission of learned counsel for the appellants on the ground that the evidence of a witness could not be read in piecemeal and the same has to be perused in totality. We have very carefully gone through the testimony of this witness and have found that he has stated that he could see only with his one eye. However, in the same breath he has stated that he could read and write without the aid of spectacles. The fact that he, during his cross examination, could not tell the details of a tree standing about 100 meters away from the place where his statement was being recorded is of no consequence to doubt the authenticity and reliability of his otherwise truthful evidence. It is to be remembered that P.W.3- Dal Chand is an injured witness, his presence at the time of incident has even been admitted by the hostile witness P.W.2- Pushpendra who was also sleeping in the same baggar (room) and his friendship with the deceased Badri Yadav is a proved fact and he (Dal Chand) used to sleep in the baggar of Badri Yadav and used to talk with him till late in the night, as a matter of routine. Having perused the entire evidence of this witness we do not find any material contradictions or embellishments in his testimony which may brand him as unreliable. Contrary to this, having examined his testimony with utmost care and caution, we find his evidence unblemished and trustworthy. He was injured in the incident and the nature of injuries sustained by him has added a flavor of acceptability to his otherwise trustworthy evidence. We are, therefore, see no reason as to why he will falsely implicate Lallu @ Lala Ram i.e. son of his close friend for committing the murder of his father i.e. Badri Yadav.

In **Ramesh Bhagwan Manjrekar and Ors. Vs. State of Maharashtra** reported in **MANU/MH/0161/1996** Hon'ble Supreme Court held as under :-

"21. It is well settled that the evidence of an injured witness can be the sole basis; in fact the best basis, for either recording or sustaining a conviction. This is because injuries ensure the presence of a witness. And once that is ensured the limited question which remains is that of his credibility and truthfulness. After going through the evidence of Shaikh Jalaluddin we not only find it to be truthful but also in consonance with probabilities and medical evidence."

In **Mohar and Ors. Vs. State of U.P.** reported in **MANU/SC/0808/2002 it was held that** *"The testimony of an injured witness has its own efficacy and relevancy. The fact that the witness sustained injuries on his body would show that he was present at the place of occurrence and had seen the occurrence by himself. Convincing evidence would require to discredit an injured witness. Similarly, every discrepancy in the statement of witness cannot be treated as fatal. the*

discrepancy which do not affect the prosecution case materially cannot create any infirmity."

In the case of **Akhtar and Ors. Vs. State of Uttaranchal, MANU/SC/0556/2009** Hon'ble Supreme Court held as under :-

*"13. In the case of **Krishan v. State of Haryana 2006 (12) SCC 459,** this Court has taken the view that if the prosecution case supported by two injured eye-witnesses Similarly, in the case of Surender Singh v. State of Haryana MANU/SC/0393/2006 : (2006)9SCC247 , this Court has opined that the testimony of an injured witness has its own relevancy and efficacy. The fact that the witness was injured at the time and in the same occurrence lends support to the testimony that the witness was present during occurrence and he saw the happening with his own eyes.*

14 . This Court has taken the view in State of M.P. v. Mansingh MANU/SC/0596/2003 : (2003)10SCC414 that the evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. It was contended by the appellant that the testimony of Jamil Ahmed (PW-2) and Mobin (PW- 3) cannot be relied on as these two eye witnesses were allegedly highly interested witnesses and were related to the deceased. In our considered view, merely because the witnesses in question were related to the deceased cannot be a ground for non-acceptance of their evidence, which otherwise was found to be trustworthy. It is true that these two witnesses are related to the deceased but at the same time one cannot lose sight of the fact that these two witnesses were also injured witnesses. It is extremely difficult to believe that the injured witnesses who themselves got injured and whose close relatives lost their lives would shield the real culprits and name somebody else only due to some enmity. The defence had ample opportunity to cross-examine these two injured eye witnesses but records show that no suggestions were put to them as to how they received the injuries, mentioned in the medical reports. In fact, various documents filed by the defence with respect to litigation among themselves itself give the unmistakable impression that there was indeed motive to attack the deceased and the injured witnesses. and if their (injured eye-witnesses) testimony is consistent before the police and the court and corroborated by the medical evidence, their testimony cannot be discarded."

Hon'ble Supreme Court in **Jarnail Singh and Ors. Vs. State of Punjab** reported in **MANU/SC/1584/2009** held as under :-

"19. Darshan Singh (PW-4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tube well.

20. In Shivalingappa Kallayanappa v. State of Karnataka MANU/SC/0053/1995 : 1994 Supp (3) SCC 235, this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case, it is proved that he suffered the injury during the said incident.

21. I n State of U.P. v. Kishan Chand and Ors. MANU/SC/0652/2004 : (2004) 7 SCC 629, a similar view has been

re-iterated observing that the Testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross examination and nothing can be elicited to discard his testimony, it should be relied upon vide Krishan and Ors. v. State of Haryana (2006) 12 SCC 459. Thus, we are of the considered opinion that evidence of Darshan Singh (PW-4) has rightly been relied upon by the courts below."

In **Abdul Sayeed Vs. State of Madhya Pradesh** reported in **MANU/SC/0702/2010**, Hon'ble Supreme Court while discussing about the weight to be attached to an injured witness was pleased to held as under :-

"26. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide Ramlagan Singh and Ors. v. State of Bihar MANU/SC/0216/1972 : AIR 1972 SC 2593; Malkhan Singh and Anr. v. State of Uttar Pradesh MANU/SC/0164/1974 : AIR 1975 SC 12; Machhi Singh and Ors. v. State of Punjab MANU/SC/0211/1983 : AIR 1983 SC 957; Appabhai and Anr. v. State of Gujarat MANU/SC/0028/1988 : AIR 1988 SC 696; Bonkya alias Bharat Shivaji Mane and Ors. v. State of Maharashtra MANU/SC/0066/1996 : (1995) 6 SCC 447; Bhag Singh and Ors. (supra); Mohar and Anr. v. State of Uttar Pradesh MANU/SC/0808/2002 : (2002) 7 SCC 606; Dinesh Kumar v. State of Rajasthan MANU/SC/7910/2008 : (2008) 8 SCC 270; Vishnu andOrs. v. State of Rajasthan (2009) 10 SCC 477; Annareddy Sambasiva Reddy and Ors. v. State of Andhra Pradesh AIR 2009 SC 2261; Balraje alias Trimbak v. State of Maharashtra MANU/SC/0352/2010 : (2010) 6 SCC 673).

27. While deciding this issue, a similar view was taken in, Jarnail Singh v. State of Punjab MANU/SC/1584/2009 : (2009) 9 SCC 719, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under:

"Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka MANU/SC/0053/1995 : 1994 Supp (3) SCC 235, this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

In State of U.P. v. Kishan Chand MANU/SC/0652/2004 : (2004) 7 SCC 629, a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy.

The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross- examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

28. The law on the point can be summarized to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

In **Manjit Singh vs. The State of Punjab, MANU/SC/1195/2019** it was held in para 13.2. of the report that there is no Rule that in every criminal case, the testimony of an injured eye-witness needs corroboration from the so-called independent witness(es). When the statement of injured eye-witness is found trustworthy and reliable, the conviction on that basis could always be recorded, of course, having regard to all the facts and surrounding factors.

Having considered the entire evidence of PW-3 Dal Chand with care and caution we are of the considered view that the trial court does not appear to have committed any illegality or to say any irregularity in accepting the reliable and trustworthy evidence of PW-3 Dal Chand. P.W.8- Ram Autar has also seen both appellants running away from the scene of crime with Country made pistol and Banka in their hands. Having considered the evidence of this witness with care and caution, the same also appears to be reliable and trustworthy in the facts and circumstances of the case. Therefore in our considered opinion no illegality has been committed by trial court in accepting his testimony.

43. It is also submitted by learned counsel for the appellants that the nature of fire-arm injuries found on the person of deceased Badri Yadav and injured P.W.3-Dal Chand could not be inflicted by the gun shots fired from the place situated outside a four feet boundary wall and even if the evidence of prosecution is taken on its face value if the gun shots were fired from beyond the 3-4 ft high boundary wall trajectory of the fire arm injuries should be downwards.

44. We have perused the postmortem report of deceased Badri Yadav which is available on record as Ext. Ka-6 as well as injury report of Dal Chand (Ext. Ka-7). Perusal of both these reports would reveal that the deceased Badri Yadav had received incised wound at 5 places of his person including multiple incised wounds over front and left side of his neck, while Dal Chand received one fire-arm wound of entry and also one fire-arm wound of exit corresponding to the fire-arm wound of entry on the left side of his chest. According to P.W.6- Dr. Akhilesh Khare who has conducted postmortem on the dead body of Badri Yadav the death of the deceased Badri Yadav had occurred due to

shock and hemorrhage caused by ante-mortem injuries. He has further stated the time of death of deceased Badri Yadav at about 12.00 O' clock in the intervening night of 3-4.4.2005. P.W.7- Dr. Rajendra, who examined the injuries of P.W.3- Dal Chand, has also proved the injury report (Ext. Ka-7) and has stated that the injuries sustained by Dal Chand were fresh and were caused by fire-arm like country made pistol and these injuries might have been sustained at about 12.00 O' clock in the intervening night of 3-4.4.2005. P.W. 1, Sher Singh has stated to have heard sound of gun shots while P.W.3- Dal Chand and P.W. 8- Ram Autar, who is a neighbour, have also stated to have heard the sound of Gun shots. P.W.3- Dal Chand who has sustained fire-arm injuries in the incident has seen the appellant Lallu @ Lal Ram firing from country made pistol and Ranjit assaulting Badri Yadav with Banka. P.W.8- Ram Autar has seen the appellants running away after committing crime with weapons in their hands and after entering the "baggar' found Badri Yadav dead and Dal Chand in seriously injured condition. Therefore consistent case of the prosecution is that deceased Badri Yadav and P.W.3- Dal Chand were assaulted by Lallu @ Lala Ram by firing gun shots from country made pistol while appellant Ranjit assaulted Badri Yadav alone by Banka. The injuries sustained on the body of the deceased Badri Yadav could have been inflicted by firearm and Banka while the injuries found on the person of Dal Chand could have been caused by fire-arm, therefore in our considered opinion there is no difference between ocular and medical evidence and in fact medical evidence fully supports the ocular evidence in material particulars. The submission that injuries of a particular trajectory or dimension have not been sustained by the deceased and injured person is of no consequence. More over the testimony of an injured witness can not be brushed aside on the basis of minor contradictions and improvements. To discard the testimony of injured person very strong and cogent reasons are required and no such major contradictions are present in the evidence of injured witness P.W.-3 Dal Chand.

In **Ramkant Rai v. Madan Rai and Ors. as reported inMANU/SC/0780/2003 : 2004CriLJ36** , the Apex Court observed in ParaNo. 22 as under:

"22. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence Including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance In the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

Appreciation of evidence of P.W.-3 Dal Chand, in the back drop of above mentioned law would reveal that the testimony of this witness is reliable and trustworthy and his presence at the spot is proved beyond all reasonable doubt. He is

an injured witness and his testimony has also been corroborated by medical evidence, therefore we do not have any reason to doubt the trustworthiness and acceptability of the evidence of this witness.

45. It is also pertinent to mention here that though the trial court has disbelieved the recovery of country made pistol at the instance of appellant Lallu @ Lala Ram on the pretext that neither the recovery memo pertaining to the recovery of country made pistol nor the pistol itself was produced in the court, perusal of record would reveal that the trial court in its judgment has mentioned that a criminal case under Section 25 Arms Act with regard to this recovery is pending before the Judicial Magistrate, Mohammadi and the appellants have filed a document Ext. Kha-3 which is the statement of P.W.8- Ram Autar recorded in that case. It is strange that the trial court despite being aware of the pendency of that case before the judicial magistrate did not bother to try that case along with instant case while it was the duty of the trial court to try that case together with the instant case. Therefore, the trial court has extended the benefit of its own wrong to the appellant Lallu @ Lala Ram and has recorded that the recovery of country made pistol from Lallu @ Lala Ram has not been proved. We do not want to disturb such finding of the trial court but would like to clarify that the recovery of any weapon on the pointing of accused, allegedly used in the crime, is a piece of evidence amongst many pieces of evidence on which the prosecution rely in seeking conviction of accused person(s) and if this one piece of evidence is not proved, it does not mean that the entire case of prosecution would be discarded on that point alone. If the remaining pieces of evidence available on record achieve the requisite standard i.e. proof beyond reasonable doubt against appellant/ accused, they can safely be convicted.

46. The recovery of Banka from appellant- Ranjit on his pointing out has been proved by the reliable testimony of P.W.8- Ram Autar and P.W.12- Sub Inspector B.D. Arun who have proved the fact of recovery of "Banka' on the pointing of appellant Ranjit from his house.

47. We are also not inclined to appreciate the submission of learned counsel for the appellants with regard to the fact that the FIR in the case is ante timed. We have carefully scanned the oral as well as documentary evidence available on record and have found that the FIR of the incident was lodged at 4.10 A.M. while the incident has occurred at about 12.00 O' clock in the mid-night and the distance of Police Station from the spot is 7 Km. P.W.9- Head Constable Ram Bux has proved the fact of lodging the FIR and also that substance of this information was entered in the G.D. (Ext. Ka-13). Inquest of the dead body of Badri Yadav has begun at 6.30 A.M. On 4.4.2005 which is evident from inquest report Ext. Ka-14 and it contains all necessary details. P.W.1- Sher Singh though has not supported the prosecution story in full, but has supported this much of the prosecution story that he lodged the FIR (Ext. Ka-1) . However, he claimed that the contents of FIR were not read over to him and he only put his signature on it. We are not inclined to accept this explanation of this witness, as it is evident on record that he has turned hostile only to support his real brother Appellant Lallu @ Lalaram. P.W. 3- Dal Chand who had gone with P.W.1- Sher

Singh to lodge the FIR has also stated to have accompanied Sher Singh along with his brother to Police Station for the purpose of lodging of FIR. The fact that at one place of his statement he stated that Ext. Ka-1 was written in front of him in the after-noon is of no consequence because it is probable that he may be confused by the fact that he is also a witness of the recovery memo of country made pistol recovered at the instance of appellant Lallu @ Lala Ram and a recovery memo pertaining to that recovery was also written in his presence. Therefore We do not find any substance in this argument of the learned counsels for the appellants.

48. In **Gangadhar Behera and others v State of Orissa**, reported in **MANU/SC/0875/2002** it is held in para 18 and 19 of the report as under :-

*"**18.** Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. [See: Gurbachan Singh v. Satpal Singh and Ors. MANU/SC/0034/1990 : 1990CriLJ562]. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See State of U.P. v. Ashok Kumar Srivastava MANU/SC/0161/1992 : [1992]1SCR37]. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (Delhi Admin.). MANU/SC/0093/1978 : 1978CriLJ766]. Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in Stirland v. Director of Public Prosecution (1944 AC (PC) 315) quoted in State of U.P. v. Anil Singh AIR 1988 SC 1988. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.*

***19.** In matters such as this, it is appropriate to recall the observations of this Court in Shivaji Sahebrao Bobade v. State of Maharashtra MANU/SC/0167/1973 : 1973CriLJ1783 :*

".....The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt....."

".....The evil of acquitting a guilty person light-heartedly as a learned

author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that, just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltiness....."

".....a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....."

49. In view of the reasons given herein above, we do not find any force in this appeal and the same is liable to be dismissed.

50. The appeals filed by the appellants, namely, Ranjit and Lallu @ Lala Ram are, thus, **dismissed** and the judgment and order of the court below dated 26.5.2007 is **affirmed.**

51. As per record of this Court and report of office dated 18.12.2019, the appellants- Ranjit and Lallu @ Lala Ram are in jail. They will serve out the sentence as ordered by the trial court.

Shri Diwakar Singh learned Amicus Curiae will get Rs. 10,000/- as his fee/ honorarium for his assistance rendered in this case.

A copy of this judgment be immediately sent to the trial court for compliance.

(2020)1ILR1397

APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 02.01.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Appeal No. 2336 of 1985

Hirday Ram & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ravindra Singh, Sri Satya Prakash, Sri Akhilesh Singh, Sri Dilip Kumar

Counsel for the Opposite Party:
D.G.A., Sri Arun Kumar

A. Code of Criminal Procedure, 1973 - Section 374(2) & Indian Penal Code, 1860 - Section 302/34 - recovery of weapon has no significance when eye-witness account is there against the said accused-one accused held guilty while rest of the two accused has given benefit of doubt. (Para 25, 26, 27, 28, 29 & 30)

Criminal Appeal partly allowed. (E-6)

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Dilip Kumar, learned Sr. Advocate assisted by Sri Akhilesh Singh, learned counsel for the appellants, Sri Arun Kumar, learned counsel for the complainant and Sri A.R. Chaursaiya, learned A.G.A. for the State.

2. This criminal. Appeal has been preferred against the judgment and order dated 31.8.1985 passed by the Sessions Judge, Sri Surya Prasad, in S.T. No. 34 of 1985 (State Vs. Hirday Ram and three others), whereby the accused-appellants Hirday Ram, Adiram, Rajvir and Udaivir have been held guilty under Section 302 read

with Section 34 IPC and have been sentenced to imprisonment for life each.

3. The prosecution's case as mentioned in the F.I.R. is that on 5.7.1984, first informant Raghuvir Singh (PW-1) along with his uncle Ram Bharose (deceased) S/o Genda Lal, his father Lajja Ram S/o Genda Lal, his cousin brother Sukhvir Singh S/o Ram Bharose, were constructing wall of their house towards South by engaging a mason (mistri) namely Doji Ram S/o Gopi Jatav, R/o Village- Oodhan, P.S. Kurra, who was doing construction work and the material of work was being supplied by the first informant and the above mentioned persons and by this construction a door was being opened towards pond. Towards South-West of the said pond was located the house of Hirday Ram S/o Manjan of his village and adjoining to his own house towards South was the field of Hirday Ram. Seeing the said door being opened Hirday Ram (accused-appellant no. 1) and his sons namely Rajvir (accused appellant no. 3), Udaivir (accused appellant no. 4) and real brother of Hirday Ram namely Adiram (accused-appellant no. 2) came near the said wall and started saying that they should not try to open the door towards the pond because that would be detrimental to them. At this, the first informant's uncle Ram Bharose told that pond did not belong to them and they would certainly open the door in that direction. Thereafter, the accused-appellants named above became deeply annoyed and started abusing them and would say that they would not allow the door to be opened in that direction. Thereafter, the first informant's uncle again stated that they could not stop him and simultaneously he along with Adiram directed his sons that they should bring gun and pistol. In the meantime, when the dispute was escalating between them, some villagers namely Ahibaran Singh (PW-2) S/o Sahookar, Aayaram S/o Sudhar Singh and Soran Singh Yadav R/o Dara Mauja Ginauli, P.S. Danahar reached there and tried to counsel Hirday Ram and other accused persons but Rajvir armed with his single barrel gun of 12 bore and Udaivir armed with country made pistol reached there and while the construction of the said wall was going on, both Rajvir and Udaivir, from the front of their house from across the pond took aim towards the first informant and other persons and fired upon them which resulted in his uncle Ram Bharose (deceased) receiving fire arm injury of pallets who became badly injured because of the pallet injuries and succumbed to the injuries while accused-appellants Hirday Ram, Adiram, Rajvir and Udaivir fled towards South from there. This occurrence happened at about 4:00 pm in the evening.

4. The first informant prepared the written report (Ext. Ka-1) and on the basis of said report HC-10 C.P. Surendra Singh lodged a criminal case against all the appellants named above under Section 302 IPC on 5.7.1984 at 7:30 p.m. promptly and prepared the chick F.I.R. (Ext. Ka-2) and made entry of the said case in G.D. No. 27 dated 5.7.1984 at 7:30 p.m. (Ext. Ka-3). The investigation of the case was handed over to S.O. Sukhvir Sharma (PW-4), who has stated that on 5.7.1984 at 7:30 p.m., the first informant Raghuvir Singh had lodged a report of this case at P.S. Kurra, District- Mainpuri in his presence and, thereafter, he immediately started the investigation of this case. He recorded statements the same day of constable Surendra Singh at the P.S. concerned and also recorded statements of first informant

Raghuvir Singh the same day at P.S. and, thereafter, departed for the place of occurrence to village Vikauna along with force and reached at about 9:00 p.m. but because of lack of light, he could not prepare panchayatnama. Thereafter, he made effort to search for the accused persons who could not be found. In the said night itself he remained in village Vikuna itself and on the next day i.e. on 6.8.1984 at about 6:00 a.m. he searched house of the accused persons but no illegal weapon or licencee gun could be recovered. He recorded statements of witness Ahibaran Singh, witness- Asha Ram Singh at 6:40 a.m. and, thereafter, in his supervision the panchayatnama of the deceased Ram Bharose was filled up by S.I. V.L. Sharma which was written by him and was also signed by him, the same also bears signatures of panchas and his own signature as well, which is Ext. Ka-4. Thereafter, the dead body was sealed and the same was dispatched for post-mortem along with all the relevant papers i.e. chalan nash, photo nash, chitthi C.M.O, chitthi R.I. and sample seal which are Ext. Ka-5 to Ka-9 respectively through constable Hanuman Singh and Home-guard Nempal the same day. He also collected the blood stained soil as well as plain soil from the place of occurrence and sealed them in separate containers and prepared its memo which is Ext. Ka-10. Thereafter he made spot inspection at the instance of first informant Raghuvir Singh and prepared site plan in his hand writing which is Ext. Ka-11.

5. Thereafter, he again on the same day i.e. on 6.7.1984 took search of the houses of the accused and prepared its memo in his hand writing which is Ext. Ka-12. On 7.7.1984, he recorded statements of other witnesses and also made search for the accused but they could not be found. On 9.7.1984, he received a sealed envelope from the doctor sahab, who had conducted post-mortem and in that, were found the pallets which were taken out of the body of the deceased and the same were deposited at P.S. vide G.D. No. 27. Again on 13.7.1984, he made search for the accused but they could not be found, although they surrendered before the court and, thereafter, he took their statements in jail and after concluding the investigation on 31.7.1984, he submitted charge sheet against the accused persons which is Ext. Ka-13. He had also sent the material collected during investigation for chemical examination.

6. On the basis of evidence gathered by police, charge was framed against the accused-appellants under Section 302 read with 34 IPC on 11.2.1985 to which they pleaded not guilty and claimed to be tried.

7. For proving this case, from the side of prosecution, first informant Raghuvir Singh as PW-1, Ahibaran Singh, eye-witness of the occurrence as PW-2, HC-10 C.P. Surendra Singh, who had prepared the chick F.I.R. and G.D. as PW-3 and the Investigating Officer S.O.- Sukhbir Sharma as PW-4, were examined. Thereafter the prosecution evidence was closed and the statements of accused were recorded under Section 313 Cr.P.C.

8. All the accused-appellants denied to have committed any offence and have further stated that they have been implicated falsely in the present case due to enmity and they have further denied the truthfulness of the entire evidence which has been gathered by the Investigating Officer, although no documentary evidence or oral evidence has been

adduced from their side in support of their defense.

9. On the basis of above mentioned evidence, learned trial court has held the accused-appellants guilty and has awarded them aforementioned punishment, hence the present appeal.

10. Learned counsel for the appellant has vehemently argued that accused as well as complainant side are collateral, meaning thereby they are related to each other and that there was no motive for the accused to kill the deceased. Particularly he emphasized that the evidence reflects that two main assailants namely Rajvir and Udaivir are said to have fired from a distance at about 30-35 yards from across the pond and drew the attention of the court towards statement of PW-1 in which he had stated that Udaivir and Rajvir armed with gun and country made pistol had come near the wall. Pointing out towards the said statement, it was argued that after having come to the wall which was being constructed, these two accused-appellants are stated to have fired from 30 to 35 yards distance from across the pond, which would suggest that had they any intention to kill the deceased, they would not have gone back to the distance of 30-35 yards and would fire from there when they had already come near the said wall. Therefore that would reflect that at the most they had intention to scare off the deceased from raising construction of the said wall and not to kill him. Therefore, it was argued that the punishment under Section 302 IPC should be converted under Section 304 (I) IPC. Further it was argued that PW-1 has clearly admitted in cross-examination that he had written in the report wrong, this fact, that Rajvir by gun and Udaivir with country made pistol had aimed towards them with an intention to kill and had fired which hit his uncle Ram Bharose because he was in grief. Further attention was drawn towards the fact that in examination-in-chief, PW-1 has clearly stated that Rajvir had made fire from his house across the pond at his uncle by the gun which hit his uncle Ram Bharose, who fell down by the side of the wall after getting injured. Further it is argued that these statements clearly reflect that the first informant had deliberately implicated the whole family of the accused persons because in fact it was only Rajvir who had made fire upon his uncle which hit him and which finally resulted in his death, while the others namely Hirday Ram and Adiram have been falsely implicated. First two having been assigned the role of exhortation and the third one i.e. Udaivir having been assigned the role of using country made pistol in firing upon not the deceased but the other witnesses which did not him them. Further it is argued that no recovery has been made of any weapon from any of the accused-appellants and, therefore, if at all any accused could be held guilty that could be only Rajvir and none else as they have been falsely implicated and even Rajvir could at the most have been convicted under Section 304(I) IPC.

11. On the other hand, learned counsel for the complainant as well as learned A.G.A. for the State have vehemently argued in favour of upholding judgment of conviction passed by the learned trial court stating that there is no infirmity in the conclusion drawn by the learned trial court on the basis of evidence on record in holding all the four accused guilty because they were all involved and there was clear cut case of exhortation made on behalf of the Hirday Ram and

Adiram, while other two i.e. Rajvir and Udaivir were assigned the role of making fire upon the deceased by respective weapons i.e. S.B.B.L gun and country made pistol.

12. To appreciate the respective arguments made on behalf of both the sides, we have to evaluate the entire evidence which has come on record.

13. PW-1, informant, has stated on oath in examination in chief that his father's name is Lajja Ram, who had two brothers. His father is Lajja Ram and Ram Bharose (deceased) was his uncle. Sukhvir Singh is son of his uncle Ram Bharose. The accused person in court namely Hirday Ram and Adiram are real brothers and accused Udaivir Singh is son of Hirday Ram and other son of Hirday Ram is Rajvir, who is accused in this case. Further he has stated that his house is in southern direction of the village. The house of his uncle Ram Bharose and his own house is one and the same and towards west of this house there is pond and towards South of that house is also pond and towards East of that pond is the agricultural field of accused persons. Towards South of the southern pond is located the house of the accused and towards East of that house of the accused is also pond. Further he has stated that accused Hirday Ram and his uncle Ram Bharose, both are *Sadhu* of each other and the family member of PW-1 and the accused are collateral. He has given statement before court on 5.8.1985 that about 13 months back, he along with his uncle Ram Bharose were constructing a wall and his cousin brother Sukhbir Singh was also getting wall of his house constructed through Doji Ram, who was being supplied construction material by them. His uncle was opening a door towards pond in the southern wall of his house, seeing which accused Hirday Ram, Adiram, Rajvir and Udaivir reached there near the said wall and restrained his uncle from opening the said door stating that, that would cause harm to them. At this, his uncle told that the said pond did not belong to them and they would not stop from opening the door in that direction. Thereafter, the accused who were present in court started abusing his uncle and when the accused stated that they would not allow the door to be opened, accused Hirday Ram and Adiram exhorted Udaivir and Rajvir to bring their gun and pistols and after that hearing abusing and quarrel, Ahibaran Singh, Asha Ram and various other peoples who were passing by, through that way, also reached there. One Soran Singh also came there and all of them tried to convince all the accused appellants, in the meantime Udaivir and Rajvir both armed with gun and pistol respectively came near wall. At that time his uncle was picking up the bricks and right then Rajvir made a fire upon PW-1's uncle from in front of his house which hit his uncle Ram Bhrose, who getting injured, fell down on the other side of the wall. The second fire was made by Udaivir Singh by country made pistol upon them (PW-1 and others) which did not hit them. Thereafter, his uncle was taken to hospital in a buffalo cart but as soon as he was placed in cart, he succumbed. This firing incident took place around 4:00 p.m. and all the four accused fled towards South-western direction in fields. His uncle Ram Bharose had fell down after getting injured by fire arm injury, at that place blood had fallen due to injury. Further, he has stated that he had written report the same day in his own hand writing which is Ext. Ka-1.

14. In cross-examination, this witness has stated that at the time of occurrence the said pond was full of water

and the wall, which was being constructed, was at a distance about 30 to 35 yards away from the house of the accused and from the said distance only, both the fires were made. If one would travel by the side of the pond, the distance of the said house from the house of the accused would be around 40 to 50 yards. To the north of his house, is the house of Gayadeen and Ranjeet and adjoining to the house of PW-1 is house of Kuchu Lal. Further he has stated that towards South of his wall is a passage and towards South of his wall there are few bricks and subsequently denied also that there were any bricks. Towards north of the said wall of his house, there were few bricks. At the time when fire was made, some bricks were lying towards southern side of the said wall and the field towards southern side of the said wall belonged to the Hirday Ram, accused which must be around to 2 - 3 bighas. Prior to the construction of the said wall, there used to live cattle in Gher. After raising the wall they were trying to convert Gher into residential portion. He further stated that earlier there existed a wall but subsequently stated that earlier there was only a foundation and not the wall, rather on the said foundation the wall was being constructed. Further it is stated that there was open area in Gher towards the pond. The said wall, which was being constructed, was about 30 to 35 hands long. The construction of the said wall was started on the date of incident itself in the morning. Doji is a mason while work of providing material to the mason was being done by them only. By the time incident took place 3-4 *'radda'* had been laid and the mason was sitting towards West of the said wall while Ram Bharose was towards South of the said wall. There must have been distance of 2 to 3 steps between mason and Ram Bharose (deceased) while at distance of about one to two steps towards North from the said mason, must have been the place where PW-1 and others were standing. At the time when fire was made Ram Bharose was bent and was picking the bricks having his face towards north. The Ram Bharose received one fire. He had written wrong in the report that Rajvir by gun and Udaivir by country made pistol, had aimed towards them, with an intention to kill, in which his uncle got injuries, because he was in grief. The report was began to be written about one or half hour after the incident of fire which was being written inside the Gher by him. They were standing close to the deceased for about half an hour and, thereafter, he started writing report. During this period of half an hour a lot of people had collected there. Approximately 10 to 20 persons had gathered there but he had written report sitting separate and at the time when he was writing the same there was no body. At the time when he was writing report in Gher, witness Soran Singh, Ahibaran Singh and Asha Ram were not a Gher. When the abusing was going on between two sides, right then these witnesses had come and this abusing had continued for five to ten minutes. Further it is stated that Lajja Ram and Sukhbir were near the dead body while he was writing report, although further he stated that prior to writing report by him, all the three witnesses have left the place. He had not talked to Ahibaran Singh and Asha Ram at the said place. When the abusing took place between the two sides, at that time the ladies of the house had also come on the spot. Further he has stated that after having written report, he had immediately left for the police station which was located about 6 to 7 miles from the place of incident and after lodging of the report at police station, police also

started for the place of occurrence immediately and he reached the place of occurrence only after police had reached there. He had spent about two hours at police station and the police personnel had come to the spot on bicycles. The son of Ram Bharose had not accompanied him to police station rather when he returned from police station, his son was standing by the side of the deceased. Lajja Ram was also present, although Ahibaran Singh, Asha Ram and Soran Singh were not present and then he had reached near the dead body, the S.O. was sitting on the cot near the dead body. Only little writing work could be completed in respect to the dead body because it had become dark and S.O. could complete writing work next day in the morning. Further it is stated that he knows wife of Mehtab Singh namely Katori, regarding snatching the jewellery of Katori, a case was filed against father of PW-1 Lajja Ram and Ram Bharose. But accused Hirday Ram was not a witness in that case against his father. He denied the suggestion that Ram Bharose was murdered in some other circumstances at some other place and that the report was lodged after consultation at the police station concerned due to enmity.

15. The other eye-witness Ahibaran Singh (PW-2) has stated in examination-in-chief that he knows the accused who were present in court who belong to his village. In his statement recorded on 6.8.1985, he has stated that about 13 months ago Ram Bharose was murdered at about 4:30 pm, at that time he was near his field of corn which was about 50 steps away from the place of incident. At that time accused and Ram Bharose and others were involved in an altercation, when he reached there. Besides him, Asha Ram had also arrived there who was ploughing the field and after some time Soran Singh also reached there and till then altercation was going on. The accused were saying that the door should not be opened towards pond while Ram Bharose was saying that he would open the door in that direction and on this, abusing took place between two sides. Hirday Ram told his son Rajvir and Udaivir to bring their pistol and gun for firing upon them and this was also stated by Adiram to them. Thereafter, the accused Rajvir and Udaivir went towards their house and came out with gun in the hand of Rajvir and country made pistol in the hand of Udaivir. Rajvir made a fire across the pond from the western side from a distance about 30 to 35 yards, which hit Ram Bharose, who fell down after getting hit and Udaivir also made fire upon Raghuvir and others but the same did not hit them and, thereafter, accused fled towards southern side. Further he has stated that they all reached near Ram Bharose and lifted him to be placed in a buffalo cart to be taken to a hospital but as soon as he was kept in the said cart, he died and therefore his dead body was kept in Baithak. Further he has stated that Doji Ram, mason, would not give statement because he is a weak person and because of being threatened by the mohamdans, he has colluded with the accused sides.

16. In cross-examination, he has stated that the abusing continued approximately for half an hour and during this period, 4 to 6 persons had come there which were namely Mulayam Singh, Asha Ram, Soran Singh, Ahibaran Singh, some other ladies and children. At the time when Ram Bharose received fire arm injury, he had bent to lift the brick with his face towards the ground about 2 to 3 steps away from Ram Bharose. Towards West, there was mason and towards East of him,

was Ahibaran Singh, Asha Ram was about 7 steps away. When the fire arm hit the deceased, then in the West was standing mason and towards East was standing the PW-2 and others. The mason was sitting on the wall. Ram Bharose was being abused. During this period of abusing, sometimes work of construction used to stopped and sometimes it used to be continued. About one and ½ steps away from the wall of Ram Bharose, the bricks were being lifted by Ram Bharose which were being given to mason. Further it is stated that all the four including PW-2 and 3 were standing about three steps away from the said wall towards South and all of them were standing at a distance from each other at about one and one half steps. Rajvir was towards South when he made fire which hit Ram Bharose in the left side in his body in scapular region.

17. In cross-examination, this witness has further stated that the son of Ram Bharose namely, Sukhbir must be around 24-25 years of age who was present at the place where wall was being constructed. At the time when the fire hit the deceased, Sukhbir had gone to take *Gara*. Lajja Ram and Raghuvir were standing at a distance of five to six steps towards North from mason Doji Ram, while Sukhbir had gone for bringing '**Gara**' from near the well which must have been around 25 steps away from there. The deceased Ram Bharose fell down after getting hit although he kept standing for about two to four minutes after getting hit but as soon was he was about to be kept in buffalo cart, he died. The buffalo cart was parked in the Gher at a distance of about six steps. He does not recollect whether any blood had fallen, while Ram Bharose was placed in the said cart. From the place where Ram Bharose had fallen after getting hit at a distance, about two steps, there was baithak in which his dead body was kept. Further he has stated that a false case was initiated against him regarding having fired upon Ranjeet in which Adiram had given a false evidence in which he had been acquitted. He had denied the suggestion that he was not present on the spot at the time of incident.

18. Apart from above two eye-witnesses' statement, it would be appropriate to refer to the injuries received by the deceased. It is evident from the judgment of the trial court that as many as seven injuries were found to have been sustained by the Ram Bharose (deceased) on his person by Dr. M.C. Gulecha, who conducted the post-mortem, which are as follows:-

(1) Fire arm wound of entrance 0.2 cm x 0.2 cm x bone deep of left side back on middle of scapula. Scapula fractured. One metallic pallet recovered from bone.

(2) Two fire arm wounds of entrance on left side back 6 cms below lower and of scapula, 3 cms away from each other. Size 0.2 cm x 0.2 cm x cavity deep.

(3) Fire arm wound of entrance 0.2 cm x 0.2 cm, muscle deep on left gluteal region 14 cms below upper border of hip bone.

(4) Fire arm wound of entrance of 0.2 cm x 0.2 cm x muscle deep on middle of back of left thigh.

(5) Fire arm wound of entrance 0.2 cm x 0.2 cm x muscle deep on middle of back of left knee joint.

(6) Fire arm wound of entrance 0.2 cm x 0.2 cm x muscle deep on calf muscle, 12 cms below knee.

(7) Fire arm wound of entrance 0.2 cm x 0.2 cm x muscle deep on back of left upper arm 6 cms above elbow joint.

19. The said injury memo has been marked as Ext. Ka-15 because learned counsel for the accused had admitted its genuineness. In the said post-mortem report, it has been opined by the doctor that deceased died as a result of above-mentioned ante-mortem injuries.

20. We would like to also take into consideration the site plan and evaluate as to whether in the light of statements given by PW-1 and PW-2, the site plan appears to be correctly prepared.

21. In the site plan Ext. Ka-11, by "A" is shown the place where the deceased was picking up the bricks and by "B" is shown the place which is 35 yards away across the river, towards South from where, fire was made upon the deceased Ram Bharose, who fell down at place "C" after getting injured. The distance between place "A" and "C" is shown to be three steps only. Beside the wall, there blood was also found spilt. From the place shown by "B", the other accused Udaivir is stated to have made fire upon witnesses by country made pistol. From "D" is shown the place where witnesses were standing which was at a distance of seven to eight steps from the place shown by "A" and by "E" is shown the place which is five steps away from the place where accused Hirday Ram and Adiram were standing at the time when fire was made by accused. By "F" is shown the place where dead body was found for preparation of panchayatnama. From the place of incident, the field of Ahibaran Singh is shown at a distance of 50 steps away and the field of Asha Ram is shown at a distance of 55 steps away. From "G" is shown the place from where Soran Singh and others heard the quarrel/abusing and from there they reached the place of occurrence and by "double arrow" is shown the place from where accused had fled in the south after giving effect to the occurrence.

22. If we read the statement of PW-1 and PW-2 in the light of above site plan, no infirmity is found as regards the occurrence having taken place at the place shown by "A" which is towards southern side of the house of the informant where wall is shown being constructed and from "B" which is 30-35 yards away from "A" towards south of the place where incident occurred and from this place shown by "D" main accused-Rajvir is stated by PW-1 to have fired by his gun which hit the deceased.

23. Learned counsel for the appellants has tried to convince the court though unsuccessfully that PW-1 has stated that Rajvir and Udaivir, both initially came with their respective arms near the wall where the deceased got hit and subsequently they returned to a place near their house shown by "B" which is at a distance about 30-35 yards away across the pond from where Rajvir fired upon the deceased, therefore, Rajvir could not be attributed the intention to kill the deceased as if he had the said intention he would not have returned to place "D" and would have made fire from close range at place shown by "A" itself.

24. We are not convinced with the said argument because it appears that learned counsel for the appellants is trying to draw wrong conclusion by the statement of PW-1 that the accused Rajvir had, initially after being armed with the said weapon came near the wall where new wall was being raised, in fact the said wall, from where he is said to have fired, was being referred the wall of his own house

and from there he is said to have fired upon the deceased from a distance of about 30 to 35 yards away and the same is also corroborated by the medical examination report because no tattooing or blackening has been found in the injuries caused to the deceased. All the said injuries which are mentioned above are pallet injuries which were possible to be caused by single arm as these were pallet injuries in dispersed area. As regards other accused Udaiveer, it has come in evidence of PW-1 and PW-2 that the fire made by the country made pistol by him did not hit anyone, therefore, we are of the opinion that it is only Rajvir, who ought to have been held guilty by the learned trial court instead of Udaivir and other two accused Hirday Ram and Adiram, who were attributed the role of exhortation.

25. There appears to be element of truth in the argument of learned counsel for the appellants that since all the accused belong to one family, the entire family has been sought to be implicated by attributing role to two out of them of exhortation and to the remaining two of making fire upon the deceased and others but the said version does not appear to be true. It is the duty of the court to sift grain from the chaff and we find that the statement of PW-1 and PW-2, who are said to be present on the place of incident when this occurrence happened, proved that it was only Rajvir whose shot actually caused serious injuries to the deceased which resulted in his death, therefore, he ought to have been held guilty of charge under Section 302 simplicitor.

26. We are also not inclined to agree with the view of the learned counsel for the appellants that the said act of the accused Rajvir would fall under Section 304(I) IPC as no intention could be imputed to him to cause death of the deceased, who belonged to the same family and was a collateral because if someone is aiming upon somebody with a fire arm and actually opening fire, it cannot be said that he would not have an intention to kill a person upon whom he fired after taking aim, because intention will definitely be attributed of killing in this case.

27. We are although of the opinion that other three accused out of whom one Hirday Ram is reported to have died in the year 1999 and his appeal has been abated on 17.7.2018, do not appear to have any role to play in giving effect to the present occurrence because informant himself has admitted that he had lodged some part in the complaint wrongly because of being under grief, hence it could not be ruled out that their implication may have been made because of enmity with a view to implicating the whole family.

28. Further argument of learned counsel for the appellants that no recovery of any weapon of assault was made from the accused-Rajvir does not appeal to reason because when eye-witness account is there against the said accused who had made fire upon the deceased, recovery of weapon has no significance.

29. The statement of PW-3 and PW-4 being formal witnesses is not being analyzed in detail. In our opinion, by the analysis which we have made above, we are of the confirmed opinion that accused-Rajvir only deserves to be held guilty under Section 302 IPC simplicitor and rest of the two accused namely Adiram and Udaivir need to be given benefit of doubt.

30. Accordingly, we **allow** the appeal of **Adiram** and **Udaivir**, they are not held

guilty under Section 302 read with Section 34 IPC and deserve to be acquitted, while accused Rajvir deserves to be held guilty under Section 302 IPC simplicitor and also hold that no prejudice would be caused by holding him guilty under Section 302 IPC simplicitor, though no charge under Section 302 IPC simplicitor has been framed against him by the trial court because he has been given full opportunity to defend himself. The appeal of the accused- **Rajvir** is **dismissed**, he shall be taken into custody, his bail bonds shall stand discharged.

31. Accordingly, the present appeal is partly allowed.

32. The accused-appellants **Adiram** and **Udaivir** are already on bail, hence they need not be taken into custody. The trial court shall obtain bail bonds from them under Section 437 (1) Cr.P.C.

33. Let a copy of this judgment be transmitted to the trial court forthwith for necessary information and compliance.

(2020)1ILR 1407

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 3079 of 1985

Bijendra Singh & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri R. S. Yadav, Sri Ajay Kumar Srivastava, Sri Jitendra Pal Singh Chauhan

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

A. Code of Criminal Procedure, 1973 - Section 374(2) & Indian Penal Code, 1860 - Sections 302/34 - contradiction **in oral and medical evidence as no injury was found on the naval region of the deceased -It appears to be improbable that a person may inflict *gandasa* blows on head and face while the head is held by another person- Therefore, this part of the prosecution story is highly improbable and doubtful- the conviction of the appellants cannot be sustained.** (Para 17)

B. Motive -The motive for committing the crime is assigned to the appellant. appellant's father had transferred his 11-12 bighas of land to the deceased. The deceased was trying to get her name mutated on the said land, which was objected by the appellant. from the evidence on record that the deceased Ram Devi was issue-less, therefore, after her death appellant Bijendra alone would inherit entire properties of his father, and that being so, there was no reason for the appellant Bijendra to have committed murder of his step mother. (Para 18)

Criminal Appeal allowed. (E-6)

List of cases cited: -

1. Akhtar Vs St. of Uttaranchal (2009) 13 SCC 722

2. Sadique and ors.Vs St. of UP, reported in 1981 Cr.L.J. 379,

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

1. By the impugned judgment dated 08.11.1985, the learned 2nd Addl. Sessions Judge, Aligarh convicted accused appellants Bijendra and Smt Khazani for the offence punishable under section 302/34 Indian Penal Code and sentenced them to under go life imprisonment.

2. The prosecution case, in brief, is that on 25/26.12.1984, a written report (Ex-ka-1) was submitted by Smt Kartari (Informant/P.W.-1) at Police Station Tappal, District Aligarh wherein she alleged that she was living with her maternal uncle Ramchand's house in village Palar after her marriage. Bijendra (appellant no.1) is son of Ram Chand. His wife and his family were also living in the same house for quite some time. Ram Chand, after the death of Bijendra's mother married (कराब) Ram Devi. Ram Chand had transferred the house and 11-12 bighas of land to Ram Devi. After his death, Ramdevi wanted to get her name mutated in the land and her share in land segregated. This annoyed accused Brijendra, who 9-10 days prior to the incident had told her not to do so. Ram Devi was issue-less. She did not heed Brijendra's advice, causing Brijendra to threaten her. It was then asserted by the informant that, on the fateful night at about 12 O'clock when she and her son Jaggo were sleeping in her maternal uncle's house. They were awakened by shrieks of (*mami*) Rama devi and saw that Bijendra was inficting gandasa blows at Mami's naval (नार) and an unknown person was holding mami's head and Bijendra's wife Khajani (co accused-appellant no. 2) was holding her legs. When they raised an alarm Bijendra threatened them. After killing Ramdevi, he and the unknown person went outside. It was also asserted that due to fear, informant and her son remained in the house whole night. In the morning after getting the complaint transcribed by Bishambhar the same was sent to the Police Station.

3. On the basis of the said written report, the First Information Report (Ex-Ka-5) was lodged on 26.12.1984 at 8.15 a.m, vide Case Crime No. 152, under Section 302 IPC against the accused appellants at P.S. Tappal, District Aligarh. The investigation was entrusted to Mahavir Singh (P.W.-5). The inquest (Ex-Ka-4) on the dead body of the deceased was conducted on 26.12.1984 at 10 a.m and thereafter it was sent for autopsy. The postmortem report is available on record as Ex-Ka-16. As per Dr J. L. Agarwal, following ante-mortem injuries were found:-

1. Incised wound 12 cm X 2.5 cm X bone deep into right side scalp 10 cm on the ear.

2. Incised wound 3 cm X 3 cm X bone deep into right side joint 12 cm above right eye brow longitude.

3. Incised wound 2 cm X 12 cm X bone deep in right side face and middle of neck with muscular rim and body, trachea and jaw.

4. Abrasion 3 cm X 1 cm in the left shoulder.

5. Lacerated would 1 cm X ½ cm on the lob of left ear.

4. The police submitted charge-sheet (Ex-Ka-13) only against the appellants Bijendra and Smt Khazani under Sections 302/34 IPC. The third unknown accused of the F.I.R. could not be traced out by the police.

5. During the course of trial, the prosecution produced five witnesses in support of its case. PW-1 Smt Kartari, is the informant and eye witness. Another eye witness is PW-2 Jaggo son of PW-1. The scribe of the F.I.R. Bishamber is PW-3. Budh Singh, a witness of extra judicial confession is PW-4. The investigating officer of the case is Mahaveer Singh, who is PW-5.

6. Opportunity was accorded to the accused appellants as per provisions of section 313 Cr.P.C, to explain the adverse and incriminating circumstances against them in the prosecution evidence. Both denied all the circumstances appearing against them in prosecution evidence and claimed false implication. Accused Bijendra stated that he is the only son of his father and the prosecution witness wanted to implicate him falsely to grab his property.

7. The doctor who conducted autopsy was not examined before the trial court. The formal proof of the post-mortem report was dispensed with, as its contents were admitted by the defence.

8. The trial Court relied upon the evidence of eye witnesses viz. P.W.-1 Smt Kartari and P.W.-2 Jaggo and held the appellants guilty and convicted and sentenced them as mentioned. Hence this appeal.

9. Heard learned counsel for the appellants, Mr S. A. Murtaza, learned AGA and perused the material on record.

10. Learned counsel for the appellants at the first instance submitted that the doctor, who conducted the postmortem examination of the deceased Smt. Ram Devi, was not examined in the court, though the same has been marked as exhibit by the court. Such a procedure adopted by the trial court could not be approved, as the contents of the postmortem report could not be admitted under Section 294 of the Code of Criminal Procedure, unless, the same was duly proved by the doctor, who had prepared the same.

11. The submission of the learned counsel for the appellants is legally not sustainable, in view of the settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party, it can be treated as substantive evidence under sub-section (3) of Section 294 Cr.P.C. The Hon'ble Supreme Court in case of **Akhtar Vs State of Uttaranchal (2009) 13 SCC 722**, has observed that if the defence has admitted the genuineness of the postmortem report before the trial court, the genuineness and veracity of the document stands proved and shall be treated as valid evidence under Section 294 Cr.P.C. The relevant portion is quoted below:-

"21. It has been argued that non-examination of the concerned medical officers is fatal for the prosecution. However, there is no denial of the fact that the defence admitted the genuineness of the injury reports and the post mortem examination reports before the trial court. So the genuineness and authenticity of the documents stands proved and shall be treated as valid evidence under Section 294 of the CrPC. It is settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under sub-Section (3) of Section 294 CrPC. Accordingly, the post-mortem report, if its genuineness is not disputed by the opposite party, the said post-mortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined."

12. We may also refer to a **Full Bench** decision of this Court, reported in **1981 Cr.L.J. 379, Sadique and other Vs State of UP**, wherein it was held -

"(Para-9)-" It is open to the prosecution or the accused to dispute the genuineness of a document filed by the

opposite party under Sub-section (1) of Section 294, Cr. P.C. In such a case the signatory of the document must be examined by the party filing the document to prove his signature and also the correctness of its contents and the evidence of the signatory will be the substantive evidence and the document may be used to corroborate or discredit his testimony. But where the genuineness of a document filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. is not disputed by the opposite party, Sub-section (3) of Section 294, Cr, P.C. is applicable and such a document may be read as substantive evidence. Section 294, Cr. P.C. is a new section as it had no equivalent in the Code of Criminal Procedure 1898. It is based on the rule of evidence that facts admitted need not be proved contained in Section 58, Evidence Act. The object of enacting this section appears to be to avoid the time of the Court being wasted by examining the signatory of the document filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. to prove his signature and the correctness of its contents if its genuineness is not disputed by the opposite party. If the signature and the correctness of the contents of a document filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. whose genuineness is not disputed by the opposite party are still required to be proved by examining the signatory of the document, the very object of enacting Section 294, Cr. P.C. will be defeated. We are, therefore, of the opinion that all documents filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. whose genuineness is not disputed by the opposite party may be read as substantive evidence under Sub-section (3) of Section 294, Cr. P.C."

13. In view of the aforesaid legal position the genuineness of the postmortem report, filed by the prosecution, has since been admitted by the defense the same can be read as substantive evidence.

14. The learned counsel for the appellants next contended that from the deposition of the PW-1 before the trial court, the authenticity of the F.I.R. becomes quite doubtful because according to the F.I.R., PW-1 is the author of the F.I.R. but PW-1 stated in her cross-examination that the F.I.R. was got written by the police Inspector at about 10 a.m. when she had come to the place of incident.

15. We have examined the version of the F.I.R. and the deposition of the informant PW-1. From the contents F.I.R. it is evident that the author of the F.I.R. is PW-1, and PW-3 Bishambhar is the scribe. We further find from the contents of the F.I.R., that it was written by the said scribe in the village of incident itself and thereafter the said scribe went to the police station to lodge the same, which was registered at the police station at 8.30 a.m. Whereas, the PW-1, in her statement before the trial court deposed that said PW-3 Bishambhar (scribe of the F.I.R.) had called the Police Inspector in the village of incident and thereafter the Police Inspector had got the F.I.R. written on which she had put her thumb impression. This witness further stated that all this was done at about 10 a.m. This part of the statement of PW-1 is extracted below:-

"मुझे गांव की औरतों ने चुपाया था फिर दरोगा जी आ गये थे विशम्बर बुलवाया था फिर लिखा पढ़ी करी फिर अंगूठा रिर्पोट पर लगया था सुबह के 10 बजे थे दरोगा जी ने मुझसे अंगूठा लगाने को कहा था। दरोगा जी ने कहा था कि तू पढ़ी तो है नहीं अंगूठा लगा दे दरोगा जी ने पढ़कर सुनाई थी।"

16. It is thus apparent from the aforequoted substantive evidence of PW-1

that the F.I.R. was got written by the Police Inspector. This being so, the F.I.R. version that the F.I.R. was dictated by the PW-1 and PW-3 Bishambhar scribed the same stands discredited. From the aforequoted evidence it is also apparent that the F.I.R. was got written by the police Inspector at about 10 a.m. and if this is so, the prosecution case that F.I.R. was lodged at the police station at 8.30 a.m. also stands falsified. From the said substantive evidence on record it cannot but be held that the F.I.R. of this case has been prepared with the confabulation and manipulation of the police and the same was not lodged at the police station at the time when it is said to have been lodged. In these facts once the very authenticity of the F.I.R. becomes doubtful the entire prosecution case becomes doubtful.

17. Learned counsel for the appellants then contended that though PWs 1 and 2 are said to be eye witnesses of the incident but from the evidence on record a reasonable doubt is created that they have not seen the incident. To appreciate this argument of the learned counsel we have examined the evidence on record and we find substance in the submissions of the appellants' counsel. We find that there is a material contradiction between medical and oral evidence, in asmuch as, in the F.I.R. the informant PW-1 has stated that the appellant Bijendra inflicted *gandasa* blows on the naval region of the deceased but in the post-mortem report there is no injury on the naval region. In fact all the *gandasa* injuries are on face and head. Faced with this situation the prosecution gave up the initial or the founding prosecution story that Bijendra inflicted *gandasa* blows on the **naval** region. The said two eye witnesses testified that appellant Bijendra inflicted *gandasa* blows on the deceased. In this regard we also notice another significant fact on record which belies the eye witness account of the said witnesses. These witnesses have deposed in the trial that when the appellant Bijendra was inflicting *gandasa* blows on the deceased one unknown accused had held the deceased by her head. From the post mortem report it is evident that except one lacerated wound and one abrasion, all other *gandasa* injuries are on the right side of head and face of the deceased. This would be possible only when the deceased was sleeping turning to her left side and her right side was exposed, that is why all the injuries are on right side of her head and face. Thus from the nature of the injuries it cannot be believed that one accused had held the deceased by her head while another accused was inflicting *gandasa* blows on the head and face. It appears to be improbable that a person may inflict *gandasa* blows on head and face while the head is held by another person. Therefore, this part of the prosecution story is highly improbable and doubtful. This circumstance clearly speak that the said two eye witnesses have not seen the incident and are giving false version with regard to manner of assault on the deceased. Once we hold the eye witnesses are unreliable on the manner of assault, and as noticed above, there is also contradiction in oral and medical evidence as no injury was found on the naval region of the deceased the conviction of the appellants cannot be sustained.

18. Now we may also deal with the motive as pleaded by the prosecution. The motive for committing the crime is assigned to the appellant Bijendra. According to prosecution appellant Bijendra's father Ramchand had

transferred his 11-12 bighas of land to the deceased Smt. Ram Devi. The deceased was trying to get her name mutated on the said land, which was objected by the appellant Bijendra. However, when the deceased did not listen to the objections of the appellant and continued to pursue her efforts in that regard the appellant Bijendra murdered her. We find from the evidence on record that the deceased Ram Devi was issue-less, therefore, after her death appellant Bijendra alone would inherit entire properties of his father, and that being so, there was no reason for the appellant Bijendra to have committed murder of his step mother, who, according to evidence on record, had brought up the appellant after the appellant's mother had died when the appellant was only 7-8 years old. Even other-wise the prosecution story that the father of the appellant Bijendra had transferred his 11-12 bighas of land to the deceased and the deceased was making endeavors in the consolidation proceedings to get her name mutated on that property does not merit acceptance as the prosecution has not proved by documentary evidence the fact of transfer of said land in favour of the deceased by her husband Ramchand and the fact that the deceased had initiated any mutation proceedings for recording of her name on the said transferred properties. In the circumstances we are unable to accept the version of motive as set up by the prosecution. On the other hand there may be a reason or motive for the PW-1 to implicate the two appellants in this case, as she was aware that if the appellants are convicted she would be a beneficiary of the properties of the father of the appellant Bijendra. It was for this reason that the defence has given a suggestion in the trial that it is not the appellants but the informant had murdered the deceased.

19. Hence, on the cumulative evaluation of the evidence on record and testing the prosecution evidence on the anvil of probabilities we are of the view that the prosecution has failed to establish the guilt of the appellants beyond all reasonable doubts and as such the appellants are entitled to get the benefit of doubt. We, therefore, allow the appeal and set aside the judgement and order of conviction and sentence of the appellants and acquit them of the charges. The appellants are on bail, their bail bonds are cancelled and sureties are discharged.

(2020)1ILR 1412

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.11.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Criminal Appeal No. 3815 of 2014

Vinay Kumar Pandey ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.K. Yadav, Sri Rajeev Lochan Shukla, Sri Santosh Kumar Singh Paliwal, Sri Sushil Kumar Dwivedi

Counsel for the Respondent:
A.G.A.

A. Code of Criminal Procedure, 1973 - Section 374(2) & Indian Penal Code, 1860 - Sections 302 -challenge to-dying declaration worthiness - two certificate regarding mental fitness of deceased issued by the doctor - the deceased remained alive for a week-husband did not visit to enquire about her welfare-accused convicted u/s 304 Part II instead u/s 302 in the light of the dying declaration of the deceased. (Para 20 & 21)

Accused conduct in not saving his wife after the incident nor, had taken her to hospital soon after the incident and in fact the Jeth and Chachiya Sasur rescued the deceased and rushed her to hospital coupled with the fact that the deceased remained alive for about a week after the incident and yet the appellant did not even visit to enquire about her welfare and condition and are also of the opinion that ends of justice would be served if appellant is convicted and sentenced to ten years rigorous imprisonment under Section 304 Part II IPC. (Para 20)

Criminal Appeal partly allowed. (E-6)

List of cases cited: -

1. Kalabai Vs. St. of M.P. 2019 reported in 2019 LawSuit (SC)

2. Govind Singh Vs. St.of Chhattisgarh 1139 LawSuit (SC) 1129

(Delivered by Hon'ble Ramesh Sinha, J.)

1. The appellant being aggrieved by the judgement and order dated 20.9.2014 passed by the Addl. Sessions Judge, Court No.2, Azamgarh passed in S.T. No.535 of 2012 State Vs. Vinay Kumar Pandey, district Azamgarh has preferred the present appeal by which the trial court has convicted and sentenced him under Section 302 IPC for imprisonment of life and further fine of Rs.10,000/- and in default of payment of fine, he has been ordered to undergo three months additional imprisonment.

2. The informant Jagdish Prasad Pandey submitted a written report on 8.7.2012 to the Station Officer of Police Station Ahraula, district Azamgarh for lodging a FIR against the accused Vinay Kumar Pandey (husband of the deceased), Sriram Pandey (father-in-law), Smt. Gayatri w/o Sriram Pandey (mother-in-law), Muniya, d/o Sriram Pandey (Nanad), Dileep Kumar S/o Sriram Pandey (devar of the deceased), elder brother-in-law of Vinay Kumar Pandey narrating that the informant had married his daughter Amrawati Devi according to Hindu rites and traditions five years ago to Vinay Kumar Pandey and he has given dowry in the marriage according to his means. After the marriage, the in-laws of the deceased namely Sriram Pandey, mother-in-law Smt. Gayatri, husband Vinay Kumar Pandey, Nanad Muniya, Devar Dileep Kumar and elder brother-in-law of Vinay Kumar Pandey namely Gaya Prasad used to cruel treat the deceased for want of dowry. When the informant visited the house of the in-laws of his daugher , she told him about the said harassment and torture made to her by her in-laws on which he pacified his daughter that every thing would be fine but after some days when the harassment and torture increased then informant brought his daughter to his house. After lapse of some days due to intervention of relatives, he sent his daughter to the in-laws house but after one or two days again her in-laws started harassing her. On 1.7.2012 at about 11 in the night he received an information from an unknown call that his daughter has been burnt to death by pouring kerosene oil for want of dowry by the aforesaid accused persons. On receiving the said information on phone, the informant along with his son Sachchidanand, wife Asha Devi and father Ram Keerat and also some persons of his village rushed immediately on a vehicle at her in-laws house then he was informed by the villagers that his daughter has been burnt and has been taken to the Azamgarh in a critical condition. Thereafter the informant along with other persons rushed to Azamgarh by vehicle and came to know that his daughter has been admitted in

Vidya Hospital, Sidhari. When they reached the said hospital, they did not find any person of the family of his daughter's in-laws. The informant was getting her daughter Amrawati medically treated and when her condition deteriorated then on 6.7.2012 in the evening she was referred to Sadar Hospital, Azamgarh by the doctor. On reaching the gate of Sadar Hospital, his daughter Amrawati succumbed to her injuries. He gave information about the incident at Sadar Kotwali, Azamgarh where after the inquest procedings, post-mortem was conducted on the body of the deceased. After the post-mortem, the dead-body of the deceased was handed over to him. Thereafter he performed her last rites. After committing the said incident, none of the family member of Vinay Kumar Pandey had come to see his daughter. The daughter of the informant was burnt to death due to want of dowry, he gave the said written report to the concerned police station for taking necessary action. As per postmortem report following injuries were found on the body of the deceased:-

"About 55-60% burn injuries on the both lower extremities except lower part of both leg and foot and lower 2/3rd both of trunk, most of the part of abdomen both breast and lower 2/3rd of left upper extremities pealing of skin present all over the burnt area and wound woos white, pus present at places, singeing of hairs present.

As per postmortem report, cause of death was septicemia shock due to antemortem burn".

3. On the basis of the written report lodged by Jagdish Prasad Pandey, an FIR was registered against the aforesaid accused persons namely Vinay Kumar Pandey, Sriram Pandey, Smt. Gayatri, Muniya, Dileep Kumar and Gaya Prasad which was registered as case crime no.273 of 2012 u/s 498-A, 304-B IPC and ¾ Dowry Prohibition Act on 8.7.2012 at 19.30 hours. The FIR was endorsed in the G.D No.16.

4. The Investigating Officer carried on the investigation of the case and made a spot inspection about the place of occurrence and recorded the statement of the witnesses u/s 161 Cr.P.C. He prepared the site-plan Ext.Ka-9 and after investigation of the case, he submitted charge sheet against the accused Vinay Kumar Pandey u/s 498-A, 304-B IPC and ¾ Dowry Prohibition Act which was marked as Ext.Ka-12.

5. The case was committed to the Court of Sessions and the trial court framed charges against the accused-appellant Vinay Kumar Pandey 498-A, 304-B IPC and ¾ Dowry Prohibition Act on 19.1.2013 and further on 22.3.2013 an alternative charge under Section 302 IPC was framed against the appellant.

6. The accused denied the charge and claimed his trial. The dying-declaration of the deceased was recorded by the Nayab Tehsildar Ramashankar Pathak (P.W.7) under the orders of the S.D.M., Azamgarh which has been proved as Ext.Ka-2.

7. The prosecution in support of it's case has examined P.W.1 Asha Devi, P.W.2 Jagdish Prasad, P.W.3 Heera Lal, P.W.4 Ram Lal Pandey, P.W.5 Ashok Kumar Pandey, P.W.6 Awadhesh, P.W.7 Nayab Tehsildar Ramashankar Pathak (retired), P.W.8 Dr. Amod Kumar, P.W.9 Satyanarayan Chauhan Nayab Tehsildar.

8. The accused have admitted the prosecution documents.

9. The statement of the accused was recorded u/s 313 Cr.P.C. He denied the prosecution case and also denied the allegation made in dying-declaration of the deceased against him. He stated that he was not present at the time of the incident and reached the hospital on receiving the information. He has donated the blood to the deceased and also performed her last rites.

10. Heard Sri Sushil Kumar Dwivedi, learned counsel for the appellant and Sri Amrit Raj Chaurasia, learned AGA for the State and perused the record.

11. Learned counsel for the appellant has vehemently argued that all the prosecution witnesses including the informant i.e. P.W.1 to P.W.6 who are family members of the deceased and other persons of the village have admitted the factum of the marriage with the deceased but they have denied the prosecution case against the appellant who have stated that the deceased was never tortured by the appellant for want of dowry and on the other hand the relationship between the two was cordial. He submited that so far as dying-declaration of the deceased is concerned, the said dying-declaration is unworthy to be believed as P.W.7 namely Ramashankar Pathak though has recorded the dying-declaration of the deceased on 2.7.2012 at 2.10 P.M under the orders of the S.D.M, Azamgarh but no orders of the S.D.M has been produced before the trial court which may show that he had visited the hospital for recording dying-declaration of the deceased Amrawati. He further submitted that the doctor Vivek Prakash who has given the fitness certificate that the deceased was fully conscious to give her statement on 2.7.2012 at 2.10 p.m and again when her statement was completed at 2.30 p.m. on the same day she remained conscious while giving the statement at Vidya Hospital, Azamgarh, the said doctor was not produced to prove the certificate of fitness. Hence the dying-declaration of the deceased wherein allegation has been made against the appellant for throwing burning lantern (Dibhari) in anger by the appellant on the deceased should not be relied upon.

12. He further submitted that even if the dying-declaration of the deceased is believed by this Court, then the conviction and sentence of the appellant under Section 302 IPC for life imprisonment by the trial court is against the evidence on record and the case would not travel beyond Section 304 Part-II IPC and the appellant who has already served out the sentence of seven years of imprisonment may be released and his conviction under Section 302 IPC by the trial court be set-aside. In support of his arguments, he has placed reliance on the judgement of the Apex Court reported in **2019 LawSuit (SC) 1139 Kalabai Vs. State of M.P.** Paragraph No.16 and 17 of the said judgement is quotted herebelow:-

[16] Learned counsel for the appellant has placed reliance on the judgement of this Court in Hari Shankar (supra). In the above case the appellant had also picked up a burning kerosene wick-stove and threw it on the deceased. Kerosene from stove spilled over the clothes they caught the fire. The deceased in the said case also died as a result of the burns received by him.This Court held that since the appellant had thrown a burning stove on the deceased, he would have known that his act was likely to cause burns resulting in death. It is useful to

extract paragraphs 2, 3 and 4 of the judgement which is to the following effect:

"2. Only question that we have to consider in this appeal is what offence can be said to have been committed by the appellant on the basis of the facts found by the High Court. It has been held that while the appellant, deceased Bheem Singh and one Shah Megan were taking tea in the tea-club of the Air Force, 32 Wing (MT Section), an exchange of words took place between the appellant and the deceased on account of the demand made by the appellant for returning Rs.50,000/- which he had advanced to the deceased. The appellant became angry and picked up the burning kerosene wick-stove and threw it on the deceased. Kerosene from the stove spilled over the clothes of the deceased and as the burning wicks came in contact with his clothes they caught fire. The deceased ultimately died as a result of the burns received by him.

3. What was submitted by the learned counsel for the appellant was that the appellant had no enmity with the deceased. He had no intention to kill the deceased as by killing him he could not have recovered the amount of Rs.50,000/- which he had advanced to the deceased. He further submitted that the quarrel between the two took place all of a sudden and in the heat of the moment the appellant had picked the stove and had thrown it towards the deceased. He, therefore, submitted that it was merely a rash and negligent act on the part of the appellant. We cannot agree with the submission of the learned counsel. Since the appellant had thrown a burning stove on the deceased, he would have known that his act was likely to cause burns resulting in death. In view of the facts and circumstances of the case, he can be said to have committed an offence under Section 304 Part II IPC.

4. We, therefore, allow this appeal partly, alter the conviction of the appellant from under Section 302 to Section 304 Part II IPC and reduce the sentence of imprisonment for life to rigorous imprisonment for five years."

[17] Following the above decision, we are of the view that the present is also a case where in the facts and circumstances of the case, the appellant can be said to have committed offence under Section 304 Part II IPC.

13. He has further placed reliance upon the judgement of the Apex Court in **2019 LawSuit (SC) 1129 Govind Singh Vs. State of Chhattisgarh.** Paragraph No.7 and 8 of the said judgement is quotted herebelow:-

[7] The entire occurrence was in a spur of moment. There was quarrel between the father and daughter as to where the bulb is to be put on. In the sudden quarrel and in spur of the moment, the appellant threw the chimney lamp on his daughter. The occurrence was sudden and there was no premeditation. The chimney lamp was burning there which the appellant had picked up and thrown on the deceased. Since the occurrence was in sudden quarrel and there was no premeditation, the act of the accused would fall under Exception 4 to Section 300.

[8] The conviction of the appellant-accused under Section 302 IPC is modified as the one under Section 304 Part-II IPC. As per jail certificate, the appellant-accused had undergone about 10 years, 2 months and 25 days as on 26.8.2017. By now, the appellant-accused has undergone about eleven years and eight months of imprisonment. Considering the facts and circumstances

of the case and the period of imprisonment which the appellant-accused has undergone, the sentence of imprisonment is modified to the period already undergone.

14. Per contra learned AGA on the other hand has opposed the argument of learned counsel for the appellant and has argued that as per the dying-declaration of the deceased, the appellant is said to have thrown the burning lantern (dibhari) on the deceased. There was some bitterness between the appellant and his wife as it appears from the dying-declaration and after the incident, the appellant did not make any effort to save the deceased from fire and had gone away. The deceased was rescued by her Jeth and Chachia Sasur who rushed her to Vidya Hospital. The appellant did not visit the hospital to inquire about the welfare of the deceased. He submitted that as per dying-declaration, the deceased has stated that since his marriage her husband used to hate her on the ground that he was more handsome than his wife. He argued that the trial court had framed alternative charge under Section 302 IPC against the appellant and found on the basis of evidence on record that the conduct of the appellant goes to show that he had intention to kill his wife by throwing the burning lantern (dibhari) on her and had gone away to sleep. Thus the trial court has rightly convicted the appellant under Section 302 IPC. Hence he prayed that the appeal of the appellant be dismissed.

15. In order to examine and appreciate the rival contentions of learned counsel for the parties, it would be appropriate to consider the submissions in the light of the dying-declaration of the deceased which is the basis of the conviction of the appellant under Section 302 IPC for life imprisonment by the trial court. The dying-declaration of the deceased recorded by the P.W.7 on 2.7.2012 at 2.10 p.m. at Vidya Hospital, Azamgarh which is Ext.Ka-2 is reproduced here under:-

''मृत्यु पूर्व बयान श्रीमती अमरावती पत्नी विनय कुमार

मै, अमरावती पत्नी विनय कुमार, उम्र लगभग 30 वर्ष सा0 गहजी बाजार, निकट पांडे पुरा थाना– अहिरौला जिला– आजमगढ़ बयान किया कि मेरी शादी अरसा 4–5 वर्ष पूर्व हुई थी। मेरे एक पुत्री, एक पुत्र है, पुत्र बड़ा है। मेरे पति फोटो ग्राफर है हमारे मायके वालो की अपेक्षा धनाढ्य है। मेरे मायके वाले गरीब है। मेरे पति मुझसे मोटर साइकिल दिलाने को कहा मेरे घर वाले पूरा नही कर पा रहे है, क्योकि गरीब है, मेरा पति मुझसे सुन्दर है, मायके वालो की अपेक्षा पैसे वाला है इस वजह से मुझसे नफरत करता है। मै 1–) वर्ष से अपने मायके में रहती थी, ससुराल वाले नही ले जाते है। पति के परिवार के रिश्तेदारो के दबाव से पति अपने घर लाये परन्तु पति मुझसे कोई रिश्ता नही रखते है। मैं कल दि0 1.7.12 की शाम लगभग 8 बजे खाना पका रही थी, उसी समय मेरे पति अपनी बहन जो चाल चलन से ठीक नही है, को समझा बुझा/मारपीट कर रहे थे मै ननद को छुड़ाने लगी तब मेरे पति मेरे ऊपर गुस्सा हो गये और जलती ि

बयान पढ़कर/सुनकर तस्दीक किया।
नि0अ0 अमरावती''

16. The marriage of the deceased Amrawati with the appellant is admitted to the parties. Though the case was registered for offence under Section 498-A, 304-B IPC and ¾ D.P. Act, the charges were framed against the appellant by the trial court for offence u/s 498-A, 304-B IPC and ¾ D.P. Act on 19.1.2013 and alternative charge was framed against the appellant by the trial court under Section 302 IPC on 22.3.2013.

17. As all the witnesses of fact have turned hostile including the family members of the deceased who have stated before the trial court that the deceased was not harassed by the appellant for want of dowry and moreover the relationship between them was cordial, hence the trial court has acquitted the appellant under Section 498-A, 304-B IPC and ¾ D.P. Act but taking into account the dying-declaration of the deceased, it has convicted the appellant under Section 302 IPC for life imprisonment. As the informant P.W.2 Jagdish Prasad Pandey and his wife Amrawati P.W.1 Asha Devi who are the parents of the deceased and other witnesses of fact i.e. P.W.3 to 6 have turned hostile and not supported the prosecution case. Hence we do not think it proper to discuss their evidence and proceed to examine the case under Section 302 IPC against the appellant which the trial court found proved against the appellant in the light of the dying-declaration of the deceased.

18. From the perusal of the dying-declaration of the deceased, it is apparent that the appellant was posing himself to be handsome husband and well of as compared to the family members of the deceased on account of which he used to hate the deceased. The deceased was living with her parents for about one and half years and due to intervention of some relatives, she was sent back by her parents to the house of the appellant. On the day of the incident i.e. on 1.7.2012 in the evening at 8 p.m. when she was cooking food, her sister-in-law who was not of good character, had some altercation with the husband of the deceased and husband was beating her sister-in-law on which her husband became annoyed with her and had thrown a burning lantern on her and she screambed and her Jeth who was taking the food came and rescued her. Her husband after throwing the burning lantern (dibhari) on her went to sleep in the house. She was admitted by her Jeth and Chachiya Sasur who rushed her to the hospital and admitted her. Her husband did not come to see the deceased in the hospital.

19. Thus from the dying-declaration of the deceased it is apparent that though the incident which has taken place appears to be a sudden quarrel between the appellant and his sister and the deceased intervened to save her husband's sister from her husband who out of anger had thrown the burning lantern (dibhari) on her and went to sleep goes to show that the appellant can not be said to have any intention to burn the deceased to death but he would likely known that due to the said act, the deceased would die on account of fire. The deceased was rescued by her Jeth who rushed her to the hospital along with her Chachiya Sasur as it appears from her dying-declaration itself. The case law which have been relied upon by learned counsel for the appellant of the Apex Court squarely covers the case of the appellant wherein the Apex Court in a similar situation has come to the conclusion that the conviction of the appellant of the said case would not attract the offence under Section 302 IPC. Hence has set-aside the conviction of the accused-appellant and altered the conviction under Section 304 Part-II IPC.

20. So far as the argument of learned counsel for the appellant regarding the veracity of the dying-declaration of the deceased is concerned is of not much significance as P.W.7 has categorically stated before the trial court that he recorded the dying-declaration of the deceased in the presence of Dr. Vivek Prakash at 2.10 p.m on 2.7.2012 who has

certified about the mental condition of the deceased before recording her dying-declaration and also after same was completed at 2.30 p.m. on the same day and simply because no orders of the S.D.M, Azamgarh has been produced by the prosecution before the trial court of the S.D.M concerned for recording the dying-declaration by P.W.7 Ramashankar Pathak and Dr. Vivek Prakash who certified the mental fitness of the deceased have not been produced the said dying-declaration cannot be disbelieved as P.W.7 has proved the dying-declaration (Ext.Ka-2) before the trial court and further he has categorically stated that the two certificates by which Dr. Vivek Prakash has certified about the mental state of the deceased. Moreover, the accused has admitted the prosecution documents which includes the dying-declaration also. Therefore, in view of Section 294(3) Cr.P.C, the two certificates regarding mental fitness of deceased issued by Dr. Vivek Prakash at the time of recording the dying-declaration of deceased by P.W.7 requires no formal proof. Hence the dying-declaration Ext.Ka-2 proved by P.W.7 cannot be discarded. Thus having considered the submissions of learned counsel for the appellant particularly in the light of the dying-declaration of the deceased, we are of the opinion that conviction of the appellant under Section 302 IPC cannot be sustained in the eyes of law. Therefore, the conviction of the appellant under Section 302 IPC by the trial court is set-aside and he is convicted under Section 304 Part II IPC. Now comes the question which is to be determined by this Court regarding the quantum of sentence which may be imposed on the appellant for offence u/s 304 Part II IPC.

20. The learned counsel for the appellant has argued that as the appellant has already served out seven years and two months, hence he may be released. Considering the said argument of learned counsel for the appellant we are of the considered opinion that taking into account his conduct in not saving his wife after the incident nor, had taken her to hospital soon after the incident and in fact the Jeth and Chachiya Sasur rescued the deceased and rushed her to hospital coupled with the fact that the deceased remained alive for about a week after the incident and yet the appellant did not even visit to enquire about her welfare and condition and are also of the opinion that ends of justice would be served if appellant is convicted and sentenced to ten years rigorous imprisonment under Section 304 Part II IPC.

21. In view of the foregoing discussions and preposition of law as has been laid down by the Apex Court and relied upon by the counsel for the appellant, we convict the appellant under Section 304 Part II IPC and sentence him to ten years R.I. accordingly. The appellant is stated to be in jail. He shall serve out the sentence as awarded by this Court

22. The appeal stands partly allowed.

(2020)1ILR 1419

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 4229 of 2018

Anand Babu ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sanjay Rajpoot

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

Criminal Law - Indian Penal Code - Sections 498A, 304B - D.P. Act, 1961 - Section 4 - Appeal against conviction.

The expression 'Soon before her death" used in section 304B I.P.C. and section 113B of the Evidence Act is present with the idea of proximity text. No definite period has been indicated and the expression "soon before hear death" is not defined. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. (para 25)

Though, the Court has visualized that direct ocular testimony is rarely available in dowry death case and in most of such offence direct evidence is hardly available and such cases are usually proved by circumstantial evidence. This section as well as section 113B of the Evidence Act enact a rule of presumption i.e. if death occurs within seven years of marriage in suspicious circumstances. (para 27)

Now convict appellant being husband was expected to explain the situations, which were under his personal knowledge, as was required u/s 106 of Evidence Act. But explanation given by this convict appellant is that deceased had committed suicide by jumping before train owing to depression. (para 42)

Hence on this score too convict appellant failed to prove whether and under which circumstance the trial court failed to appreciate facts and evidence placed on record. (para 44)

Appeal is dismissed. (E-2)

List of cases cited: -

1. Pathan Hussain Basha Vs. St. of A.P., AIR 2012 SC 3205

2. Kashmir Kaur Vs. St. of Punj., AIR 2013 SC 1039

3. Banshi Lal Vs. St. of Har., AIR 2011 SC 691

4. Mustafa Shahdal Shaikh Vs. St. of Mah., AIR 2013 SC 851

5. Kaliyaperumal Vs. St. of T. N., AIR 2003 SC 3828

6.Satvir Singh & ors. Vs.. St. of Punj. and another, (2001) 8 SCC 633

7. Rajinder Singh Vs. St. of Punj., (2015) 6 SCC 477

8. Reema Agarwal Vs. Anupam, AIR 2004 SC 1418

9. Trimukh Maroti Kirkan Vs. St. of Mah., (2007) 10 SCC 445

10. Vice Sumer Singh Vs. Surajbhan Singh & ors., (2014) 7 SCC 323

11. Sham Sunder Vs. Puran, (1990) 4 SCC 731

12. M.P. Vs. Saleem, (2005) 5 SCC 554

13. Ravji Vs. St. of Raj., (1996) 2 SCC 175

14. Ashok Kumar Vs. St. of Raj., 1991(1) SCC 166

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal under section 374(2) of Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) has been filed by convict appellant Anand Babu against judgment of conviction and sentence made therein dated 4.6.2018 passed by Court of Sessions Judge, Pilibhit, in S.T. No. 288 of 2014, State Vs. Anand Babu and others, arising out of Case Crime No. 724 of 2014, u/s 498A, 304B I.P.C and 4 D. P. Act, P.S. Jahanabad, District Pilibhit.

2. In brief, memo of appeal contends that the trial court failed to appreciate facts and law placed before it. There was no evidence against appellant. Marriage

between deceased and appellant, was solemnized on 8.6.2014, in a simple manner with no dowry nor any demand at the time of marriage or subsequent to marriage. No evidence with regard to demand of dowry or cruelty with regard to it was there on record. Spouse were living happily and no complaint, in any manner, was there prior to present incident. Both families were farmers, having no status to claim or fulfill demand of dowry. Both of witnesses were declared hostile and they have not supported prosecution, even then impugned judgment of conviction with deterrent sentence was passed. Autopsy examination report reveals cause of death due to head injury and it was an accident. But learned Sessions Judge, Pilibhit, failed to appreciate the facts and law placed on record. Hence this appeal for setting aside impugned judgment of conviction and sentence made therein with further prayer for acquittal from charges levelled against appellant.

3. Perusal of impugned judgment and record of lower court reveals that F.I.R. (Ext. Ka1), chik F.I.R. (Ext. Ka2) of Case Crime No. 724 of 2014, u/s 498A, 304B I.P.C and 4 D. P. Act, P.S. Jahanabad, District Pilibhit, dated 29.6.2014 registered at 17.35 hours, for an occurrence of 27.6.2014, having no specific mention of time upon F.I.R. having computerised typing and signature of complainant Sunil Kumar over it (Ext. Ka1) against Anand Babu (husband), Shakuntala Devi (mother-in-law), Guddu Joshi (brother-in-law), Vijay Joshi (brother-in-law), Shanker (brother-in-law-Bahnoi), Gita (wife of Shanker) and Shrawan Kumar (father-in-law), with this contention that informant Sunil Kumar was a resident of Mohalla Dubey, P.S. Bisalpur, District Pilibhit, and since last 15 years he was residing at Delhi and working as labourer, for maintaining his family, residing there at. His sister Savita was married to Anand Babu, resident of Mohalla Mishran Tola @ Joshi Tola, P.S. Jahanabad, District Pilibhit, about three months back at Delhi. This was second marriages of both Anand Babu and Savita. After some time of marriage Anand Babu (husband), Shrawan Kumar (father-in-law), Shakuntala (mother-in-law), Guddu and Vijay (brothers of Anand Babu), their brother-in-law (Bahnoi) Hari Shanker and their Sister Gita demanded Rs. One lac for doing business. They started demanding dowry from Savita and as a result cruelty was being committed with her. Informant, along with his father Ram Prakash, brother Sushil and nephew Akash went to Jahanabad for making persuasion to accused persons that he was not in a capacity to make payment of dowry of Rs. One lac. Please do bear. But it was of no avail and persistent demand of dowry with cruelty was there. On 27.6.2014 information about murder of Savita was received through telephone. Informant along with his family members rushed at spot and found dead body at mortuary. Savita, informant's sister, was murdered for dowry by her in-laws and an attempt to make it a case of accident was made. Whereas this was a dowry death. Hence this report.

4. Inquest report (Ext. Ka5) was got prepared by S.I. Phool Singh, upon information received through telephone from Circle Officer, Jahanabad, on 27.6.2014 at 10.00 A.M. regarding lying of a dead body of deceased lady at Platform no. 2 of Railway Station, who had met with some accident at railway track. Inquest proceeding started at 11.30 A.M. Death was held to be owing to antemortem

injuries caused by dashing of rail, but it was opined to get it examined under autopsy examination for which requisite papers, challan dead body (Ext. Ka6), Photo dead body (Ext. Ka7), specimen seal of sealing dead body (Ext. Ka8), letter to R.I. (Ext. Ka9) and letter to C.M.O. (Ext. Ka10) were got prepared and those papers, along with sealed intact dead body, were carried to Medical Officer (PW5) Dr. D. N. Singh, who was on postmortem duty, where autopsy examination was conducted and autopsy examination report (Ext. Ka4) under handwriting and signature of Dr. D. N. Singh was got prepared at the time of autopsy examination. External and internal examinations of dead body, which was under sealed intact position, and was duly identified by police personnel, who brought it, was got made, wherein three antemortem injuries (1) lacerated wound 8 cm x 6 cm x bone deep on occipital region, underlying bone fracture, (2) lacerated wound 7 cm x 4 cm x scalp deep on forehead, and (3) defused abraded contusion present at multiple places all over body along with few lacerated wound over back. Haemotama was present in occipital lobe right side with profusing of blood in brain tissue. Bleeding from nose and ear was present resulting death owing to coma and hemorrhage due to antemortem injuries.

5. Investigation resulted in submission of charge sheet (Ext. Ka13) against Anand Babu, Guddu, Vijay, Shakuntala @ Maharani and Shrawan Kumar. Magistrate took cognizance on 13.8.2014 over charge sheet.

6. As the offence punishable u/s 304B I.P.C. was exclusively triable by Court of Sessions, hence after making compliance of provisions of section 207 Cr.P.C., file was committed to the Court of Sessions, under section 209 Cr.P.C., for making its trial.

7. Learned Additional Sessions Judge/ Special Judge (E.C. Act), Pilibhit, vide order dated 30.9.2014 heard learned learned Public Prosecutor as well as learned counsel for defence, thereupon charges for offences punishable under above sections were framed against accused persons. Charges levelled by Sri Yogesh Chandra Tripathi, Additional Sessions Judge/ Special Judge (E.C. Act), Pilibhit, in English translation by Court itself, is being reproduced as below:

"I, Yogesh Chandra Tripathi, Additional Sessions Judge/ Special Judge (E.C. Act), Pilibhit, charge you accused (1) Anand Babu, (2) Guddu, (3) Vijay, (4) Smt. Shakuntala Devi @ Maharani, (5) Shrawan Kumar, as follows-

First- That Anand Babu was married with Savita, sister of informant Sunil Kumar, D/o Ram Prakash, resident of Mohalla Dubey, P.S. Bisalpur, District Pilibhit, three months back to her death and after marriage, you being husband and in-laws demanded Rs. One Lac in dowry and owing to failure in fulfillment of the same, you did cruelty by way of physical and mental torture resulting cruel treatment with her. Thereby you committed offence punishable u/s 498A I.P.C. within the cognizance of this court.

Second- You demanded Rs. One Lac in dowry from informant's sister after her being at your house and in case of default you did assault and cruelty with her. You with a cruel behaviour assaulted her and owing to demand of dowry and failure of its fulfillment you made murder of her on 27.6.2014, thereby you committed offence of dowry death

punishable u/s 304B I.P.C. within the cognizance of Court.

Third- You after marriage of Savita, informant's sister, with Anand Babu and her being at your house did demand of Rs. One lac in additional dowry, thereby committed offence punishable u/s 4 of D.P. Act within cognizance of this court.

In alternate

That you with a joint intention for fulfillment of common object did assault over informant's sister Savita on 27.6.2014 at your house, thereby she was murdered. Hence, you committed offence punishable u/s 302 read with 149 I.P.C. within the cognizance of this court.

I hereby direct you for trial for above charge.

Dated: 30.09.2014

Sd/- Illegible

(Yogesh Chandra Tripathi)

Addl. Sessions Judge/ Special Judge (E.C. Act), Pilibhit."

8. Charges were read over and explained to accused persons, who pleaded not guilty and claimed for trial.

9. Prosecution examined PW1- informant Sunil Kumar, PW2- HC Rita Tomar, PW3- Sushil Kumar Joshi, PW4- Ram Prakash, PW5- Dr. D. N. Singh, PW6- S.I. Phool Singh, PW7- Dy. S.P. Investigating Officer Indu Siddhartha and PW8- Suresh Chandra.

10. With a view to have explanation of accused persons, if any, over incriminating material brought on record by prosecution, statements of accused persons were got recorded u/s 313 Cr.P.C. in which each of accused persons denied the accusation and pleaded their innocence by alleging testimonies to be false. It was said in common that deceased committed suicide by jumping before train over railway track owing to her depression. Because she was previously married with Govind and was blessed with two kids, who were with Govind and against her wishes she was married with Anand Babu, under pressure of her family members. She remained under depression. There was no demand of dowry or cruelty with regard to it nor a question of such demand ever arisen. Previous marriage with Govind was not broken by a decree of divorce and this fact was hidden, while performing marriage with Anand Babu. No evidence in defence was given by accused persons.

11. After hearing learned public prosecutor as well as learned counsel for defence, learned Sessions Judge, Pilibhit, passed the impugned judgment, wherein accused-appellant Anand Babu was convicted for offences punishable u/s 498A, 304B I.P.C. read with section 4 D. P. Act. He was acquitted of charge levelled as alternative charge for offence punishable u/s 302 read with 149 I.P.C.

12. One accused Vijay was minor and juvenile in conflict with law. Hence, his file was got separated and transmitted to Juvenile Justice Board, Pilibhit, for making trial.

13. Rest of accused persons Guddu, Smt. Shakuntala Devi @ Maharani and Shrawan Kumar were acquitted of the charges levelled against them. No State Appeal against judgment of acquittal of Guddu, Shakuntala Devi @ Maharani and Shrawan Kumar is there.

14. This appeal is only by convict appellant- husband Anand Babu against judgment of conviction as well sentence. It was awarded after hearing learned Public Prosecutor as well as learned counsel for defence on the quantum of sentence and was in the tune of ten years R.I. for offence punishable u/s 304B I.P.C., two years R.I. and fine of Rs. 10,000/-, in case of default of payment of fine six months additional imprisonment, for offence punishable u/s 498A I.P.C. and one year's R.I. and fine of Rs. 5000/- and in case of default four months additional imprisonment for offence punishable u/s 4 D.P. Act with direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this case crime number towards sentence awarded, as above.

15. Against the judgment of conviction and sentence made therein convict appellant Anand Babu (husband) has filed this criminal appeal.

16. Heard Sri Sanjay Rajpoot, learned counsel for accused-applicant and Sri Munna Lal, learned AGA for the State.

17. Learned counsel for appellant argued that this was second marriage performed by informant and his family members without any information or disclosing about erstwhile marriage of Savita with Govind or her two kids being with Govind. This was against wishes of Savita resulting her depression. The marriage was performed at Delhi at Arya Samaj temple that too without any dowry and in a very ordinary manner. Both sides i.e. bride and groom sides are poor farmers and residents of Pilibhit having no means of living except doing job of labourer and 'Pheriwala' for their two time meals. No demand of dowry in the tune of Rs. One lac was ever made nor there was any cruelty with regard to it. Even then this judgment of conviction and sentence was passed. There was great inconsistency and material contradiction amounting exaggeration and embellishment in the testimonies of prosecution witnesses. This all had arisen bonafide doubt in the case of prosecution, but the trial court failed to appreciate facts and law placed before it. It was neither dowry death nor a murder. Rather the death was owing to an accident due to suicide, committed by the deceased. Instantly information was given to informant and his family members, who got this delayed report lodged against accused persons. On the same set of evidence, learned trial Judge passed judgment of acquittal for co-accused persons, but convict appellant has been convicted and sentenced on the evaluation of same evidence; merely because of his being husband of deceased. Hence this appeal with above prayer for setting aside impugned judgment of conviction and sentence made therein with a further prayer for judgment of acquittal against the charges levelled against him.

18. Learned AGA vehemently oppose the arguments of learned counsel for appellant. It was argued by learned AGA that after having information of unnatural death, within three months of marriage, the informant and his family members had rushed at the spot and found her dead and her dead body was lying at mortuary, where autopsy examination was got conducted. After performing last rituals, this F.I.R. was got lodged and it was with all precise accusation of dowry death against accused persons. Prosecution by its four witnesses of fact, as well formal witnesses, has proved its case beyond

reasonable doubt. As convict appellant was husband, demand of dowry to the tune of Rs. One lac was made at Delhi followed by subsequent demand of dowry. Prosecution case was proved in their testimonies by factual witnesses. Hence, judgment of conviction and sentence was awarded against husband-convict appellant. For rest of accused persons, who were not instrumental in demand of dowry or cruelty with regard to it, the case could not be proved beyond reasonable doubt. Hence judgment of acquittal for them was passed. It was correct appreciation and marshaling of facts placed on record and proper with due application of law in making judgment of conviction. Before sentencing, both sides were heard over quantum of sentence and under correct perception of law with supported precedents, sentence of ten years R.I. with other sentences were awarded. Hence, judgment of conviction and sentence made therein is with full support of fact and evidence placed on record coupled with correct perspective of law propounded by various Courts. Hence this appeal, being devoid of merit, deserves to be dismissed.

19. Section 304-B of I.P.C. was inserted by Act No. 43 of 1986 w.e.f. 19.11.1986 that:-

1. Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

There is an explanation that for the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

2. Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

20. The Apex Court in **Pathan Hussain Basha Vs. State of Andhra Pradesh, AIR 2012 SC 3205** has propounded that if a married woman dies in unnatural circumstances at her matrimonial home within seven years from her marriage and these are allegations of cruelty or harassment upon such married woman for or in connection with demand of dowry by the husband or relatives of the husband, the case would squarely come under "dowry death" and there shall be a presumption against the husband and the relatives.

21. The Apex Court in many cases has propounded that where the evidence revealed that accused-husband killed deceased-wife for not satisfying his dowry demand but nothing on record to show involvement of co-accused in-laws with the offence committed by the accused, co-accused in-laws are not guilty of offence under sections 304B I.P.C.

22. The Apex Court in **Kashmir Kaur Vs. State of Punjab, AIR 2013 SC 1039** has propounded that in a case of trial for dowry death the essential ingredients to attract the provisions of section 304B I.P.C. for establishing offence are (a) that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry, (b)

the death of the deceased woman was caused by any burn or bodily injury or some other circumstance, which was not normal, (c) such death occurs within seven years from the date of her marriage, (d) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband, (e) such cruelty or harassment should be for or in connection with demand of dowry, and (f) it should be established that such cruelty and harassment was made soon before her death.

23. The Apex Court in **Banshi Lal Vs. State of Haryana, AIR 2011 SC 691** has propounded that the court has to analyse the facts and circumstances as leading to death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. Meaning thereby cruelty or harassment with regard to demand of dowry soon before death is a crucial ingredient to be proved by prosecution before attracting any provisions of section 304B I.P.C.

24. Apex Court in **Mustafa Shahdal Shaikh Vs. State of Maharashtra, AIR 2013 SC 851** has propounded that "soon before death" means interval between cruelty and death should not be much. There must be existence of a proximate and live links between the effect or cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

25. This has again be reiterated by Apex Court in **Kaliyaperumal Vs. State of Tamil Nadu, AIR 2003 SC 3828** that the expression 'Soon before her death" used in the substantive section 304B I.P.C. and section 113B of the Evidence Act is present with the idea of proximity text. No definite period has been indicated and the expression "soon before hear death" is not defined. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

26. Regarding presumption under section 113B of the Evidence Act in this very ruling the Apex Court has propounded that the presumption shall be raised only on proof of the following essentials:-

1. The question before the court must be whether the accused has committed the dowry death of a woman.

2. The woman was subjected to cruelty or harassment by her husband or his relatives.

3. Such cruelty or harassment was for, or in connection with, any demand for dowry.

4. Such cruelty or harassment was soon before her death.

27. Though, the Apex Court has visualized that direct ocular testimony is rarely available in dowry death case and in most of such offence direct evidence is

hardly available and such cases are usually proved by circumstantial evidence. This section as well as section 113B of the Evidence Act enact a rule of presumption i.e. if death occurs within seven years of marriage in suspicious circumstances. This may be caused by burns or any other bodily injury. Thus, it is obligatory on the part of the prosecution to show that death occurred within seven years of marriage. If the prosecution would fail to establish that death did not occur within seven years of marriage, this section will not apply.

28. Before going any further, it would be relevant to mention here that section 113-B of Indian Evidence Act, 1872, provides that when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. The explanation to the section provides that expression 'dowry death' shall have the same meaning as in section 304B of IPC. Section 304B of the IPC defines 'dowry death' and provides punishment for said offence. Section 304B IPC provides that where the death of a woman is caused by any burns or bodily injury or occurs otherwise, than under normal circumstances, within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any other relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.

29. Sub-section 2 of section 304-B further provides that whoever commits dowry death shall be punished for imprisonment for a term which may not be less than seven years but which may extend to imprisonment for life. It is relevant to mention here that section 498A provides punishment for an offence of cruelty by husband or a relative of husband of a woman.

30. Their Lordships of Hon'ble Supreme Court in the case of **Satvir Singh and others vs. Sate of Punjab and another, (2001) 8 SCC 633** has observed as under:

"20. Prosecution, in a case of offence under Section 304B IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and also that such cruelty or harassment was caused soon before her death. The word dowry in Section 304B has to be understood as it is defined in Section 2 of the Dowry Prohibition Act, 1961. That definition reads thus:

"2. In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly -

(a) by one party to marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

31. Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage

and the third is "at any time" after the marriage. The third occasion may appear to be an unending period. But the crucial words are "in connection with the marriage of the said parties". This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of "dowry". Hence the dowry mentioned in Section 304B should be any property or valuable security given or agreed to be given in connection with the marriage.

32. It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304B is to be invoked. But it should have happened soon before her death. The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words soon before her death is to emphasise the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the court would be in a position to gauge that in all probabilities the death would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept "soon before her death".

33. Their Lordships of Hon'ble Supreme Court in the case of **Rajinder Singh v. State of Punjab, (2015) 6 SCC 477** has observed as under:

"7. The primary ingredient to attract the offence under Section 304B is that the death of a woman must be a "dowry death"."Dowry" is defined by Section 2 of the Dowry Prohibition Act, 1961, which reads as follows:

"2. Definition of "dowry".-In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies

Explanation I.- [***] Explanation II.-The expression "valuable security" has the same meaning as in Section 30 of the Indian Penal Code (45 of 1860)."

8. A perusal of this Section shows that this definition can be broken into six distinct parts:

(1) Dowry must first consist of any property or valuable security - the

word "any" is a word of width and would, therefore, include within it property and valuable security of any kind whatsoever.

2) Such property or security can be given or even agreed to be given. The actual giving of such property or security is, therefore, not necessary.

3) Such property or security can be given or agreed to be given either directly or indirectly.

4) Such giving or agreeing to give can again be not only by one party to a marriage to the other but also by the parents of either party or by any other person to either party to the marriage or to any other person. It will be noticed that this clause again widens the reach of the Act insofar as those guilty of committing the offence of giving or receiving dowry is concerned.

5) Such giving or agreeing to give can be at any time. It can be at, before, or at any time after the marriage. Thus, it can be many years after a marriage is solemnised.

6) Such giving or receiving must be in connection with the marriage of the parties. Obviously, the expression "in connection with" would in the context of the social evil sought to be tackled by the Dowry Prohibition Act mean "in relation with" or "relating to".

9. The ingredients of the offence under Section 304-B have been stated and restated in many judgments. There are four such ingredients and they are said to be:

(a) death of a woman must have been caused by any burns or bodily injury or her death must have occurred otherwise than under normal circumstances;

(b) such death must have occurred within seven years of her marriage;

(c) soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(d) such cruelty or harassment must be in connection with the demand for dowry."

34. Hence, the present case is to be scrutinized in view of above settled principles of law and factual evidence proved on record.

35. PW1-informant Sunil Kumar, in his testimony, has categorically stated that his sister Savita, who was previously married with Govind, but was with dissolution of her marriage, was married with convict appellant Anand Babu three months prior to her unnatural death. This date of marriage and Marriage certificate (Ext. Kha11), which was of Arya Samaj Temple, Tishajari, Delhi, having photographs of Anand Babu and Savita affixed over it, was proved by this witness and this fact has not been disputed in his cross-examination. Rather fact of marriage with convict appellant on 8.4.2014 was undisputed before trial court as well as before this appellate court by learned counsel for appellant. The main thrust was made by learned counsel for appellant that the second marriage with convict appellant was without a valid divorce decree regarding erstwhile marriage of deceased with Govind. This aspect is of no avail because admittedly, marriage was performed and certificate (Ext. Kha11) of same is on record. It was said from very beginning that previous marriage with Govind was dissolved by mutual consent. Dissolution of marriage by a decree of divorce is a legal mandate for dissolution of marriage. But even under Hindu Marriage Act ritual of dissolution of marriage by way of mutual consent in lower trodden community or any

community having this custom prevailed therein has been held to be a way of dissolution of marriage. Moreso, the validity of same may be a question before Family Court or a Civil Court, regarding declaration of status of marriage in between parties. But regarding criminal trial for an offence of dowry death, it has been propounded by Apex Court at many times, particularly in ***Reema Agarwal Vs. Anupam, AIR 2004 SC 1418*** that inspite of marriage being illegal or unrecognized, the same shall be held to be a marriage in a criminal trial regarding cruelty with regard to demand of dowry and for domestic violence. In the present case, marriage is admitted fact. Hence illegality or irregularity is of no consequence for this trial. This marriage was performed on 8.4.2014 and this unnatural death of bride-deceased occurred on 27.6.2014. It is also an undisputed fact. This has been proved by testimony of PW1, regarding which, there is no contradiction, exaggeration or embellishment. This witness has categorically said that after having information of death of his sister Savita, he along with his family members rushed at the place of her in-laws and found dead body of his sister at mortuary. After getting the same, after autopsy examination, last rituals were performed then after report of this case by way of presenting a computerised application having signature of this witness i.e. Exhibit Ka1 was presented at P.S. Jahanabad, where this case crime number was got registered against accused persons. No contradiction or exaggeration regarding registration of this case crime number is there in his testimony. It has further been corroborated by testimony of PW2- Head Constable Reeta Tomar, who in her testimony, has averred that while being posted as constable clerk at P.S. Jahanabad on 29.6.2014, she, on the basis of Ext. Ka1, brought by Sunil, who was accompanied by Parveen and Manoj Pandey and had come at P.S. Jahanabad at 17.35 hours, got case crime number registered vide chik no. 186 of 2014 by way of making entry in General Diary, which was prepared under one and common process by pasting carbon beneath it under handwriting and signature of this witness and the same is on record as Exhibit ka2- chik F.I.R. and Exhibit Ka3- General Diary entry. A suggestive question was put to this witness that this report was got lodged under dictation of police personnel and this has been vehemently answered in negative. It has further been reiterated that Sunil Kumar gave this FIR (Ext. Ka1) to this witness and on the basis of which, this case crime number was registered at above given time, date and place under handwriting and signature of this witness. Regarding this testimony, in answer to question put u/s 313 Cr.P.C., there is no denial regarding registration of case crime number by this witness. Rather a false implication has been answered. But this witness has categorically proved formal registration of this case crime number and there is corroboration by PW1 and PW2.

36. PW3- Sushil Kumar Joshi is further a witness of fact and brother of deceased, who has said that deceased was married with Anand Babu as per Hindu rituals on 8.4.2014. All accused persons are husband and his blood relatives. They demanded Rs. One lac from the deceased and within ten to 11 days of marriage Rs. 10,000/- was demanded from this witness. He paid Rs. 5000/- but again within 10 to 11 days Rs. 20,000/- was demanded. It was said to be beyond his capacity then after a telephonic demand from his father was made by accused persons in the tune

of Rs. One lac. Father of this witness along with Akash went to accused for persuading, but they were not amenable and persistent demand of Rs. One lac in dowry was there for which deceased made complaint to her parents. There was complaint of torture too and on 27.6.2014 an information regarding death of his sister was received. He along with his father and brother rushed at Pilibhit and found dead body of his sister at mortuary. After autopsy examination, dead body was handed over to them and it was taken at Bisalpur, where last rituals were performed on 28.6.2014. Then after on 29.6.2014 this FIR was got lodged, upon report of his brother. In cross-examination, it has specifically been said by this witness that deceased was previously married. But after personal settlement, she was residing at her parental house. Subsequently, she was married with Anand Babu and this witness was a witness of above marriage. It was performed at Arya Samaj Temple, Delhi. Within 20-24 days of marriage there was demand of dowry from father of this witness, whereas within ten days Anand Babu demanded money of Rs.10,000/- from this witness and he without disclosing to any one of his family members paid Rs. 5000/- to Anand Babu. Anand Babu had gone Delhi within ten days of marriage for making demand and then after he made persistent demand of Rs. One lac, which could not be fulfilled. This unnatural death occurred within three months of marriage. There is no contradiction, exaggeration and embellishment in the testimony of this witness. It is fully corroborated by statement of PW2.

37. PW4- Ram Prasad is father of deceased and he has said in his testimony the case of prosecution in full tune. Specific mention of demand of Rs. One lac in dowry by convict appellant and incapacity to make payment of same has been said by this witness. Information of death under unnatural circumstances on 27.6.2014, was received by this witness, though it was reported to be a death owing to rail side accident and this was communicated by his nephew at 2.00 P.M. of 27.6.2014. He along with his family members rushed at Pilibhit and on the same day at about 7 to 7.30 P.M. he reached Pilibhit and found dead body of his daughter at mortuary. Marriage was performed at Arya Samaj Temple at Delhi on 8.4.2014 and this was under initiation of sister and brother-in-law (Bahnoi) of Anand Babu. Regarding demand of dowry and incapacity to make payment of same then after persistent demand coupled with cruelty, there is no contradiction, exaggeration or embellishment in testimony of this witness. Rather this witness is a fully natural witness with full reliability and his testimony is fully corroborated by testimonies of PW1 and PW3. Though, since very beginning the case of defence is that deceased committed suicide by jumping before a train i.e. death under unnatural circumstances is not disputed. But plea of suicide is being taken. Whereas PW5 Dr. D. N. Singh in his testimony has proved medico legal examination in autopsy examination of deceased, which was brought in sealed intact position along with papers of inquest proceeding by constable of P.S. Jahanabad, wherein injuries were found, as written in inquest report. Postmortem report (Ext. Ka5) prepared under signature of this witness and above antemortem injuries were cause of this death as those injuries caused coma and hemorrhage resulting death. In examination in chief, this witness, has categorically said that all

these three injuries, written as above, may be caused by hard blunt object. But in cross-examination a suggestive question was put that they may be of rail accident and it was answered in affirmative. There is no crush injury over deceased. Injuries were over head resulting fracture of occipital bone, laceration of scalp deep over forehead. Even if, it was owing to jumping before train, there is no evidence of jumping before train brought on record by convict appellant against whom there was presumption of dowry death u/s 113B of Evidence Act. But as against it, there was testimony of Investigating Officer-PW7 wherein she has categorically said in her testimony in chief that during investigation sister of convict appellant had made statement that deceased had asked her sister-in-law Rita Devi for taking her at her home. Because she was being tortured by her in-laws and there is no rebuttal or contradiction or cross-examination of this peace of evidence said by investigating officer in her testimony. This Rita Devi was sister of convict appellant and she has narrated against appellant before this investigating officer, but Rita Devi has not been examined in defence for making rebuttal of this testimony. Death of deceased is unnatural, even if, it may be suicide, is unnatural for bringing ingredient of dowry death fulfilled, as provided u/s 304B I.P.C.

38. In the present case, prosecution by these evidence of fact i.e. PW1, PW3 and PW4 has successfully proved that marriage of deceased with convict appellant was performed on 8.4.2014. Deceased died under unnatural circumstances because of coma and hemorrhage caused by antemortem injuries found over her person under unnatural circumstances on 27.6.2014. There had been persistent demand of dowry coupled with cruelty in the tune of Rs. One lac and this was even one week before the above unnatural death. Convict appellant is husband of deceased. Hence all necessary ingredients of dowry death were proved by prosecution and presumption of offence of dowry death having committed by accused, who was her husband, was there. It was incumbent upon husband- convict appellant Anand Babu to give evidence in defence for rebutting above presumption raised u/s 113B of Evidence Act. But no evidence in defence has been given by convict appellant.

39. PW6- S.I. Phool Singh, is the investigating officer, who conducted inquest proceeding on 27.6.2014 and in his testimony he categorically proved that after having information of lying of a dead body of a lady at platform no. 2 of railway station from his Circle Officer, he along with relevant documents rushed at spot and did perform inquest proceeding under his handwriting and signature. Requisite papers, challan dead body, photo dead body, specimen seal of seal by which dead body was sealed intact, letter to R.I. and letter to C.M.O. were prepared by this witness and this was opined by witnesses of inquest proceeding to be death owing to antemortem injuries, but examination in autopsy examination was needed. Hence those documents were got prepared and then sealed intact dead body along with those documents were sent for its autopsy examination. The spot map, where this death was said as well as the spot, where this dead body was lying, was got prepared by this witness. These documents have been formally proved by this witness and regarding it there is no contradiction or dispute by learned counsel for defence. Rather those proceedings have been

undisputed and even said to have been death owing to suicide by jumping before train at railway track by deceased herself.

40. PW7- Dy. S.P. Investigating officer Mrs. Indu Siddhartha, in her testimony, has proved investigation of Case Crime No. 724 of 2014, u/s 498A, 304B I.P.C and 4 D. P. Act, P.S. Jahanabad, District Pilibhit, wherein she has formally proved site plans, Ext. Ka11 and Ext. Ka12 and charge sheet Ext. Ka13 to be under handwriting and signature of this witness. She has categorically said that track man was examined by her, who had said about death owing to jumping before train by unknown lady. This has been said by convict appellant Anand Babu too. But it was unnatural death, which has been proved by prosecution and this was within three months of marriage, wherein all through there was demand of dowry coupled with cruelty with regard to it.

41. PW8- Suresh Chandra, in his testimony, has said that he himself had not seen the lady jumping before train. Rather it was hearsay. Hence his testimony is of no avail for this trial.

42. Now convict appellant being husband was expected to explain the situations, which were under his personal knowledge, as was required u/s 106 of Evidence Act. But explanation given by this convict appellant is that deceased had committed suicide by jumping before train owing to depression, which she was suffering because her marriage was performed against her wishes and she was under depression because her two kids were living with her erstwhile husband. Even if this statement of convict appellant is to be accepted, then he, being husband, was duty bound for being careful for reporting matter to his in-laws regarding situation of mental depression of deceased. But no such information was either given to police nor to informant side nor even this unnatural happening was reported at police station by convict appellant. Rather this criminal machinery was put in motion by presenting Exhibit Ka1 by informant. Convict appellant was not present in the inquest proceeding too. He did not perform last rituals of deceased. These all circumstances, even otherwise, goes against him.

43. Apex Court in ***Trimukh Maroti Kirkan Vs. State of Maharashtra, (2007) 10 SCC 445*** has propounded as under:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused, if the strict principle of circumstantial evidence, as notice above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties."

44. Hence on this score too convict appellant failed to prove whether and under which circumstance the trial court failed to appreciate facts and evidence placed on record. Hence, from over all appreciation of facts and evidence placed on record, it is apparently clear that judgment of conviction passed by learned Trial Judge is fully based on evidence and supported by it. There is no illegality or irregularity in it.

45. So far as sentence regarding appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual case.

46. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of Court to constantly remind itself that right of victim, and be it said, on certain occasions persons aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that Courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime, which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to society's cry for justice against the criminal'. **[Vice Sumer Singh Vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder Vs. Puran, (1990) 4 SCC 731, M.P. Vs. Saleem, (2005) 5 SCC 554, Ravji Vs. State of Rajasthan, (1996) 2 SCC 175].**

47. In the present case aggravating and mitigating circumstances, narrated as above, prove that dowry death was committed by convict appellant.

48. Apex Court in ***Ashok Kumar Vs. State of Rajasthan, 1991(1) SCC 166*** has propounded as under:

"Bride burning is a shame of our society. Poor never resort to it. Rich do not need it. Obviously because it is basically an economic problem of a class, which suffers both from ego and complex. Unfortunately, the high price rise and ever increasing cost of lving coupled with enormous growth of consumer goods effacing difference between luxury and essential goods appear to be luring even the new generation of youth, of best service, to be as much part of the dowry menace as their parents and the resultant evils flowing out of it. How to curb and control this evil? Dowry killing is a crime of its own kind where elimination of daughter-in-law becomes immediate necessity. If she or her parents are no more able to satiate the gree and avarice of her husband and their family members, to make the boy available, once again in the marriage market. Eliminate it and much may stand resolved automatically ... ... …"

49. Hence, sentencing too of convict appellant was adequate and commensurate to degree of offence on this score. The appeal is liable to be dismissed.

50. The appeal is dismissed accordingly.

(2020)1ILR 1435

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 5738 of 2011

Shyam Lal & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri D.N. Joshi, Sri Deepak Srivastava

Counsel for the Opposite Party:
A.G.A., Sri Shashi Kant Singh

A. Common object- for applicability of section 149, there need not be a prior meeting of minds. It is enough that each has the same object in view. It is the knowledge which is necessary to attract the liability. Common object of unlawful assembly is different from common intention as it can develop during course of incident at the spot.

B. Plea of alibi- when the accused takes plea that when the occurrence took place, he was somewhere else. An alibi is not an exception envisaged in the IPC. It is a rule of evidence u/s 11 of evidence act- facts inconsistent with the fact in issue are relevant.

C. Code of Criminal Procedure, 1973 - Section 374(2), Indian Penal Code, 1860 - Section 147, 304/149, 323/149 - counterblast- Engagement of accused in job of raising construction-places were in close vicinity-their presence on spot at the time of occurrence cannot be ruled out-plea of alibi could not be proved to the satisfaction of the court- inconsistency in the statement of witnesses in their examination in chief in cross-offence punishable u/s 147, 323/149 are proved against the accused- but offence u/s 304/149 is not proved beyond reasonable doubt-appeal partly allowed for offence u/s 304/149. (Para 22 to 31)

Criminal Appeal allowed. (E-6)

List of cases cited: -

1. Dharam Pal Vs. St. of U.P. AIR 1994 SC 1546

2. Lalji Vs. St. of U.P. AIR 1989 SC 754

3. St. of A. P. Vs. Thakkidiram Reddy & Ors. AIR 1998 SC 2702

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal under Section 374(2) of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') has been filed by Shyam Lal, Bijai alias Ram Sajivan, Kallu alias Ram Ujagir, Udal alias Udairaj, Awadhraj, Girdhari and Sudama Prasad against judgment of conviction and sentence made therein in Sessions Trial No. 108 of 2004, State Versus Shyam Lal and others, arising out of Case Crime No. 162 of 2004, under Sections 147, 304/149, 323/149 I.P.C., Police Station Durgaganj, District Sant Ravidas Nagar, Bhadohi, passed by court of Additional Sessions Judge, Court No. 3, Bhadohi- Gyanpur, wherein convicts-appellants have been sentenced with one year's simple imprisonment and fine of Rs.1,000/- and in case of default one month's additional simple imprisonment for offense punishable under Section 147 I.P.C., ten years' rigorous imprisonment with fine of Rs.5,000/- each and in default three months' additional simple imprisonment under Section 304/149 I.P.C., six months simple imprisonment and fine of Rs.500/- and in case of default one month's

additional simple imprisonment for offence punishable under Section 323/149 I.P.C. with a direction for concurrent running of sentences.

2. Memo of appeal is with this ground that trial court failed to appreciate facts and evidence placed on record. First information report, lodged by complainant, was based on wrong facts. PW-1 Jitendra Kumar was not present on spot at the time of alleged occurrence, because he was neither injured nor his presence is beyond doubt. There was no public witness of alleged occurrence. Statement of prosecution witnesses were full of contradictions. Medical evidence was not in support of prosecution case. Hence, this appeal is with a prayer for setting aside impugned judgment of conviction and sentence dated 17.09.2011 with a further prayer for grant of acquittal against charges levelled against appellants.

3. From the very perusal of trial court record, it is apparent that Jitendra Kumar, S/o Ram Shiromani, R/o Village Gangarampur, P.S. Durgaganj, District Sant Ravidas Nagar, filed a written report (Ext.Ka-1) at Police Station Durgaganj on 12.07.2004 with this contention that on above date at about 9.30 A.M., there occurred quarrel in between Shyamlal, Kallu @ Ram Ujagir, Udal @ Udairaj, Bachai @ Ram Sajivan, Awadhraj, all sons of Bansi and Sudama Prasad and Girdhari, S/o Ramnath and informant's side regarding construction of chak road from the land of informant. Those named accused persons, being armed with lathi-danda, did assault by lathi-danda and brick pelting, resulting injuries to ladies of informant's house as well as Madan Lal, Dharamraj, Shyam Bihari, Sri Nath and Ravindra Kumar. They were taken to Government Hospital, Gyanpur, from where they were taken to Kabir Chaura Hospital, Varanasi. Informant's aunt Photo Devi was also accompanying them, who came back and apprised that others were under treatment, whereas Ravindra Kumar died, while reaching Kabir Chaura Hospital. This occurrence was witnessed by many persons, hence request for taking legal recourse was made. On the basis of this written report (Ext.Ka-1), Chik F.I.R. (Ext.Ka-19) was got registered at 00.10 P.M. on 13.07.2004 as Case Crime No. 162 of 2004, under Sections 147, 149, 336, 323, 304 I.P.C., at Police Station Durgaganj. This registration of case crime number was entered in General Diary Entry at Report No. 20 of the day. The matter was investigated, wherein Spot Map (Ext.Ka-4) was got prepared, brick parts, lying thereat, on the place of occurrence, was taken in custody by way of preparing recovery memo (Ext.Ka-2), injured Smt. Kamla Devi, Smt. Shivrati Devi, Sumitra Devi, Shrinath and Chhabbi Devi were got medically examined at Primary Health Centre, Suriyawan and their Medico Legal Reports are Ext.Ka-11, Ext.Ka-6, Ext.Ka-8, Ext.Ka-9, Ext.Ka-12. Medico Legal Report of Photo Devi is Ext.Ka-10, of Balraji Devi is Ext.Ka-7 and of Madan Lal is Ext.Ka-5. Deceased Ravindra Kumar died and his inquest proceeding was got conducted, wherein Inquest Report (Ext.Ka-13), Letter R.I. (Ext.Ka-14), Letter C.M.O. (Ext.Ka-15), Photo Dead Body (Ext.Ka-16), Police Form-13 (Ext.Ka-17) was got prepared. Thereafter, dead body along with those documents was sent for its autopsy examination under sealed intact position. It was got examined under autopsy examination and report of autopsy examination (Ext.Ka-3) was on record. Statement of witnesses were recorded

under Section 161 Cr.P.C., whereupon Charge Sheet (Ext.Ka-18), under handwriting and signature of Investigating Officer, for offences punishable under Sections 147, 323/149, 325/149, 304/149 I.P.C., was got filed, whereupon Magistrate took cognizance.

4. As offence, punishable under Section 304 I.P.C., was exclusively triable by court of Sessions, hence learned Chief Judicial Magistrate, Bhadohi-Gyanpur, vide order dated 25.10.2004, committed this file to Court of Sessions Judge, Bhadohi at Gyanpur, where it was registered as Sessions Trial No. 108 of 2004. After receipt of this file in the court of Sessions Judge, Bhadohi at Gyanpur, after framing of charges, this case was made over to the court of Additional Sessions Judge, Court No.3, Bhadohi at Gyanpur for its trial. In the court of Sessions Judge, Bhadohi, Public Prosecutor / learned D.G.C. (Criminal), opened its case and after hearing learned counsel for accused charges against Shyamlal, Bachai alias Ram Sajivan, Kallu alias Ram Ram Ujagir, Udal alias Udairaj, Awadhraj, Girdhari and Sudama Prasad were framed on 08.12.2004 by the then Sessions Judge, Bhadohi at Gyanpur. Charges levelled against those accused persons in vernacular language is being translated in English by Court itself and is being reproduced as below:-

1. On 12.07.2004 at 9.30 A.M. in Village Gangarampur, within area of Police Station Durgaganj, District Sant Ravidas Nagar, Bhadohi, you with intention to kill Ravindra Kumar, made an unlawful assembly and thereby you committed offence punishable under Section 147 I.P.C. within cognizance of this Court.

2. On above date, time and place, you in furtherance of common intention, assaulted Ravindra Kumar by lathi-danda and brick-stone pelting, which was a culpable homicide not amounting to murder, punishable under Section 304/149 I.P.C. within cognizance of this Court.

3. On above date, time and place, you in furtherance of common intention, you did grievous hurt by giving assault by lathi-danda and brick pelting to Smt. Balraji, thereby committed offence under Section 325/149 I.P.C. within cognizance of this Court.

4. You on above date, time and place by lathi-danda and pelting brick and stone did voluntarily assault and hurt over Madan Lal, Smt. Shivpatti, Smt. Baliraji, Smt. Sunita Devi, Shrinath, Smt. Photo, Smt. Kamla Devi and Smt. Chhabbi Devi, thereby committed offence under Section 323/149 I.P.C. within cognizance of this Court.

5. The charges were read over to accused persons, who pleaded not guilty and claimed for trial. Prosecution examined PW-1 Jitendra Kumar, PW-2 Smt. Sumitra Devi, PW-3 Madan Lal, PW-4 Dr. A.K. Singh, PW-5 Shyam Lal, PW-6 Nagendra Prasad Mishra Pharmacist, PW-7 Islamul Haq Khan, PW-8 S.I. Radhey Shyam Pushkar, PW-9 C.P. 156 Shankar.

6. With a view to have explanation of accused persons over incriminating materials furnished by prosecution and the version of defence, accused persons were examined under Section 313 Cr.P.C., wherein each of accused answered accusation and testimony of PW-1 Jitendra Kumar, PW-2 Smt. Sumitra Devi, PW-3 Madan Lal, PW-4 Dr. A.K. Singh, PW-5 Shyam Lal, PW-6 Nagendra Prasad Mishra Pharmacist, PW-7 Islamul Haq Khan, PW-

8 S.I. Radhey Shyam Pushkar, PW-9 C.P. 156 Shankar to be false, fictitious and fabricated, given under animosity. Evidence in defence was said to be given. Shyam Lal narrated in reply to question no. 13 "मुझे वादी पक्ष के लोगो ने मारा था इसका मुक़दमा मेरे भाई राम सजीवन ने किया है क्रॉस केस से बचने के लिए झूठा मुक़दमा किया गया" (Prosecution side had assaulted us, for which case was got lodged by my brother Ram Sajivan and with a view to save themselves from criminal liability, this false accusation was got lodged) [English translation by Court itself]. The same is reply of almost each of accused persons except assertions given by Ram Sajivan that on 12.07.2004 at about 9.30 A.M. chak road was being constructed for use by accused persons from the field of accused Sudama under his consent, which was damaged by Shyam Bihari, Ram Shiromani, Dharamraj and Madan. This was protested. Shyam Bihari, Dharamraj, Ram Shiromani and Madan give assault by lathi-danda, wherein Shyam Lal, Udairaj, Ram Ujagir, Balraji and Pintu were badly injured, for which case was got registered by this accused at Police Station Durgaganj and with a view to save themselves from criminal liability, this false case has been got lodged as counter blast of same. Convict-appellant Ram Ujagir has also said like so. The same is the version of convict-appellant Udairaj. Convict-appellant Awadhraj has pleaded his alibi that he was taken by police of Durgaganj at 8.00 A.M. on 12.07.2004 and he was restrained and confined under Section 51 read with 107/116 Cr.P.C. but falsely implicated in this occurrences. Convict-appellant Sudama Prasad, too, had taken plea of alibi that he was not present on spot on above date, time and place. Rather, he was busy in making construction of house of Pratap Dhobi, since 8 A.M. to 5 P.M., on the above date of occurrence. Girdhari also took plea of alibi that he was at Village Dhanaura regarding construction of house as labourer.

7. In defence, Jadawati Devi as DW-1 has said that Sudama was raising construction of her house on 12.07.2004 since 7 A.M. and was present thereat. DW-2 Mohd. Jumrati as DW-2, for proving presence of Girdhari Lal at his house for raising construction has been examined. Learned trial Court made trial of Sessions Trial No. 108 of 2004 along with its cross case Sessions Trial No. 98 of 2005; State of U.P. Vs. Shyam Bihari & others, arising out of N.C.R. No. 14 of 2004, under Sections 323/34, 504 I.P.C and passed impugned judgment of conviction in Sessions Trial No. 108 of 2004, wherein Shyam Lal, Bijai alias Ram Sajivan, Kallu alias Ram Ujagir, Udal alias Udairaj, Awadhraj, Girdhari and Sudama Prasad were held guilty for offence of rioting punishable under Section 147 I.P.C., culpable homicide not amounting to murder punishable under Section 304/149 I.P.C., voluntarily causing simple hurt, punishable under Section 323/149 I.P.C. They were acquitted for charges levelled for causing grievous hurt punishable under Section 325/149 I.P.C. After hearing over quantum of sentence, impugned judgment sentencing the convicts-appellants, as above, was passed, for which this appeal.

8. No appeal by State regarding acquittal under Section 325/149 I.P.C. is there.

9. In Sessions Trial No. 98 of 2005, which was a cross case version, judgment of conviction and sentence made therein

for offence punishable under Sections 323/34, 504 I.P.C. was passed against Shyam Bihari, Ram Shiroman, Dharm Nath and Madan and after hearing over quantum of sentence, they have been sentenced with six months simple imprisonment and fine of Rs.500/- and in default one month additional simple imprisonment under Section 323/34 I.P.C with further imprisonment of one year simple imprisonment and fine of Rs.1000/- and in default one month additional simple imprisonment under Section 504 I.P.C. with a direction for concurrent running of sentences. The judgment of conviction and sentence made therein has been challenged by convicts-appellants Shyam Bihari, Ram Shiroman, Dharm Nath and Madan in Criminal Appeal No. 5969 of 2011, Shyam Bihari Vs. State of U.P., arising out of N.C.R. No. 14 of 2004, Police Station Durgaganj, District Sant Ravidas Nagar, Bhadohi. Above appeal has been heard and is being decided by separate judgment in it, together with this appeal.

10. Learned counsel for appellants argued that trial court failed to appreciate facts and law placed on record. Appellants were not aggressor. There was no unlawful assembly to commit murder or culpable homicide nor any such injury caused by lathi-danda was found over persons of deceased Ravindra in its inquest or autopsy examination report, because injuries found in external examination were abrasions. It was said by PW-2 wife of deceased that three persons, namely, Kallu, Bachai and Shyam Lal did assault over Ravindra, they ride over his chest and exerted pressure over his neck, resulting injuries, which caused his death owing to Asphyxia and internal injury to trachea and laceration of lungs. It was not the object of unlawful assembly because all those appellants were said to have rushed on spot, where chak road was being constructed, and it was being damaged, resulting a quarrel, wherein this occurrence took place, but trial court failed to appreciate it and sentenced each of appellants for offence of culpable homicide punishable under Section 304 I.P.C. which was not under common object of unlawful assembly. Hence, this appeal with above prayer.

11. Learned A.G.A. has vehemently opposed the aforesaid argument with this contention that trial court has rightly convicted and sentenced the appellants on the basis of statements recorded before it, wherein each of convicts-appellants, under joint mens rea, in furtherance of their common object of unlawful assembly did assault over Ravindra and other injured witnesses, wherein Ravindra succumbed to above injury and it was culpable homicide not amounting to murder, punishable under Section 304 read with 149 I.P.C., for which there was no illegality or irregularity. Other sentences were also in accordance with facts and law placed on record. This appeal is devoid of merit. Hence, the same is to be dismissed.

12. Section 149 I.P.C. provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence i.e. there must be an unlawful assembly, commission of an offence by any member of an unlawful assembly, such offence must have been committed in prosecution of the common object of the

assembly; or must be such as the members of the assembly knew to be likely to be committed. If these three elements are satisfied, then only a conviction under Section 149, I.P.C., may be substantiated, and not otherwise. None of the Sections 147, 148 and 149 applies to a person who is merely present in any unlawful assembly, unless he actively participates in the rioting or does some overt act with the necessary criminal intention or shares common object of the unlawful assembly. Use cannot be made of Section 149 for the purpose of establishing the guilt of the accused constructively except in cases falling under the Penal Code. For applicability of Section 149 there need not be a prior meeting of minds. It is enough that each has the same object in view. The elements of Section 149 are: (i) Commission of an offence by any member of an unlawful assembly; (ii) Commission of the offence in prosecution of the common object of the unlawful assembly; and (iii) the offence must be such as the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. As has been propounded by Apex Court in **Dharam Pal v. State of U.P.; AIR 1994 Supreme Court 1546**, that where ingredients of Section 149 are not present, it is difficult to hold the accused liable with the aid of Section 149. Sections 149 and 34 relate to vicarious or collective liability and surfacially involve some amount of resemblance and overlapping. Section 34 is restricted to common intention and does not embrace any knowledge. Under Section 149 it is the knowledge which is necessary to attract the culpability. It has been held by Supreme Court that common object of unlawful assembly is different from common intention as it can develop during course of incident at the spot *coinstante*. The meaning of prosecution of common object is attainment of common object and 'object' means purpose or design and in order to make it common it must be shared by all and no proof of overt act is necessary. Section 149, I.P.C. makes every member of an unlawful assembly, at the time of committing of the offence, guilty of that offence. The section creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts, committed pursuant to the common object, by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section, the fact that he did nothing with his own hands, would be immaterial. He cannot put forward the defence that he did not with his own hands, commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. The basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly with the requisite common object or knowledge. Thus, once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held

guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it. In other words it is not open to the Court to acquit members of the unlawful assembly for lack of corroboration as to their participation, as was propounded in **Lalji v. State of U.P.; AIR 1989 SC 754**. "In prosecution of the common object" this phrase means that the offence committed was immediately connected with the common object of the unlawful assembly, of which the accused were members. The act must be one which must have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. Expression in prosecution of common object in Section 149 is to be strictly construed as equivalent to in order to attain common object. Hence, existence of common object and offence committed in pursuance of common object is to be established by prosecution. Doing some overt act is not necessary to bring home charge under Section 149. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case. To ascertain whether a particular person shared the common object of the unlawful assembly it is not essential to prove that he committed some illegal over act or had been guilty of some illegal omission in pursuance of the common object. Once it is demonstrated from all the facts and circumstances of a given case that he shared the common object of the unlawful assembly in furtherance of which some offence was committed or he knew it was likely to be committed by any other person, he would be guilty of that offence. Undoubtedly, commission of an overt act by such a person would be one of the tests to prove that he shared the common object, but is not the sole test, as has been propounded in **State of Andhra Pradesh v. Thakkidiram Reddy and others; AIR 1998 Supreme Court 2702**

13. In present case, admittedly, quarrel occurred in between both sides at a place where chak road was being constructed. Accused Shyam Lal, Bijai @ Ram Sajivan, Kallu @ Ram Ujagir, Udal @ Udairaj, Awadhraj, Sudama Prasad and Girdhari were said to be present on above spot and they were armed with lathi-danda. They assaulted injured Ravindra, as a result of which he died. The common object of giving assault to any of the injured was not said by PW-1 Jitendra Kumar in Ext.Ka-1. Rather at about 9.30 AM on 12.07.2004, there occurred quarrel at the place of construction of chak road, wherein assault by lathi-danda and pelting of brick and stone was said, resulting injuries to injured persons. This has been specifically said in cross-examination of this witness that both sides had entered into some written compromise on 16.06.2004 regarding construction of this disputed chak road. It was under mediation by the then Village Pradhan and other members of village assembly and on 11.07.2004 chak road was being constructed as per above compromise. Land of Jagannath and Sudama was adjacent to above chak road. A dilapidated house of this witness PW-1 and of accused was under sharing because both sides were residing in this house at any time. This chak road was for beneficial enjoyment of complainant / informant PW-1 Jitendra

Kumar, Sudama and accused persons. Soil was led over this chak road. A suggestive question has been put to this witness that on that date at about 7 A.M. Shyam Bihari, Ram Shiromani, Dharamraj and Madan damaged above chak road by spade, which was protested by Ram Sajivan. Matter reached up to police station. S.O., Durgaganj rushed on spot and both Shobhnath and Awadhraj were taken at Police Station, Durgaganj at about 8 A.M. Thereafter, this occurrence took place at about 9.30 A.M. The injuries of accused side was not explained by this witness though question in cross-examination were put. A question regarding cross case was also put, but this witness could not explain about it. Meaning thereby, this PW-1 has said that he was not aware about injury to other side or any cross case to present case, being tried together, but it has specifically been said by this witness at page no. 8 of statement that accused persons were assembling for entering in quarrel. They were Awadhraj, Udairaj, Shyamlal, Kallu, Bachai, Girdhari, Sudama, Madanlal, Shrinath, Shyam Bihari and ladies i.e. both sides were present and there occurred some abuse i.e. affray was caused. Some persons other then those rushed on road and pelting of stones started. It ran for five minutes. Complainant side were also present thereat and due to pelting of stones, injury was caused to Madan Lal, Sursatti Devi, Dharamraj, Photo Devi, Shrinath, Hirawati Devi, Latera Devi and Kamla Devi. Sobhnath was not injured in it. Shrinath was injured at his leg. Madan Lal was injured over his head i.e. injury to either side was admitted by this witness and this unlawful assembly was with object of quarreling over chak road. It was not with any object of giving assault or causing culpable homicide nor there was knowledge of this fact of culpable homicide of deceased Ravindra, for which PW-2, wife of deceased, has categorically said that it was Kallu, Bachai and Shyam Lal, who caused those injuries, resulting his death.

14. PW-1 informant Jitendra Kumar in his examination-in-chief has said on oath that on 12.07.2004 at about 9.30 A.M., there occurred a quarrel regarding construction of chak road, wherein Kallu Ram, Shyam Lal, Udairaj, Bachai Ram, Ram Sajivan, Awadhraj, Sudama Prasad and Girdhari Lal, armed with lathi-danda, brick and stone, did assault, resulting injuries to Madan Lal, Dhramraj, Shyam Bihari, Shrinath and Ravindra Nath. Ladies of informant's house Photo Devi, Sursatti Devi, Chhabbi Devi, Kamla Devi, Latera Devi and Durga Devi, were also beaten by lathi-danda and brick pelting by those accused persons. This occurrence resulted death of Ravindra Nath, S/o Shobh Nath, while he reached at Kabir Chaura Hospital, Varanasi and this was owing to assault made by accused persons. This occurrence was reported by written F.I.R. under handwriting and signature of this witness, which is Ext.Ka-1 on record and brick-stone were taken in possession by I.O. under witness-ship of this witness by way of preparation of recovery memo, having his signature over it and the same recovery memo is on record. It was prepared by Investigating Officer in his presence, which is Ext.Ka-2 on record. In cross-examination this witness has categorically said that he was not present at Kabir Chaura Hospital, when Ravindra died. That is why he is not aware about the time of death of Ravindra. But it was of about 11.30 A.M. As this witness was not present at Kabir Chaura Hospital, hence his testimony is on the basis of

information given by Photo Devi, but this witness has categorically said that Photo Devi, Sursatti Devi, Madan Lal, Dharm Raj, Shyam Bihari, Shrinath, Durga Devi and Kamla Devi were at Kabir Chaura Hospital. Inquest of dead body was got conducted and it was examined under autopsy examination. Cross case version has been said by learned counsel for defence and same was being tried together with present Sessions trial. Hence, this occurrence at above time, date and place, wherein persons were injured and under this injury Ravindra died was undisputed fact. This occurrence, owing to construction of chak road, was also undisputed. Inquest report Ext.Ka-13 has been proved by PW-7 Islamul Haq Khan, the then Station Officer of Police Station, Suriyawan, who has said in his examination-in-chief that while being posted as Sub-Inspector of Police Station Suriyawan on 13.07.2004, Case Crime No. 162 of 2004, under Sections 147, 149, 336, 323, 304 I.P.C. of Police Station Durgaganj was investigated for filling inquest proceeding, wherein inquest proceeding of deceased Ravindra Kumar, S/o Sobhnath, R/o Gangarampur, P.S. Durgaganj was got performed and deceased was having injuries written in it. This inquest report was Ext.Ka-13 and for getting autopsy examination conducted, requisite documents Letter R.I. (Ext.Ka-14), Letter C.M.O. (Ext.Ka-15), Photo Dead Body (Ext.Ka-16), Police Form-13 (Ext.Ka-17) were got prepared under handwriting and signature of this witness and the same are on record. This dead body under intact sealed position along with those documents were sent for autopsy examination. Regarding it, there is no material contradictions, exaggeration or embellishment in examination in cross. Although, this has further been corroborated by testimony of Dr. A.K. Singh PW-4 that while being posted as Medical Officer Maharana Balwant Singh Hospital, on 13.07.2004 he was deputed on postmortem examination duty, where dead body of Ravindra Kumar, under wrap of cloth, fully intact, sealed along with specimen seal, was brought and after comparing seal it was got identified by Constable Balendra Yadav and Chhotey Lal of Police Station Durgaganj. Autopsy examination of dead body was got conducted. The deceased Ravindra was of average body built, of 30 years age, having rigor mortise present over limbs, eyes were closed, frost and mucus with blood was oozing from nostrils and he was having following injuries:-

1. Bloody frost oozing from nostrils and mouth opening.

2. Multiple abrasions 5cmx1.5cm over left side of neck towards lower side just at right clavicle bone.

3. Abrasion 2cmx1cm right side of neck towards lower side chest above right clavicle.

4. Abrasion 1cmx1cm over left mastoid region.

5. Abrasion 1cmx1cm on right upper limb towards outer aspect.

6. Abrasion 1cmx1cm right side over back, 5cm below right scapula.

Under internal examination, brain and its membrane was congested. Left lung and its membrane was congested and lacerated. Trachea was lacerated and there was blood in the upper muscles of neck. Left lung was congested and lacerated. Blood was present in the cavity. Right chamber of heart was with blood. Left was empty. Teeth were 16/16. Stomach was empty. Digestive material with gases were in small intestine. Faecal matter with gases was in the large

intestine. Urinary bladder was empty. Death was one day old and due to Asphyxia and shock, owing to throttling. Autopsy examination report (Ext.Ka-3) was prepared under handwriting and signature of this witness. Regarding, this autopsy examination, internal and external situation of deceased body and cause of death, as above, there is no contradiction, exaggeration or embellishment.

15. PW-6 Nagendra Prasad Mishra, Chief Pharmacist, is the secondary evidence, examined for proving medico legal report of injured Madan Lal, Shivrati, Smt. Balraji, Smt. Sumitra Devi, Shrinath, Smt. Photo Devi, Kamla Devi and Smt. Chhabbi Devi, who were examined at Government Hospital. These medico legal examination reports were entered in Medico Legal Register from page no. 8 to 15, wherein original medico legal reports are there and those, filed on record, were copy of same medico legal reports, which were compared and proved to be copy of same. This was exhibited as Ext.Ka-5 to Ext.Ka-12.

16. PW-9 Constable Shankar is the secondary evidence for proving registration of this Case Crime No. 162 of 2004 under handwriting and signature of Constable Ram Gopal with whom this witness was posted at Police Station Gyanpur. Chik FIR and G.D. Entry of same is under handwriting and signature of Constable Ram Gopal, for which as secondary evidence, proved the same, on the basis of which Ext.Ka-19 and Ext.Ka-20 has been exhibited. Hence, this registration of case crime number has been formally proved by PW-1 Jitendra Kumar, which is reiterated and corroborated by testimony of this prosecution witness no. 9 Shankar, for which there is no contradiction, exaggeration or embellishment.

17. The statements of accused recorded under Section 313 of Cr.P.C. and stand of defence during trial was that on 12.07.2004 at 9.30 A.M. there occurred a quarrel in between both sides, wherein cross cases were got registered and there was use of lathi-danda with pelting of brick-stone, resulting injury to both sides. Sessions Trial No. 98 of 2005; State vs. Shyam Bihari & Ors. is also under trial before this Court with this sessions trial. Informant Ram Sajivan has lodged case for this occurrence against Shyam Bihari, Ram Shiroman, Dharm Nath and Madan at Police Station Durgaganj, District Sant Ravidas Nagar, Bhadohi. Meaning thereby, this occurrence was not a disputed one and injury on both sides were undisputed. The medico legal reports of injured, who have been examined in this trial is on record.

18. PW-2 Sumitra Devi has said that occurrence took place on 12.07.2004 at about 9.30 A.M. when Bachai, Shyam Lal, Awadhraj, Udal, Kallu, Girdhari and Sudama, armed with lathi-danda, came at the door of this witness. This quarrel was regarding chak road. This was protested by Shrinath and he was beaten by them. This witness along with her husband Ravindra Kumar (deceased), her father-in-law Shobhnath tried to intervene and save Shrinath. Then, Kallu, Bachai, Shyam Lal with others did assault over these three wherein Ravindra was badly beaten by Kallu, Bachai and Shyam Lal. Upon exhortation made by Shyam Lal, Kallu, Bachai and Shyamlal gave lathi blow to Ravindra Nath and thereupon they pressed his chest and neck. Thereafter, this witness, her father-in-law Shobhnath and her sister-in-law tried to save Ravindra,

wherein Bachai assaulted this witness and Udal, Girdhari and Sudama assaulted her sister-in-law. Ravindra Nath, Shobhnath, this witness, her sister-in-law, Latera Devi, Chhabbi Devi, Photo Devi and Ram Shiromani were also injured. Madan Lal and Dharm Raj too were injured. All injured were examined at Government Hospital, Suriyawan. Her husband was taken at Gyanpur, from where he was referred to Government Hospital, Kabir Chaura, Varanasi, but he died just after reaching at above Hospital and this death was owing to above injuries. Meaning thereby, injuries to accused persons Madan Lal and Dharm Raj too are undisputed fact and this injury was not free fight assault. Rather a quarrel occurred when abuse was made. This was protested by Shrinath. He was assaulted, wherein interception was made by Ravindra, his wife Sumitra Devi and his father Shobhnath. Then they were assaulted. Specific role of giving assault over Ravindra was assigned against Kallu, Bachai and Shyamlal, who gave assault over Ravindra upon exhortation of Shyam Lal by riding over his chest and pressing his neck. Thereafter, Shobhnath and this witness tried to save Ravindra. Then they were assaulted. Hence, this culpable homicide was not under furtherance of common object of unlawful assembly, but this was subsequent development in which upon exhortation made by Shyam Lal, Kallu, Bachai and Shyam Lal did above assault over chest and neck of Ravindra, resulting injuries, which resulted his death. Deceased Ravindra was given assault by lathi-danda, but no fracture of any bone was there. Rather laceration of lung resulting presence of blood in cavity and fracture of trachea resulting blood in respiratory tract was there. It was owing to pressing over chest by riding over it. The accused persons were armed with lathi-danda stone and brick, but they had not given any bony fracture injury over deceased Ravindra, rather above injury, which resulted his death, was owing to laceration of lungs etc. for which specific allegation of this eyewitness is against Kallu, Bachai and Shyam Lal, who were members of unlawful assembly. But, the object of committing death or causing multiple abrasions on Ravindra could not be gathered from above sequence of occurrence, rather it was informed as overt act of above Kallu, Bachai and Shyam Lal, resulting death of deceased Ravindra. Hence, trial court failed to appreciate these facts and evidence placed on record and convicted each of convict-appellant for offence punishable under Sections 304/149 I.P.C. Rather, it was a proved case for offence punishable under Section 304 I.P.C. against Kallu, Bachai and Shyam Lal only. For rest, this finding is not proved against beyond doubt.

19. This witness has said that accused persons did pelting of brick and stones. Ladies of family of accused also did stone pelting. Prior to this quarrel, this stoning was made. It was 2-4 pelting and it was at the house of this witness, but who did this pelting could not be said by this witness nor she could recognize those ladies, who did this pelting. Meaning thereby, both sides did quarrel. Pelting of stones was made, which resulted injury to complainant side, hence offence punishable under Section 323/149 and 147 I.P.C. was proved, but it was not the common object of unlawful assembly that culpable homicide of Ravindra was to be committed nor unlawful assembly did this offence in pursuance of that common object nor they were aware of this fact. Neither it was intended nor any fracture by lathi-danda was caused nor death was

owing to above injury made by lathi-danda, rather it was injury caused by sequence written, as above. Hence, this offence punishable under Section 304/149 I.P.C. was not object of above unlawful assembly and accused other then Kallu, Bachai and Shyam Lal may not be held constructively liable for those offence. Rather, it was an act of Kallu Bachai and Shyam Lal only.

20. PW-5 Shyam Lal, who is formal witness, was erstwhile Investigating Officer of Case Crime No. 162 of 2004, under Sections 147, 149, 336, 323, 304 I.P.C. and he visited spot and prepared spot map upon pointing of informant Jitendra Kumar, which is in handwriting and signature of this witness, proved and exhibited as Ext.Ka-4 on record. He took brick and stones in his possession by way of preparation of recovery memo Ext.Ka-2 under his handwriting and signature. In cross-examination, this witness has said that till his visit on spot he was not aware about cross case version nor about injuries sustained by accused side and in the course of investigation he could not be aware as to whether dilapidated house shown in the site map was of accused side or of complainant side or of both. He has formally proved investigation made by him, for which there is no material contradiction.

21. PW-9 is Sub Inspector Radhey Shyam Pushkar, Investigating Officer, who has said that in his investigation of Case Crime No. 162 of 2004, under Sections 147, 149, 336, 323, 304 I.P.C., P.S. Durgaganj, he got the statement of injured witnesses recorded under Section 161 Cr.P.C. Their medico legal report entered in case diary. The inquest proceeding were copied in case diary. Medical Officer statement was recorded in case diary. Remand for accused persons were taken. Then, witnesses were examined. Thereafter, charge sheet under his handwriting and signature Ext.Ka-18 was submitted before Court, which is on record. In cross examination he has said this case crime number was registered in his absence and investigation was deputed to this witness on 16.07.2004. Prior to it, he is not aware of facts. Formal investigation has been proved by this Court witness.

22. Hence, on the basis of overall appreciation of above evidence, it is proved that accused persons Shyam Lal, Bijai alias Ram Sajivan, Kallu alias Ram Ujagir, Udal alias Udairaj, Awadhraj, Girdhari and Sudama Prasad rushed at the place of occurrence, which was being constructed, where they entered in a quarrel with complainant side, followed by assault under furtherance of common object of above unlawful assembly.

23. Plea of alibi, proved by DW-1 Jadawati Devi and DW-2 Mohd. Jumrati were regarding engagement of accused in job of raising construction, but both the places were in close vicinity and it cannot be ruled out that their presence on above spot at that time may not be possible. Even, there is inconsistency in the statement of these witnesses from their examination-in-chief in cross.

24. Hence, offence punishable under Sections 147 and 323/149 I.P.C. were proved against them, for which learned Sessions Judge has sentenced after hearing over quantum of sentence and sentence is commensurate to offence committed by them. For this part, this appeal merits its dismissal.

25. Regarding conviction and sentence for offence punishable under Section 304/149 I.P.C., the conviction and sentence for appellants Shyam Lal, Bijai @ Ram Sajivan and Kallu @ Ram Ujagir was based on facts and evidence on record. Hence for them, this appeal merits its dismissal. For rest of convicts-appellants Udal @ Udairaj, Awadhraj, Girdhari and Sudama Prasad, constructive liability for offence punishable under Section 304/149 I.P.C is not proved beyond reasonable doubt. Hence, there appeal for this piece of offence is liable to be allowed. Accordingly, conviction and sentence for this section against convict appellants Udal @ Udairaj, Awadhraj, Girdhari and Sudama Prasad is to be set aside.

26. Accordingly, this appeal is partly allowed. Impugned judgment of conviction dated 17.09.2011, for offence punishable under Sections 147, 323/149 I.P.C. against each of convicts-appellants is confirmed and appeal for it is being dismissed.

27. Appeal of Shyam Lal, Bijai @ Ram Sajivan and Kallu @ Ram Ujagir is being dismissed in toto. The conviction and sentence awarded against them is being confirmed.

28. The appeal of convicts-appellants Udal @ Udairaj, Awadhraj, Girdhari and Sudama Prasad for conviction and sentence for offence punishable under Sections 304/149 is being allowed on the basis of benefit if doubt. Their conviction is being set aside and they are acquitted for this offences.

29. Keeping in view the provisions of section 437-A Cr.P.C. convicts-appellants Udal @ Udairaj, Awadhraj, Girdhari and Sudama Prasad are directed to forthwith furnish a personal bond and two reliable sureties each in the like amount to the satisfaction of trial Court before it, which shall be effective for a period of six months or till order of appeal in appellate court, if any, regarding acquittal for offence punishable under Section 304/149 I.P.C..

30. Let a copy of this judgment along with lower court's record be sent back to the court concerned for amendment of warrant of conviction and sentence as per above conviction and sentence and for immediate compliance.

31. The convicts-appellants Shyam Lal, Bijai alias Ram Sajivan, Kallu alias Ram Ujagir, Udal alias Udairaj, Awadhraj, Girdhari and Sudama Prasad are on bail. Their sureties are discharged. They shall surrender before the trial court within fifteen days from the date of judgment, where they shall be sent for jail for suffering sentences awarded to them.

(2020)1ILR 1447

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 1856 of 1987

Neki Ram ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Brijesh Sahai, Sri Bhvya Sahai

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

A. Indian Penal Code, 1860 - Section 466 - Forgery in respect of service of summons upon defendant - summon issued in election petition by 'Election Tribunal' /Sub Division Officer - *Held* - S. 466 IPC is also applicable where a document or certificate is forged & purported to have been made by a 'public servant' in official capacity (Para 12)

B. Criminal Procedure Code, 1973 - Section 195(3) - Applicability to Election Tribunal - 'Election Tribunal' under U.P. Panchayat Raj Act, 1947 - not a 'Court' in terms of Section 195(3) Cr.P.C.

'Election Tribunal' is not a Civil, Revenue or Criminal Court - Tribunals, included within term 'Court' u/s 195(3) Cr.P.C are such 'Tribunal' as have been constituted by or under a Central, Provincial or State Act -& declared by such Act to be a 'Court' for the purpose of Section 195 Cr.P.C. 15 - Prescribed Authority/'Election Tribunal' has not been so declared under the provisions of Act, 1947 to constitute a 'Court' for the purpose of Section 195 Cr.P.C (Para 13, 14, 15 & 16)

C. Criminal Procedure Code, 1973 - Section 197(1) - Prosecution of public servants - Applicability - person concerned should be such a public servant who can be removed only with sanction of Central Government or State Government and not otherwise (Para 20)

Held - Revisionist - a Peon/class IV employee in the office of Election Tribunal - his service condition governed by Group 'D' Employees Service Rules, 1985 - Authority competent to remove is District Level Officer -& for removal sanction of State Government not required - Revisionist does not come within the category of aforesaid 'public servant' - Section 197(1) Cr.P.C. is not attracted at all (Para 20 & 21)

D. Criminal Procedure Code, 1973 - Section 197 - *'acting or purporting to act in the discharge of his official duty'* - protection is available only when - alleged act - done by the public servant - is reasonably connected with the discharge of his official duty – alleged act must fall within the scope and range of the official duties of the public servant

Revisionist - Peon in the office of Prescribed Authority/Election Tribunal - duty of serving summons upon defendants/respondents - Revisionist made forgery in respect of service of summons upon defendant and aforesaid forged document submitted in Tribunal for further proceedings - *Held* - Official duty of Revisionist was to serve summon upon parties - It was not at all his duty to make a false endorsement regarding service and forged signature of addressee - Section 197 is not attracted.

Criminal Revision dismissed. (E-5)

List of cases cited: -

1. L. Chandra Kumar Vs. Union of India, AIR 1997 SC 1125

2. Devinder Singh and others vs. State of Punjab through CBI (2016) 12 SCC 87

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

1. Heard Sri Bhvya Sahai, Advocate, holding brief of Sri Brijesh Sahai, learned counsel for revisionist, learned A.G.A. for State of U.P. and perused the record.

2. This criminal revision under Section 401 read with Section 397 Cr.P.C. has been filed aggrieved by judgment and order dated 03.12.1987 passed by Sri Y.K.Singhal, Vth Additional District and Sessions Judge, Saharanpur, in Criminal Appeal No.51 of 1985 whereby appeal was dismissed and judgment and order dated 07.02.1985 passed by Sri Vishram Singh, Magistrate Nakur, Saharanpur in Case No.502 of 1982 by which Revisionist was convicted under Sections 466 and 471 IPC and sentenced to undergo one year simple imprisonment and fine of Rs.100 under Section 466 IPC, and, six months' simple imprisonment and fine of Rs.50/-

under Section 471 IPC, has been confirmed. Both the sentences were directed to run concurrently.

3. Learned counsel for Revisionist contended that, if a document of a Court is allegedly forged, no cognizance can be taken under Section 466 IPC unless complaint is made by Court itself, which has not been done in the present case. Therefore, entire proceedings are illegal. He further submitted that Revisionist was a 'Peon' in Election Tribunal, who was deputed duty of serving summons and this was a part of an 'official duty' to be discharged by him, thus, without sanction under Section 195 or 197 Cr.P.C., cognizance could not have been taken. Since in the present case, no such sanction was obtained, therefore, entire proceedings are illegal.

4. Learned A.G.A. submitted that Section 466 IPC is applicable where a document is forged, and purported to have been made by a 'public servant' in official capacity and therefore, it is rightly applied. Further Section 195 Cr.P.C. has no application since 'Election Tribunal' is not a 'Court' in terms of Section 195(3) Cr.P.C. Section 197 is also inapplicable since Revisionist is not a person who is to be removed with the sanction of State or Central Government.

5. I have examined the submissions advanced by learned counsel for parties and perused the record.

6. Sections 466 and 471 IPC, as applicable at the relevant time, reads as under :

"466. Forgery of record of Court or of public register, etc.-*Whoever* ***forges a document****, purporting* ***to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity,*** *or an* ***authority to institute or defend a suit, or to take any proceedings therein,*** *or to* ***confess judgment****, or a* ***power of attorney****, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

"471. Using as genuine a forged document.-*Whoever fraudulently or dishonestly* ***uses as genuine any document*** *which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document."*

7. On perusal of above provisions, I find that in order to attract Section 466 IPC, following ingredients have to be shown :

(i) The document is question was a forged document.

(ii) It was forged by Accused;

(iii) Such document is purported to be :

(a) A record of the proceeding of Court of Justice;

(b) A Register of Birth, baptism, marriage or burial.

(c) A Register kept by public servant.

(d) A certificate or document purporting to be **made by a public servant in his official capacity.**

(e) An authority to institute or defend a suit or take any proceeding therein or to confess judgment, or

(f) A power of attorney.

8. The term 'Forgery' has been defined in Section 463 IPC and what would constitute 'making a false document' has been defined in Section 464 IPC. Sections 463 and 464 IPC, as applicable at the relevant time, read as under :-

*"**463. Forgery.**-Whoever **makes any false document** or part of a document with intent **to cause damage or injury, to the public or to any person,** or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, **or with intent to commit fraud** or that fraud may be committed, commits forgery."*

*"**464. Making a false document.**-A person is said to make a false document-*

*First-Who **dishonestly or fraudulently makes, signs, seals or executes a document** or part of a document, **or makes any mark denoting the execution of a document,** with the intention of causing it to be believed that such document or part of document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or*

Secondly.--Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly--Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration."

9. In the present case, record shows that an Election Petition No.53 of 1982 was instituted by Randu against Jeevad and others before Election Tribunal/Presiding Officer under U.P. Panchayat Raj Act, 1947 *(hereinafter referred to as "Act, 1947")*. Summons were issued. Neki Ram, Revisionist who was Peon in the office of Prescribed Authority/Election Tribunal was deputed duty of serving summons upon defendants/respondents in the aforesaid Election Petition.

10. As per Section 12-C of Act, 1947 read with Rule 24 of U.P. Panchayat Raj Rules, 1947 *"hereinafter referred to as "Rules, 1947")*, Sub-Division Officer is Prescribed Authority before whom election petition can be presented and he constitute Election Tribunal. Appointment of a Class IV employee in the office of Sub-Divisional Officer is governed by recruitment, appointment and condition of service of Class IV employees i.e. Group 'D' Employees Service Rules, 1985 *(hereinafter referred to as "Rules, 1985")*, which is a Rules framed under Proviso to Article 309 of Constitution of India. Appointing Authority of a Class IV employee in district level offices and offices subordinate thereto is a District Level Officer.

11. It was alleged that Randu, accused, in collusion with other co-accused got an endorsement made by Revisionist on the summons that copy of summons alongwith Election Petition (plaint) has been served upon Jeevad. Actual endorsement made, reads as under :

''श्रीमान जी एक किता समन मय अर्जी दावे के जीवण को दे दिया गया''

"Sir, one summon alongwith plaint was handed over to Jeevad."

(English Translation by Court)

12. Jeevad was illiterate. His signatures were forged on the summons. The said summons was submitted in Election Tribunal. For this forgery, Revisionist and others were tried in Case No.502 of 2002 under Sections 466, 471, 120B IPC. Trial Court found that Revisionist has made forgery in respect of service of summons upon Jeevad and aforesaid forged document was submitted in Election Tribunal for further proceedings of Election Petition. Court, therefore, found that it was a 'forged' document purported to be made by a 'public servant' in official capacity. Aforesaid document amounts to a forged certificate of service, hence Section 466 IPC is attracted. It cannot be said that Section 466 IPC is applicable only to a document of a Court or document or proceeding of a Court but it includes within its ambit the documents or certificate purporting to be made by a 'public servant' in his official capacity. This otherwise submission advanced by Sri Sahai is rejected.

13. Now I come to argument relating to sanction. In order to attract Section 195 Cr.P.C., it has to be seen whether 'Election Tribunal' can be said to be 'Court' or not. Sub-section (3) of Section 195 Cr.P.C. clearly excludes 'Election Tribunal' from being treated as a 'Court'. Section 195(3) Cr.P.C. reads as under :-

"In Clause (b) of sub-section (1), the term "Court" means a ***Civil, Revenue or Criminal Court,*** *and* ***includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court*** *for the* ***purposes of this section."*** (emphasis added)

14. Section 195 Cr.P.C. will be attracted only when an Election Tribunal can be said to be a 'Court' within the meaning of Section 195(3). It could not be disputed by learned counsel for Revisionist that 'Election Tribunal' is not a Civil, Revenue or Criminal Court. He, however, submitted that it include 'Tribunal' within its ambit. But I find that Tribunals, included within term 'Court' defined under Section 195(3) Cr.P.C., are of restricted nature namely such 'Tribunal' must have been constituted by or under a Central, Provincial or State Act and declared by such Act to be a 'Court' for the purpose of Section 195 Cr.P.C.

15. It is not shown that Prescribed Authority/'Election Tribunal' has been so declared under the provisions of Act, 1947 to constitute a 'Court' for the purpose of Section 195 Cr.P.C. Distinction between 'Court' and 'Tribunal' has been considered by a seven Judges judgment in **L. Chandra Kumar Vs. Union of India, AIR 1997 SC 1125.**

16. In common parlance, it cannot be doubted that 'Election Tribunal' is a Tribunal constituted by a Provincial Act i.e. Act, 1947 but in absence of any declaration made by said Act to treat 'Election Tribunal' as a Court, in my view, Section 195 Cr.P.C. is not attracted.

17. Thus argument advanced with reference to Section 195 Cr.P.C. i.e. first issue is answered against revisionist.

18. Now coming to issue of want of sanction under Section 197 (1) Cr.P.C., here also I find that it has no application in the case in hand. Section 197 Cr.P.C. reads as under :

"197. ***Prosecution of Judges and public servants.***

(1) When any person who is or was a Judge or Magistrate or a ***public servant not removable from his office save by or with the sanction of the Government*** *is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-*

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression" Central Government" were substituted.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(3-A) Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

19. It is admitted that Sub-Section (2) has no application herein. Thus, I confined my scrutiny to Section 197(1) only. Essential conditions to be satisfied for attracting Section 197(1) Cr.P.C, are -

(i) Offence mentioned therein is committed by public servant, Judge or Magistrate;

(ii) The public servant employed in connection with the affairs of the Union or a State is not removable from his office save by or with the sanction of the Central Government or the State Government as the case may be.

(iii) The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act.

(iv) If in doing his official duty, he acted in excess of his duty, but there is reasonable connection between the act and the performance of the official duty, the excess will not be sufficient ground to deprive the public servant of protection.

(v) The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in discharge of his official capacity.

(vi) It must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty.

(vii) The act can be performed in discharge of his official duty as well as in dereliction thereof.

20. Thus, the first condition to apply while attracting Section 197 Cr.P.C. is that not only person concerned must be a 'public servant' but also he should be such a public servant who can be removed only with sanction of Central Government or State Government and not otherwise.

21. In the present case, Revisionist is a Class IV employee. It could not be shown by learned counsel for Revisionist that Class IV employee in State Government service is liable to be removed only with the sanction of State Government. On the contrary, I find that statutory rules have been framed in respect of Class IV employees working in various departments and district level. Authority competent to appoint and remove Class IV employees in Districts are District Level Officers.

22. Therefore, the very first condition that in order to attract Section 197(1), public servant must be such whose removal is possible only with sanction of State Government is not attracted. Revisionist does not come within the category of aforesaid 'public servant'. Hence, Section 197(1) Cr.P.C. is not attracted at all.

23. In order to attract provision relating to sanction, Supreme Court has considered the matter at length in **Devinder Singh and others vs. State of Punjab through CBI (2016) 12 SCC 87** and has culled out certain principles as under :

"I. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

II. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 Code of Criminal Procedure has to be construed narrowly and in a restricted manner.

III. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection Under Section 197 Code of Criminal Procedure There cannot be a universal Rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

IV. In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary Under Section 197 Code of Criminal Procedure, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 Code of Criminal Procedure would apply.

V. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.

VI. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

VII. Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

VIII. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

IX. In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question

of good faith or bad faith may be decided on conclusion of trial. "

24. Applying above principles, when I examined the facts of this case, it cannot be doubted that official duty of Revisionist was to serve summon upon parties to whom summons were issued. It was not at all his duty to make a false endorsement on the document regarding service and also forged signature of addressee. The nature of allegation and charge found proved against revisionist does not come within the official duty of Revisionist and in this regard, I find no manner of doubt that Section 197 is not attracted. Therefore, in respect of issue no.2 also I find no force in the submission.

25. However, whether, as a matter of fact, act of accused-Revisionist can be said to be in discharge of official duties or not require evidence. Therefore, I am not expressing any final opinion on this aspect. Even otherwise, this aspect has a little relevance in the present case for the reason that accused-revisionist having not satisfied the category of 'public servant' on which Section 197(1) Cr.P.C. is applicable therefore, requirement of sanction in the case of accused-Revisionist is an imaginary issue. I, therefore, reject the submission advanced otherwise and answer issue-2 against Revisionist.

26. No other argument has been advanced.

27. Dismissed.

28. Interim order, if any, stands vacated.

(2020)1ILR 1455

REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 4239 of 2019

Gyan Prakash Agrawal ...Revisionist
Versus
Shri Babu Khan & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Vikas Srivastava

Counsel for the Opposite Parties:
A.G.A., Sri Balesh Tripathi, Sri Saumitra Dwivedi, Sri K.M. Mishra, Sri Jitendra Kumar Pandey

A. Negotiable Instruments Act, 1881 - Section 148 - Deposit of fine not less than 20% is condition precedent for admission of appeal.

B. Negotiable Instruments Act, 1881- Section 148 - Applicability to complaint filed prior to 1.9.2018-Section 148 of the N.I. Act can be applied to complaint filed prior to 1.9.2018.

C. Criminal Procedure Code, 1973 - Section 357(2) - Its Applicability to NI Act - not applicable in an appeal by the drawer against conviction under section 138 of Negotiable Instruments Act.

Revisionist challenged the order of Session court directing the Appellant to deposit 30% of the amount of fine / compensation pending appeal - *Held* - Perfectly justified order. (Para 23)

Criminal Revision dismissed. (E-5)

List of cases cited: -

1.Vipin Kumar Vs St. of UPAIRONLINE 2018 AL L 4035

2. Dilip S. Dhanukar Vs Kotak Mahindra Bank (2007) 6 SCC 528

3.Surinder SinghDeswal @ Col. S. S. Deswal Vs Virender Gandhi AIR 2019 SC 2956

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

1. This revision has been filed against the impugned judgment and order dated 23.10.2019 passed by District and Sessions Judge, Hapur, in Criminal Appeal No. 98 of 2019 and impugned judgment and order passed by C.J.M./A.C.J.M., Hapur dated 23.9.2019 and order dated 25.9.2019 sentencing the accused appellant in case no. 34 of 2019 previously entered complaint no. 8496/2015 under Section 138 N.I. Act, P.S.-Hapur Kotwali, District- Hapur whereby the learned court below convicted and sentenced 1 years simple imprisonment for the offence under Section 138 N.I. Act and fine of Rs. 1 crore 20 lacs.

2. Heard Sri Mangla Prasad Rai, learned Senior Advocate assisted by Sri Vikas Srivastava, learned counsel for the revisionist, Sri Saumitra Dwivedi, learned counsel for the opposite party and the learned A.G.A. for the State.

3. Brief facts of the case are that the proceedings under Section 138 of the N.I. Act were initiated against the revisionist with the allegation that two cheque no. 789636 and cheque no. 789637 dated 20.7.2014 for a sum of Rs. 50-50 lacs each was issued by the revisionist, which has been bounced. Respondent no. 1 filed complaint case before the A.C.J.M, under Section 138 N.I. Act. The proceeding of complaint case has ultimately resulted in order of conviction awarding of one year simple imprisonment together with imposition of fine of Rs. 1crores 20 lacs. The amount of fine to be appropriated by paying Rs. 1crore 15 lacs to the complainant (respondent no. 1) and balance of Rs. 5 lacs to be deposited to the State.

4. Aggrieved by this judgment dated 25.9.2019 the revisionist has preferred an appeal before Sessions Court. This appeal has been admitted on 23.10.2019 and the revisionist has been enlarged on bail under Section 389 Cr.P.C. Further order has been passed upon the application filed by the revisionist to stay the conviction order/sentence awarded by learned Magistrate meanwhile respondent no. 1 also filed the application under Section 148 of the N.I. Act with prayer that whole fine should not be stayed as mandate given in Section 148 of the N.I. Act. After hearing Sessions Court passed the order to furnish 30% of the fine awarded by the trial court deposited within 30 days.

5. Learned counsel for the revisionist filed revision on two grounds the first ground is to set aside the judgment and order dated 23.9.2018 passed by ACJM, Hapur and second prayer is to set aside the order dated 23.10.2018 passed by Sessions Court.

6. So far as regards first prayer upon which the revisionist has challenged the order dated 25.9.2019 by filing revision with submission that the judgment under revision is manifestly erroneous, not sustainable in law and learned trial court failed to appreciate the evidence adduced by the complainant (respondent). It is further submitted that learned trial court has passed its judgment without any relevant and cogent reason. It has further been submitted that execution of the cheque has not been proved. He further prayed to allow the revision and set aside the impugned judgment and order dated 25.9.2019 passed by ACJM, Hapur. On perusal of the record it appears that revisionist has already availed the statutory remedy before Sessions Court

under Section 374 (3) Cr.P.C. by way of filing an appeal and thus the revisionist have full opportunity to review or re-appreciate the evidence as adduced in trial court. The appeal is a continuation of the proceeding only such proceeding where parties were same and they are adversely affected by the judgment, then they may file appeal. As stated above as the revisionist has already availed opportunity of appeal before Sessions Court and appeal is admitted on 23.10.2019 before Sessions Court and presently appeal is pending before Sessions Court and every aspects of the case shall be tested during appeal. So by way of revision the revisionist cannot avail the parallel remedy. The revisionist cannot challenge the legality or impropriety of the order passed by the trial court and therefore, no remedy can be granted to the revisionist so far as regards to the first prayer for setting aside the judgment and order dated 25.9.2019 passed by the trial court..

7. So far as regard the second prayer by way of revision is concerned, revisionist filed an application under Section 389 of the Cr. P.C. for suspension of sentence and releasing him on bail, during pendency of appeal. Meanwhile, the respondent (complainant) also filed the application before Sessions Court with prayer to comply the provision as envisaged in Section 148 (i) of the N.I. Act. By considering the provisions of amended Section 148 of the N.I. Act, which has been amended by Amendment Act No. 20/2018, which came into force w.e.f. 1.9.2018, the appellate Court, while suspending the conviction and sentence under Section 389 of the Cr.P.C. Learned appellate court directed that the execution and suspension of conviction of appellant (revisionist) subject to deposit of 30% of the amount of compensation/fine awarded by the learned trial Court.

8. Learned counsel appearing on behalf of the revisionist vehemently submitted that in the present case as the criminal proceedings were initiated and the complaints were filed against the accused for the offence under Section 138 of the N.I. Act, prior to the amendment Act came into force, Section 148 of the N.I.Act, as amended shall not be applicable. It is further submitted by the learned Advocate appearing on behalf of the revisionist that the legal proceedings, whether civil or criminal, are to be decided on the basis of the law applicable on the date of the filing of the suit or alleged commission of offence by the trial Court or the appellate Court, unless the law is amended expressly with retrospective effect, subject to the provisions of Article 20 (1) of the Constitution of India.

9. It is further submitted by the learned counsel for the revisionist that as per Section 357 (2) of the Cr.P.C., no such fine is payable till the decision of the appeal. It is submitted that therefore also the first appellate Court ought not to have passed any order directing the appellants to deposit 30% of the amount of fine/compensation, pending appeal. In support of his above submission, learned Counsel has heavily relied upon the decision of this Court in the case of ***Vipin Kumar Vs. State of U.P. AIRONLINE 2018 ALL 4035*** in which this Court held the right of appeal is statutory right available to accused and that deposit of such amount cannot be made a condition precedent for admission of appeal. It has also been held that ends of justice would be met if part of the order which directs furnishing of bank guarantee to the extent

of 25% is modified and substituted with a direction to furnish personal bond and security in the form of surety of like amount to the extent of 25% of the amount..

10. Learned counsel for the revisionist also submitted that once the appeal is admitted under the provisions contained under Section 357 (2) of the Code of Criminal Procedure, there shall be an automatic stay of the condition to deposit fine and that the conditions imposed by the appellate court in that regard is without jurisdiction.

11. Learned counsel for the revisionist placed reliance upon a decision of Hon'ble Apex Court in that ***Dilip S. Dhanukar v. Kotak Mahindra Bank***, reported in (2007) 6 SCC 528. Honble Apex Court interpreted the provisions of Section 357 (2) Cr.P.C., which has bee quoted below:-

"73. i) In a case of this nature, Sub-Section (2) of Section 357 of the Code of Criminal Procedure would be attracted even when Appellant was directed to pay compensation;

ii) The Appellate Court, however, while suspending the sentence, was entitled to put the appellant on terms. However, no such term could be put as a condition precedent for entertaining the appeal which is a constitutional and statutory right;

iii) The amount of compensation must be a reasonable sum;

iv) The Court, while fixing such amount, must have regard to all relevant factors including the one referred to in Sub-Section (5) of 357 of the Code of Criminal Procedure;

v) No unreasonable amount of compensation can be directed to be paid.

12. The Hon'ble Apex Court has clarified that right of appeal is statutory right available to accused and that deposit of such amount cannot be made a condition precedent for admission of appeal. The Court has further clarified that appellate court shall be at liberty to put the appellant to terms which has to be reasonable and fair. The appellate court therefore while admitting the appeal and staying sentence has jurisdiction to put the apellant to terms which are reasonable and fair.

13. On account of the above submission and relying upon the aforesaid decision learned counsel for the revisionist prayed to allow the present revision and further prayed to quash and set aside the impugned order passed by the appellate court by which the revisionists have been directed to deposit 30% of the amount of the compensation/fine considering the provisions of Section 148 N.I. Act as amended.

14. Learned counsel for the respondent submitted that contention of the learned counsel for the revisionist has no substance. It is submitted that first of all amendment in Section 148 of the N.I. Act is procedural in nature and therefore there is no question of applying the same retrospectively. It is further submitted that as such no vested right of the appeal of the appellants has been taken away or affected by amendment in Section 148 of the N.I. Act. It is submitted that in the present case, admittedly, the appeals were preferred after the amendment in Section 148 of the N.I. Act came into force and therefore Section 148 of the N.I. Act, as amended, is

rightly invoked/applied by the learned first appellate Court. It is submitted that therefore the amendment so brought in the Act by insertion of Section 148 of the N.I. Act is purely procedural in nature and not substantive and does not affect the vested rights of the appellants, as such, the same can have a retrospective effect and can be applied in the present case also. It is vehemently contended that after amendment in Section 148 of the N.I. Act the provisions of Section 357 (2) Cr.P.C. shall not be applicable.

15. Before arriving at any conclusion, I want to discuss the object behind the amendment made in Section 148 of the N.I. Act. With the objective of reducing delay in proceedings pertaining to dishonour of cheques and to provide interim relief to the payee in such cases, the Negotiable Instruments (Amendment) Bill of 2017 was tabled before the Lok Sabha. The Central Government has been receiving several representations from the public, including the trading community, relating to the pendency of cheque bounce cases. The same may be imputed to the delay tactics adopted by unscrupulous drawers of dishonoured cheques on account of the ease of filing of appeals and obtaining stay on proceedings. As a result of this, injustice is caused to the payee of a dishonoured cheque who has to spend considerable time and resources in court proceedings to realise the value of the cheque. Such delays compromise the sanctity of cheque transactions.

16. As per the Statement of Objects and Reasons of the Bill of 2017, the Negotiable Instruments Act of 1881 is proposed to be amended with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money". Further, it is expected that "the proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy.

17. In the wake of current scenario, The Negotiable Instruments (Amendment) Act, 2018 passed by both the Houses (Lok Sabha on July 23, 2018; Rajya Sabha on July 26, 2018; and notified on August 02, 2018) has come as a breather for the aggrieved Drawees. Non-payment because of cheque dishonor contribute majorly towards business inconsistencies leading not only to an cash flow, but also chain of inconveniences/incalculable losses forced upon them involuntarily.

18. Further, delayed justice owing to lengthy court procedures add to the woes. Therefore, the Amendment Act aims to give potency in enforcing quick relief and to act as a deterrent for future cases by enhancing credibility of cheques as a negotiable instrument. Briefly, following are the key features of the latest 2018 amendment vide the added Sections 143-A and 148:

(a) Interim compensation to Drawee up to 20% of the cheque amount in case of either summary trial or summons case where the Drawer pleads not guilty;

(b) In addition to the above amount, if the Drawer appeals against the compensation awarded by the trial court to the Drawee, the appellate court can further order minimum of 20% of the awarded

amount to be deposited/released to the Drawee; and

(c) In both (1) and (2), the amount is to be deposited within 60 days of the courts order, extendable by another 30 days subject to courts satisfaction.

19. A very pertinent feature of this interim compensation is that at the courts discretion it may be also recovered as if it were a fine under Section 421 of the Code of Criminal Procedure, 1973 implying that the courts have the power to issue a warrant for attachment and sale of any moveable property belonging to the offender (Drawer); or issue a warrant to the District Collector to realise the amount as arrears of land revenue from the moveable/immoveable property of the defaulter (Drawer).

20. Thus, the Drawer of the cheque is made liable to prosecution and partial payment upon dishonour of the cheque implying that the provisions are punitive as well as compensatory, that is, the punitive aspect leading to compensation. It can be ascertained that the Legislature has made a remarkable move by bringing this amendment in the interest of speedy justice.

21. The bill seek to achieve objective, introduce Amended Section 148 of the N.I. Act is as under:-

""148. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), in an appeal by the drawer against conviction under 138 of the N.I. Act, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial Court:

Provided that the amount payable under this subsection shall be in addition to any interim compensation paid by the appellant under Section 143 A.

(2) The amount referred to in subsection (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant."

22. Every question raised by the revisionist in revision has already been settled by Hon'ble Apex Court in **Surinder Singh Deswal @ Col. S. S. Deswal Vs Virender Gandhi AIR 2019 SC 2956**, the relevant paragraph nos. 8, 9 and 10 are quoted below:-

"8. It is the case on behalf of the appellants that as the criminal complaints against the appellants under Section 138 of the N.I. Act were lodged/filed before the amendment Act No. 20/2018 by which Section 148 of the N.I. Act came to be amended and therefore amended Section 148 of the N.I. Act shall not be made applicable. However, it is required to be

noted that at the time when the appeals against the conviction of the appellants for the offence under Section 138 of the N.I. Act were preferred, Amendment Act No. 20/2018 amending Section 148 of the N.I. Act came into force w.e.f. 1.9.2018. Even, at the time when the appellants submitted application/s under Section 389 of the Cr.P.C. to suspend the sentence pending appeals challenging the conviction and sentence, amended Section 148 of the N.I. Act came into force and was brought on statute w.e.f. 1.9.2018. Therefore, considering the object and purpose of amendment in Section 148 of the N.I. Act and while suspending the sentence in exercise of powers under Section 389 of the Cr.P.C., when the first appellate court directed the appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court, the same can be said to be absolutely in consonance with the Statement of Objects and Reasons of amendment in Section 148 of the N.I. Act.

8.1 Having observed and found that because of the delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings, the object and purpose of the enactment of Section 138 of the N.I. Act was being frustrated, the Parliament has thought it fit to amend Section 148 of the N.I. Act, by which the first appellate Court, in an appeal challenging the order of conviction under Section 138 of the N.I. Act, is conferred with the power to direct the convicted accused - appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in Section 148 of the N.I. Act, it cannot be said that any vested right of appeal of the accused - appellant has been taken away and/or affected. Therefore, submission on behalf of the appellants that amendment in Section 148 of the N.I. Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to 1.9.2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the N.I. Act, no substantive right of appeal has been taken away and/or affected.. Therefore the decisions of this Court in the cases of Garikapatti Veeraya (supra) and Videocon International Limited (supra), relied upon by the learned senior counsel appearing on behalf of the appellants shall not be applicable to the facts of the case on hand. Therefore, considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act stated hereinabove, on purposive interpretation of Section 148 of the N.I. Act as amended, we are of the opinion that Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence under Section 138of the N.I. Act were filed prior to amendment Act No. 20/2018 i.e., prior to 01.09.2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in Section 148 of the N.I. Act would be frustrated. Therefore, as such, no error has been committed by the learned first appellate court directing the appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court considering Section 148 of the N.I. Act, as amended.

9. Now so far as the submission on behalf of the appellants that even considering the language used in Section

148 of the N.I. Act as amended, the appellate Court "may" order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court and the word used is not "shall" and therefore the discretion is vested with the first appellate court to direct the appellant - accused to deposit such sum and the appellate court has construed it as mandatory, which according to the learned Senior Advocate for the appellants would be contrary to the provisions of Section 148 of the N.I. Act as amended is concerned, considering the amended Section 148 of the N.I. Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the N.I. Act, though it is true that in amended Section 148 of the N.I. Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned. Therefore amended Section 148 of the N.I. Act confers power upon the Appellate Court to pass an order pending appeal to direct the Appellant Accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the Appellant Accused under Section 389 of the Cr.P.C. to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended Section 148 of the N.I. Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the appellant. Therefore, if amended Section 148 of the N.I. Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in Section 148 of the N.I. Act, but also Section 138 of the N.I. Act. Negotiable Instruments Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonoured of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions, the Parliament has thought it fit to amend Section 148 of the N.I. Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in Section 148 of the N.I. Act and also Sec 138 of the N.I. Act.

10. Now so far as the submission on behalf of the appellants, relying upon Section 357 (2) of the Cr.P.C. that once the appeal against the order of conviction is preferred, fine is not recoverable pending appeal and therefore such an order of deposit of 25% of the fine ought not to have been passed and in support of the above reliance placed upon the decision of this Court in the case of **Dilip S. Dhanukar (supra)** is concerned, the aforesaid has no substance. The opening word of amended Section 148 of the N.I. Act is that **"notwithstanding anything contained in the Code of Criminal Procedure....."**. Therefore irrespective of the provisions of Section 357 (2) of the

Cr.P.C., pending appeal before the first appellate court, challenging the order of conviction and sentence under Section 138 of the N.I. Act, the appellate court is conferred with the power to direct the appellant to deposit such sum pending appeal which shall be a minimum of 20% of the fine or compensation awarded by the trial Court."

23. In view of the above and for the reasons stated above, I am of the view that applicability of the provision under Section 148 of the N.I. Act is mandatory. Deposit of fine not less than 20% is condition precedent for admission of appeal and provision under Section 357 (2) Cr.P.C. are not made applicable during admissibility and pendency of appeal. Section 148 of the N.I. Act can be applied to complaint filed prior to 1.9.2018. I see no reason to interfere with the impugned order dated 23.10.2019 passed by the appellate sessions court directing the Appellants to deposit 30% of the amount of fine/compensation pending appeals. The order of appellate court is perfectly legal. There is no illegality or perversity in the order dated 23.10.2019.

24. Revision filed by the revisionist is devoid of merit and is liable to be dismissed.

25. Revision is **dismissed..**

(2020)1ILR 1463

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 231 of 2015

Smt. Shashi Bala ...Appellant

Versus

Rajendrapal Singh ...Respondent

Counsel for the Appellant:
Sri Satyender Kumar Singh

Counsel for the Respondent:
Sri Pankaj Agarwal, Sri Tarun Agarwal

A. Family Courts Act, 1984 - Section 19 & Hindu Marriage Act, 1955 - Section 13(1) - appellant challenged the decree of divorce-decree passed on the ground of desertion-plaintiff failed to establish commission of physical or mental cruelty-court below made no attempt to find out why appellant was forced to leave matrimonial home-plaintiff never discharged his liability towards his wife and children-for a period of eleven long years, plaintiff kept quiet-now plaintiff is stopped from raising this plea-plaintiff did not made any attempt for restitution of conjugal rights nor he discharged his liabilities-it is the plaintiff-husband who has committed cruelty upon appellant-wife-award of cost of Rs. 2 lacs to pe paid to appellant by plaintiff-suit filed by plaintiff is dismissed. (Para 7, 22 to 25)

First Appeal allowed. (E-6)

List of cases cited: -

1. Smt. Kavita Sharma Vs. Neeraj Sharma (First Appeal No. 525 of 2006), para28

2. Ashwani Kumar Kohli Vs. Smt. Anita (First Appeal No. 792 of 2008) para 7, 8, 10, 11, 12, 13

(Delivered by Hon'ble Rajeev Misra,J.)

1. Present First Appeal under Section 19 of Family Courts Act 1984 (hereinafter referred to as Act 1984) has been filed by Appellant i.e. wife challenging judgement dated 13.03.2015 and decree dated 27.03.2015 passed by Principal Judge, Family Court, Ghaziabad in Suit No. 367

of 2005 (Sri Rajendra Pal Singh Vs. Smt. Shashi Bala) filed by Plaintiff i.e. husband under Section 13 (I) of Hindu Marriage Act 1955 (hereinafter referred to as Act 1955) whereby aforesaid Suit has been decreed resulting in annulment of marriage of parties held on 04.12.1996.

2. We have heard Mr. Satyendra Kumar Singh, learned counsel for Defendant-Appellant (hereinafter referred to as Appellant) and Mr. Tarun Agarwal, Advocate holding brief of Mr. Pankaj Agarwal, learned counsel representing Plaintiff-Respondent (hereinafter referred to as Plaintiff).

3. Plaintiff filed Original Suit No.237 of 2004 (Sri Rajendra Pal Singh Vs. Smt. Shashi Bala) under Section 13 (1) of Act 1955 for a decree of divorce on the ground of 'cruelty' committed by Appellant. According to plaint allegations, marriage of Plaintiff was solemnized with Appellant on 04.12.1996 at Aligarh in accordance with Hindu Rites and Customs. From aforesaid wedlock two children namely Krishan Kant and Jatin Pal were born. Appellant was working as a teacher in Government Girls Inter College, Vijay Nagar, Ghaziabad but on her request transferred to Moradabad. Plaintiff is working in Indian Navy and posted at Sena Bhawan, New Delhi. Accordingly, Plaintiff is getting handsome salary. As such, Plaintiff can maintain his family including Appellant and himself. Subsequently, relationship between Plaintiff and Appellant became strained. According to Plaintiff, it is Appellant, who is responsible for such sorry state of affairs; she is a short tempered lady with bad character; her behaviour towards Plaintiff as well as other relatives of Plaintiff was never cordial; she is guilty of telling lies and further uncareful to maintain good relations; she was completely under pressure of her parents; not willing to keep good and cordial relations with Plaintiff; Parents of Appellant are greedy and want to extort money earned by Plaintiff as well as Appellant; she used to leave residence of Plaintiff without informing him; used to absent herself from School; went to some unknown place without informing Plaintiff; when Plaintiff attempted to enquire about such conduct, she became furious and did not categorically reply to the query made by Plaintiff. In such circumstances, according to Plaintiff, minor children were facing difficulty and further their future was also said to be in dark. Appellant left house of Plaintiff in 1999. However, due to intervention of some respectable persons a compromise was arrived at between parties on 22.04.1999. She committed breach of aforesaid compromise, which was unbecoming of an obedient wife. Appellant ultimately abandoned house of Plaintiff on 28.02.2004. Since then Appellant is not residing with Plaintiff. On the aforesaid factual premise, it was prayed that suit filed for divorce be decreed.

4. Suit was contested by Appellant. She accordingly filed a written statement dated 06.07.2005 denying plaint allegations. Additional pleas were also raised by Appellant. Factum regarding marriage and birth of two children from wedlock of parties was admitted. She also admitted of serving as Lecturer at Government Girls Inter College, Vijay Nagar, Ghaziabad but later on transferred to Cantt. Moradabad. It was further admitted that Plaintiff is working in Indian Navy and posted at New Delhi. However,

rest of the averments made in plaint were denied. According to Appellant wild allegations have been made by Plaintiff against Appellant without there being any cogent reason behind the same; charges levelled against her character have caused physical and mental cruelty upon her; behavior of with her was rude and abusive; it was Plaintiff, who has tortured physically and mentally for demand of dowry; Plaintiff himself was of a shady character as he frequently used to stay at his Bhabhi's residence at Kavi Nagar, Ghaziabad; when aforesaid conduct of Plaintiff was objected by Appellant, Plaintiff cooked a false story against her; it is only when aforesaid conduct of Plaintiff became unbearable that Appellant went to Moradabad and is residing there since then. On the aforesaid defence, Appellant pleaded for dismissal of suit for divorce filed by Plaintiff.

5. Court below upon consideration of pleadings of parties framed following two issues for consideration:

A. Whether Plaintiff is entitled to decree of divorce on grounds mentioned in the plaint.

B. Any other relief, if admissible.

6. After issues were framed by Court below, parties went to trial. Plaintiff in support of his case adduced himself as P.W.-1, V. P. Singh as P.W.-2, Smt. Ram Saheli Sharma as P.W.-3 and Dr. Ramesh Kumar Verma as P.W.-4. Further vide list of documents (Paper No. 19 Ga), Plaintiff filed large number of documentary evidence in proof of his case. Appellant in support of her defence adduced only herself as D.W.-1. No other witness was adduced by Appellant nor any documentary evidence was filed by her in support of her defence.

7. Court below upon consideration of pleadings, oral and documentary evidence on record decided issues framed by it. In respect of Issue no.1, Court below concluded that Plaintiff is clearly entitled to grant of decree of divorce in terms of Section 13 (1) (1b) of Act 1955 i.e. on the ground of 'desertion'. Court below however concluded that Plaintiff has failed to establish commission of any physical or mental 'cruelty' upon him by Appellant. In the opinion of Court below, from material filed by Plaintiff it is apparent that it is Plaintiff, who has committed mental cruelty upon Appellant. However, since it is an admitted position that Appellant has 'deserted' Plaintiff for the last 11 years and aforesaid fact, is an admitted fact therefore same is not required to be proved under Indian Evidence Act. Consequently, suit for divorce filed by Plaintiff was decreed by Court below on the ground of 'desertion' vide judgement dated 13.03.2015 and decree dated 27.03.2015.

8. Feeling aggrieved by aforesaid judgement and decree passed Court below, wife i.e. Appellant has now approached this Court by means of present First Appeal.

9. Mr. Satyendra Kumar Singh, learned counsel for Appellant in challenge to judgement and decree passed by Court below submits that same are patently illegal and in excess of jurisdiction. According to learned counsel for Appellant, Court below while passing aforesaid judgement and decree has only considered case of Plaintiff; no attempt has been made to find out why Appellant was forced to leave matrimonial home on

28.02.2004 alongwith her two children; Plaintiff was also under moral and legal obligation to maintain his wife and minor children; There did not exist any explanation on the part of Plaintiff for his failure to discharge aforesaid moral and legal obligation; In fact, there is complete silence on the part of Plaintiff right from 28.2.204 in not taking any action for restitution of conjugal relationship between parties or to discharge of his moral and legal obligations; and the same denote the clever attitude of Plaintiff.

10. Mr. Tarun Agarwal, Advocate holding brief of Mr. Pankaj Agarwal, learned counsel for Plaintiff submits that Court below has decreed suit of Plaintiff on the ground of proved 'desertion' which is perfectly just and legal. He further submits that parties have been living separately since 28.02.2004 and therefore, Court below has done justice to parties by decreeing suit for divorce filed by Plaintiff. He has further tried to support impugned judgement and decree on the strength of findings recorded therein as well as observations made by Court below.

11. Varied arguments raised by counsel for parties give rise to only determination as under:

A. Whether judgement and decree passed by Court below on the ground of 'desertion' on part of Appellant can be sustained in law and fact.

12. Since the issue involved in present appeal relates to Section 13 of Act 1955, it is appropriate to reproduce the same for ready reference:

" 13 Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation. In this sub-section, the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

STATE AMENDMENT

Uttar Pradesh.-- In its application to Hindus domiciled in Uttar Pradesh and also when either party to the marriage was not at the time of marriage a Hindu domiciled in Uttar Pradesh, in section 13--

(i) in sub-section (1), after clause (i) insert (and shall be deemed always to have been inserted) the following

"(1-a) has persistently or repeatedly treated the petitioner with such

cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or", and

(ii) for clause (viii) (since repealed) substituted and deem always to have been so substituted for following.

" (viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and--

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party; or"."

13. Section (1) (i-b) of Act of 1955 provides that a decree of divorce can be granted in case after the solemnization of marriage, the petitioner has been treated with 'cruelty'. Similarly Section 13 (I) (i-b) of Act 1955 provides for grant of decree of divorce provided the other party has 'deserted' petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

14. Admittedly, Plaintiff filed above mentioned suit for divorce on the grounds of 'cruelty' as well as 'desertion'. Court below upon consideration of pleadings as well as oral and documentary evidence on record concluded that Plaintiff has failed to prove commission of physical or mental 'cruelty' by Appellant upon him. To the contrary, Court below conluded that in fact 'cruelty' has been committed by Plaintiff upon Appellant. Therefore, plea of 'cruelty' raised by Plaintiff, as a ground of divorce, stands negated by Court below. There is no cross appeal by Plaintiff or a regular appeal challenging aforesaid finding recorded by Court below. As such, conclusion drawn by Court below that Plaintiff has failed to establish commission of physical or mental 'cruelty' by Appellant upon him has become final. Consequently, this Court cannot examine correctness of aforesaid finding recorded by Court below.

15. Court below has decreed suit of Plaintiff on the ground of desertion. On evaluation of pleadings and material on record Court below has concluded that Appellant has deserted Plaintiff on 28.02.2004 and since then parties are living separately. Court below has further observed that upto date of delivery of judgement, more than 11 years have rolled by and parties have not met each other. Reference was also made to various other pleadings showing intention of parties not to live together. On aforesaid factual premise, Court below concluded that there is proved 'desertion' on the part of Appellant and consequently decreed suit for divorce filed by Plaintiff.

16. Mr. Satyendra Kumar Singh, learned counsel for Appellant submits that in order to decree a suit for divorce on the ground of 'desertion' precondition provided in Section 13 (I) (ib) of Act 1955 has to be fulfilled on the date of presentation of plaint. According to counsel for Appellant, date of 'desertion' on the part of Appellant stated in plaint is 28.02.2004 whereas plaint itself was presented on 07.03.2005. He thus submits that on the date of presentation of plaint, a period of two years had not rolled by and therefore, mandatory requirement of Section 13(I) (ib) of Act 1955 was not fulfilled. Consequenlty, Court below could not have decreed suit of Plaintiff on the

ground of 'desertion'. As such, judgement and decree passed by Court below is manifestly illegal and liable to be set aside by this Court.

17. Mr. Tarun Agarwal, Advocate on the other hand has supported impugned judgement and decree passed by Court below. According to counsel for Plaintiff, irrespective of factual scenario that period of two years had not elapsed on the date of presentation of plaint, yet it is an undisputed fact that Appellant has remained in 'desertion' for the last 15 years. He has also referred to pleadings of parties showing their disinclination for residing together. He thus urged that even if decree passed by Court below cannot be sustained on the ground of proved 'desertion', still it can be maintained on the ground of 'irretrievable break down' of marriage. Forcing the parties to live together after such a long period of self imposed isolation would itself cause injustice rather than doing justice to parties.

18. Section 13(I) (ib) of Act 1955 is a mandatory provision and therefore, if a suit for divorce is filed on the ground of 'desertion', the precondition provided in above Section for grant of decree of divorce on the ground of desertion must be fulfilled on the date of presentation of suit. Admittedly, date of desertion by Appellant, pleaded in plaint is 28.02.2004 whereas plaint was presented on 07.03.2005. Evidently, period of two years of desertion on the part of Appellant had not expired on the date of presentation of plaint. Therefore, precondition provided in Section 13(I) (i-b) of Act 1955 was not fulfilled on the date of presentation of suit. Subsequent events which have taken place after the institution of suit are irrelevant as same cannot be taken into consideration under scheme of Act 1955. Therefore, we have no hesitation to hold that decree passed by Court below decreeing suit for divorce filed by Plaintiff on ground of 'desertion' is manifestly illegal.

19. With regard to the argument relating to irretrievable break down of marriage, we find from perusal of plaint that no such ground was pleaded in the plaint. Therefore, question that crops up for consideration is "whether a decree of reversal can be passed on a ground which was not the subject matter of adjudication before the Court below."

20. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in ***First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma)*** decided on 7.2.2018, wherein it has been observed as follows in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and

emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also noteworthy that in Naveen Kohli v. Neelu Kohli (supra) Court made recommendation to Union of India that Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce. "

21. Similarly this Court in ***First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita)*** decided on 17.11.2016 has also considered this question and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC),

1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

22. In the case in hand, we find that the parties have not been living separately on account of their own free will. Record shows that it is plaintiff, who has refused to keep Appellant alongwith minor children with him. Appellant has categorically pleaded that intention of Plaintiff since beginning was to spoil matrimonial life. Plaintiff never discharged his liability towards Appellant i.e. his wife nor paid attention towards his children. In this view of matter, argument raised by learned counsel for Appellant that there has been an irretrievable break down of marriage has no factual foundation. That apart, this Court in **Ashwani Kumar Kohli (supra)** has held that divorce cannot be granted on the aforesaid ground particularly when such a plea is raised by one party alone. In addition to aforesaid, decree of divorce was not prayed for on ground of irretrievable break down of marriage as parties are alleged to have been living separately since 28.02.2004. Plaint of above mentioned divorce suit was presented in 2005 whereas divorce petition was finally decided vide judgement dated 13.03.2015 and decree dated 27.03.2015 passed by Principal Judge (Family Court), Ghaziabad in Suit No. 367 of 2005 (Sri Rajendra Pal Singh Vs. Smt. Shashi Bala). For a period of eleven long years, Plaintiff

kept quiet and now for the first time, this issue has been raised. Thus we are of the considered opinion that Plaintiff is estopped from raising this plea.

23. In the light of law laid down by Apex Court and the facts of case, the following undisputed position emerges. Appellant has left her matrimonial home on 28.02.2004. From 28.02.2004 till today, i.e. for more than fifteen years parties, they have been living in isolation. There is no evidence on record that Plaintiff made any attempt for restitution of conjugal rights. There is also no evidence showing action taken by Plaintiff in discharge of his moral and legal obligations towards his wife i.e. Appellant and minor children. Court below has recorded conclusive finding that it is Plaintiff who has committed physical / mental 'cruelty' upon Appellant and not vice-versa. In view of aforesaid findings, it cannot be said that Appellant has 'deserted' Plaintiff and that too without any reasonable cause. On the contrary, she has been forced to leave her matrimonial home.

24. In the aforesaid backdrop, we are unable to uphold impugned judgement and decree passed by Court below. The appeal succeeds and is allowed. Impugned judgement dated 13.03.2015 and decree dated 27.03.2015 passed by Principal Judge, Family Court, Ghaziabad in Suit No. 367 of 2005 (Sri Rajendra Pal Singh Vs. Smt. Shashi Bala) are hereby set aside. Aforesaid suit filed by Plaintiff shall stand dismissed.

25. Considering the facts and circumstances of case, we quantify the cost at Rs.2 Lakhs to be paid by Plaintiff to Appellant within a period of one month from today by means of an account payee draft drawn in favour of Appellant, failing which, Court below shall proceed to recover same as if it is recovery pursuant to an order passed by Court below itself.

(2020)1ILR 1472

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2020

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Second Appeal No. 1045 of 2019

Dharmendra Yadav ...Appellant
Versus
Girish Kumar Sahni ...Respondent

Counsel for the Appellant:
Sri Manish Goyal, Sri Nikhil Mishra

Counsel for the Respondent:
Sri Sunil Dutt Kautilya, Sri H.N. Singh, Sri Vineet Kumar Singh

A. Licence cannot be revoked, if the licencee acting upon the licence had executed a work of permanent character as contemplated by section 60(b) of the Easement Act. (Para 26)

B. Code of Civil Procedure, 1908 - Section 100 - challenge to-decree of suit-appellant was in possession of the shop as licencee-nature of licence whether revocable or irrevocable was in issue before the appellate court-fixture on the wall of disputed shop is not at all an improvement of permanent character-no material on record to show that any construction was made inside the shop-raising of wall or removal of existing wall may not amount to permanent structure-thus, licence in favour of appellant remains of revocable nature-conclusion arrived at by the lower appellate court is legally sustainable. (Para 12 to 17, 31 to 42)

C. Licence is merely for the use of the licensed property by the grantee and it does not create any interest in the property and a licencee is not legally

entitled to maintain a suit for possession against the grantor. (Para 17)

D. The respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him during subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the property subsequently through some other person. (Para 37)

Second Appeal dismissed. (E-6)

List of cases cited: -

1. Hero Vinoth (minor) Vs. Seshamal (2006) 5 SCC 545

2. Himmatrao Marotrao Dhobale Vs. Arun Gulabrao Jichkar 2014 SCC On Line Bom 1252 Bhagwati Prasad Vs. Shri Chandramouli AIR 1966 SC 735

3. Mool Chand Bakhuru Vs. Rohan (2002) 2 SCC 612

4. Nathulal Vs. Phoolchand (1969) 3 SCC 120

5. Sardar Govindrao Mahadik Vs. Devi Sahai (1982) 1 SCC 237

6. Venkatalal G. Pittie Vs. Bright Bros (Pvt) Ltd., AIR 1987 SC 1939

7. Surya Properties Pvt. Ltd. Vs. Vimalendu Nath Sarkar, AIR 1964 CAL 1

8. Leena Roy Choudhary Vs. Indumati Bose, AIR 1980 Patna 120

9. Amjad Khan Vs. Shafiuddin AIR 1925 All 203

10. Sitara Shahjahan Begam Vs. Munna AIR 1927 All 342

11. Manzoor Ahamad Vs. Muhammad Abdul Jamil AIR 1933 All 842

12. Ram Sarup Gupta Vs. Bishun Narain Inter College (1987) 2 SCC 555

13. Shanker Gopinath Apte Vs. Gangabai Hariharrao Patwardhan AIR 1976 SC 2506

14. Sant Lal Jain Vs. Avtar Singh AIR 1985 SC 857

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

1. Heard Shri Manish Goyal, Senior Advocate assisted by Shri Nikhil Mishra, learned counsel for the appellant and Shri H.N Singh, Senior Advocate assisted by Shri Vineet Kumar Singh, learned counsel for the respondent.

2. This second appeal has been filed by defendant-appellant Dharmendra Yadav against the judgement and decree dated 21.09.2019 passed by Additional District Judge, Court No. 2, Allahabad in Civil Appeal No. 109 of 2018 arising out from Original Suit no. 1095 of 2011 between both the parties by which the learned Additional District Judge, Court No. 2, Allahabad has partly reversed the impugned judgement of the learned trial court in Original Suit No. 1095 of 2011 passed on 20.09.2018 by which Civil Judge (SD), Allahabad and has decreed the suit in toto.

3. From the perusal of the record attached with this second appeal, it appears that the civil suit no. 1095 of 2011 was filed by the respondent Girish Kumar Sahini (plaintiff in the suit) against the appellant Dharmendra Yadav (defendant in the suit) for mandatory injunction in respect of disputed shop no. 3, Bahuguna Market, Allahabad, alleging that the plaintiff purchased the said disputed shop on 27.03.2003 from Allahabad

Development Authority by a registered sale deed. On or around 01.05.2003, the defendant gave a proposal for purchasing the disputed shop on payment of Rs. 4,50,000/- and also promised to get the sale deed executed within 6 months after paying the sale amount. Relationship between the parties was cordial and the defendant requested the plaintiff to give him the disputed shop on licence. Because of cordial relationship and on the assurance of defendant, he gave the shop to the defendant on his request on licence. The defendant, however, neither made the payment of sale amount to the plaintiff nor he took any step for execution of the sale deed. Realizing the dishonest intention of the defendant, in December 2006, the plaintiff refused to sell the said shop to him and asked him to vacate the shop and demanded Rs. 4,500/- monthly as damages. Defendants' brother Rakesh Yadav had purchased the shop no. 4 of Bahuguna Market and the defendant without any permission of the plaintiff demolished the intervening wall existed between shop no. 3 and 4 and converted the same into one shop. The plaintiff gave notice to defendant on 02.09.2011 revoking the licence and asking the possession of the said disputed shop with a monthly damage at the rate of Rs. 4,500/-. The defendant did not deliver back the possession of the shop nor paid the damage. Hence, the suit was filed by the plaintiff.

4. The defendant in his written statement denied the allegations of the plaintiff and stated that the plaintiff entered into an agreement to sell the disputed shop to defendant on a consideration of Rs. 4,50,000/- and the same was paid by the defendant and thereafter the plaintiff delivered the possession of the shop. The plaintiff is bound to execute the sale deed of the disputed shop on the basis of the said agreement to sale. After getting possession of the disputed shop, the defendant made a lot of development and spent enough money on the disputed shop and renovated it for the purpose of business. He was never a licensee nor the possession was delivered to him as licensee and the plaintiff took the whole amount and gave him the shop. The defendant was always ready and prepared to get the sale deed executed. It was agreed between them that the defendant or his brother Rakesh would make the payment of Rs. 4,50,000/- to plaintiff and the plaintiff after purchasing the disputed shop from Allahabad Development Authority will execute sale deed in favour of defendant. In pursuance of the said contract, the defendant paid Rs. 80,000/- by account payee cheque drawn on Oriental Bank of Commerce dated 01.02.2003. The remaining amount of Rs. 3,70,000/-was paid in cash on 01.05.2003. Raising legal pleas of Section 41 of Special Relief Act, Order 7 Rule 11(D) C.P.C., the defendant has stated that the plaintiff is not entitled for any relief. The defendant has given adequate reply in response to the notice of the plaintiff dated 02.09.2011. Shop no. 2, 3 and 4 of the Bahuguna Market are situated in a row and above these shops, residential accommodation is situated and the same has been allotted by the Allahabad Development Authority. Shop no. 2 is allotted to defendant and shop no. 4 is allotted to his brother Rakesh Yadav and shop no. 3 (disputed) is allotted to plaintiff. The plaintiff is not entitled to get back the possession over the disputed shop. The defendant has a joint family with joint business and shop no. 3 is run jointly by him and his brother Rakesh Yadav.

5. Replication has been filed by the plaintiff in which the earlier allegations of the plaint has been repeated and it has been alleged that the defendant is bound to vacate the disputed shop and the payment of Rs. 80,000/- made by Rakesh Yadav has no connection with the disputed shop.

6. The learned court below framed the following issues:-

1. Whether Rs. 4,50,000/- has not been paid to the plaintiff by the defendant as per agreement

2. Whether the possession of disputed shop no. 3, Bahuguna Market, Allahabad has been given to the defendant by the plaintiff as licensee as alleged in para 4 of the plaint? If yes whether defendant is in possession over disputed shop no. 3 as licensee?

3. Whether the defendant has removed middle wall situated between disputed shop no. 3 and shop no. 4 as alleged in para 4 of the plaint and both has been amalgamated? If yes whether the plaintiff is entitled to get restored status quo ante?

4. Whether the alleged license given to the defendant has been revoked by the plaintiff through notice dated 02.09.2011? If yes then effect?

5. Whether defendant has not handed over the possession of the disputed shop in compliance of the notice to the plaintiff? If yes whether the plaintiff is entitled to get possession of the disputed shop no. 3?

6. Whether the plaintiff is entitled to get Rs. 4,500/- per month from the defendant from 18.10.2008 to 18.02.2011, total Rs. 1,62,000/- as use of the shop and compensation and Rs. 2,275/- as expenses of notice total Rs. 1,64,275/-?

7. Whether the plaintiff is entitled to get Rs. 200 per day as uses of the disputed shop from the defendant as compensation?

8. Whether suit is barred by order 7 rule (11D) of the Civil Procedure Code as alleged in para 12 of the written statement?

9. Whether suit is under valued?

10. Whether the court fee paid is insufficient?

11. Whether the plaintiff is entitled to get any relief?

7. Evidence was given from both the sides by way of oral evidence and documentary evidence.

8. After hearing both the sides the learned Civil Judge (SD), Allahabad by his judgement dated 20.09.2018 partly decreed the suit of plaintiff for necessary expenses against water tax, house tax, property tax with 9% simple interest per annum till the continuation of the licence. For remaining relief the suit was dismissed.

9. Against this judgement, the appeal was filed by the plaintiff numbered as Civil Appeal No. 109 of 2018 which was decided by the impugned judgement of Additional District Judge, Court No. 2, Allahabad vide judgement and order dated 21.09.2019. by which the appeal has been allowed and the suit of the plaintiff has been decreed with the direction to the defendant to restore the previous status of the disputed shop and hand over the possession within 30 days. Defendant has been also directed to pay Rs. 4,500/- per month to the plaintiff as damage for use and occupation from the date of service of notice i.e. 03.09.2011 till he does not vacate the disputed shop. It has also been directed that if the defendant fails to comply, the plaintiff shall be at liberty to

get restored the possession of the disputed shop and realize the damages according to law.

10. Aggrieved by the judgement of the first appeal this second appeal has been filed.

11. The appellant has raised following substantial question of law in this second appeal:

1. Whether the plaintiff-respondent was entitled to the equitable remedy in form of a decree of mandatory injunction having approached the court with unclean hands by deliberately concealing the fact that he was not entitled to enter into any agreement in relation to the property in dispute without prior approval of Allahabad Development Authority?

2. Whether the suit filed by the plaintiff-respondent was liable to be dismissed being vague as the plaint did not disclose the nature or terms of the licence alleged to have been granted to the defendant-appellant?

3. Whether the findings of the lower Appellate Court are perverse in as much as it ignored the statement of the witnesses and misread the statement of the witness of defendant and also did not notice the cross-examination of the plaintiff and further went beyond the pleadings and misplaced itself by placing undue reliance upon inapplicable provisions of the Transfer of Property Act, 1882, Indian Contract Act, 1872 and The Indian Easement Act, 1882?

4. Whether the lower appellate court erred in holding that the defendant-appellant is not entitled to claim benefit of Section 60(b) of the Indian Easements Act, 1882 without reversing the categorical finding arrived at by the learned trial curt holding that the conditions prescribed under Section 60(b) of the Act were met by the defendant-appellant?

5. Whether the lower appellate court was justified in setting aside the finding of trial court without setting out the reasons as per the law laid down by the Hon'ble Supreme Court in the case of Sarju Pershad v. Jwaleshwari Pratap Narain Singh (reported in AIR 1951 SC 120)?

12. The learned senior advocate for the appellant has referred to the judgement in **Hero Vinoth (minor) v Seshamal (2006) 5 SCC 545** in order to show the meaning of 'substantial question of law' which is a pre-condition for exercising the jurisdiction of second appeal. There, the Supreme Court has laid down:

"A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. The question of law raised will not be considered as a substantial question of law, if it stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provision of law or binding precedent, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In second type of cases, the substantial question of law arises not because the law

is debatable, but because the decision rendered on a material question, violates the settled position of law."

13. The learned Senior Advocate for the appellant has argued that the plaintiff filed a suit for mandatory injunction which is an equitable relief and for that relief the plaintiff was legally expected to come with clean hands. The suit premises was allotted to the plaintiff by ADA and in the allotment letter it is a condition that for a period of 5 years, he would not transfer the shop. He accepted payment from the defendant, concealing the terms of allotment, and transferred the shop to the defendant. The learned lower appellate court completely ignored this fact and committed error in giving relief to the plaintiff.

14. There is no dispute with regards to the terms of allotment. But, it is not admitted by the plaintiff that he entered into an agreement to sell out the alleged shop to the defendant and for that he took the total consideration amount. The learned appellate court has found that it was not correct that any agreement to sale was executed by the plaintiff in favour of the defendant. Presumption could also be not raised as a contract to sale for immovable property is required to be in writing and it should be registered. There is no contract in writing and as such there is no question of registration. Therefore, oral agreement to sell immovable property is not enforceable at law nor the same can create any right in respect of the disputed shop in favour of the defendant. Therefore, this argument is of no avail as there is no transfer of the shop and no agreement to sell was ever executed by the plaintiff. A finding to that affect has been given by both the courts below and that finding, being a finding of fact, has become final and cannot be interfered in second appeal. There is yet another reason to render the submission of the appellant-defendant baseless as the defendant himself has alleged that shops no. 2,3 and 4 are situated in a row and are constructed by ADA. Out of these 3 shops, shop no.2 has been allotted to the defendant and shop no. 4 has been allotted to his brother. Shop no. 3 has been allotted to the plaintiff. The defendant claims that his family is joint. In such situation, when two adjacent shops are allotted to him and his brother, it can be presumed that he must be having full knowledge of that condition in the allotment letter. As such he cannot be permitted to say that the plaintiff did not inform him about the aforesaid condition and he was misled by the plaintiff.

15. Another argument is that the learned lower appellate court reversed the finding of the trial court without assigning reasons for setting aside the findings and it raises substantial question of law. The learned appellate court overlooked the fact that the trial court has greater opportunity of appreciating the oral evidence and the lower appellate court should be very slow in differing with the conclusion of the trial court unless the finding arrived at by the learned trial court is wholly improbable. From the perusal of the record attached and the judgements of the two courts below, it is clear that the learned trial court concluded that the appellant-defendant was in possession of the shop as licensee and that finding of fact was never challenged in the first appeal and the same became final. The only issue before the appellate court was with regards to the nature of licence whether revocable or irrevocable. Therefore, that part of the argument has no force that the lower

appellate court did not give finding determining the status of appellant-defendant.

16. It has been also submitted that the plaint of the plaintiff was vague as he did not disclose the terms of licence. For two reasons this argument lacks merit. Firstly, the definition of 'license' itself. The term 'license' has been defined in section 52 of the Easement Act defines license as follows:

"52. "license" defined- *Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."*

17. It is not necessary that for the purpose of creation of license any instrument be written and the grant of license may be express or implied as provided by section 54 of the Act. The learned trial court on the basis of evidence on record recorded the finding that the defendant was in possession of the disputed shop on the basis of implied license. License, therefore, is merely for the use of the licensed property by the grantee and it does not create any interest in the property and a licensee is not legally entitled to maintain a suit for possession against the grantor. There was an oral understanding between both that within six months a sale deed will be executed on payment of consideration amount and it has come in the statement of the plaintiff that for this six months, the plaintiff gave the disputed shop on license because of cordial relationship and on the request of the defendant. Moreover, the license is in respect of a shop and therefore, the use thereof is limited for that purpose by necessary implication. In a case of implied license, it is not possible to spell out the terms and conditions of the license except that the same was given to the licensee on his request for use the same as a shop. Therefore, I do not find any force in this argument.

18. The learned counsel to the appellant-defendant has further argued that the learned lower appellate court pointed out that once the learned trial court reached to finding that the defendant is a licensee, on the basis of oral agreement, made out a third case of irrevocable licence in favour of the defendant, whereas, the defendant never pleaded himself to be licensee, and dismissed the suit so far as relief of eviction and possession is concerned. The submission of the learned counsel is that he was in possession of the disputed shop on the basis of the agreement between the parties and not on the basis of any license granted by the plaintiff and therefore, he was wrongly considered to be a licensee and as such the court below committed an error in arriving at the conclusion of license.

19. In **Himmatrao Marotrao Dhobale v Arun Gulabrao Jichkar 2014 SCC On Line Bom 1252**, as referred by the learned senior advocate for the respondent-plaintiff to contradict the argument advanced from the side of the appellant-defendant, there was pleading of plaintiff that the defendant is a licensee of the suit plot which was denied by the defendant who stated that he offered to purchase the suit land but the plaintiff avoided and later on in the knowledge of

the plaintiff, he constructed a house thereon. A plea of estoppal was taken. The same was rejected and the trial court concluded on the basis of evidence on record that the plaintiff proved the defendant to be licensee and the defendant cannot be denied the benefit of section 60(b) of the Easement Act on the ground that he denied himself to be licensee. Once it is found that despite deficiency in the pleadings, the parties knew the case and proceeded to trial on those issues by producing evidence, it would not be open to a party to raise the question of absence of pleading in appeal. To further authenticate this view, the judgement in **Bhagwati Prasad v Shri Chandramouli AIR 1966 SC 735** may be referred.

20. In view of above discussion, even if the appellant-defendant did not plead himself to be licensee, he rather denied that he is a licensee of the disputed shop, once a finding was reached that he was a licensee in the disputed shop and that finding of the trial court was not disturbed by the learned lower appellate court, section 60 (b) of the Easement Act became applicable.

21. So far as the argument with regard to the oral agreement is concerned, the law is settled that oral agreement to sell immovable property has no legal affect and is not admissible in evidence altogether. In **Mool Chand Bakhuru v Rohan (2002) 2 SCC 612**, the issue before the Court was whether a person, claiming to be a proposed vendee, can protect his possession of an immovable property on the plea of part performance under section 53-A of the Transfer of Property Act on the basis of an oral agreement, the terms of which have not been reduced in writing? Section 53-A of the Transfer of Property Act reads as follows:

*"**53A. Part performance.**- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some work in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or part-performance thereof."*

22. It is clear from the above provision itself that in order to attract the said provision, there should be an agreement to transfer immovable property for consideration and it should be in writing and signed by the transferor coupled with delivery of possession of such property and the vendee cannot protect his possession on the basis of an oral agreement. This view finds support from the judgement in **Nathulal v Phoolchand (1969) 3 SCC 120 and**

Sardar Govindrao Mahadik v Devi Sahai (1982) 1 SCC 237. In **Mool Chand Bakhuru (supra)**, there was no agreement in writing and only letters of the vendor were brought on record in which he had shown his willingness to sell his immovable property. The Supreme Court remarked:

"At the most it is an admission of an oral agreement to sell and not a written agreement. Statutorily, the emphasis is not on a written agreement only. In addition, the emphasis is on the terms of the agreement as well which can be ascertained with reasonable certainty from the written document. There was no meeting of minds. Admission made by Mool Chand of an oral agreement to sell does not spell out the other essential terms of the agreement to sell such as the time frame within which the sale deed was to be executed and as to who would pay the registration charges etc. the letters written by Mool Chand cannot be taken to be an agreement to sell within the meaning of Section 53A spelling out the terms of an agreement for sale."

23. In the case in hand, the learned trial court, after taking into consideration the evidence on record, arrived at the conclusion that there was no written agreement to sell of the disputed shop executed between the parties. This finding of fact was never challenged by the appellant by filing any appeal and therefore, that finding of fact became final and that cannot be subjected to scrutiny in the second appeal. Consequently, it is also not relevant what money was advanced and by whom, by the appellant or his brother. The learned trial court also gave finding that the appellant-defendant was a licensee in the disputed shop and that has also not been challenged by the defendant by filing any appeal against that finding and therefore, that finding of fact also became final and the same cannot be put to scrutiny in this second appeal. Therefore, the dispute involved a limited question of revocability of the licence in view of section 60(b) of the Easement Act.

24. The learned trial court held that the possession of the defendant over the disputed shop was based on implied licence and because the plaintiff failed to establish terms of licence and the notice for revocation was ineffective as the possession was delivered on the basis of oral agreement and the agreement continued between the parties and also that the defendant had removed the intervening wall between the disputed shop and the other shop, the licence was neither revoked nor was revocable.

25. The lower appellate court, however, concluded that once it is found that there was no agreement in writing, the defendant could not protect his possession on the basis of oral agreement if any and the provision of section 53A of the Transfer of Property Act could not be attracted. This finding was based on the settled position of law in view of the judgements in **Nathulal (supra) Sardar Govindrao Mahadik (supra)** and **Mool Chand Bakhuru (supra)**. Further, the learned lower appellate court concluded on the basis of joint reading of sections 2(d), 2(g), 2(h), 8, 31 and 39 of the Indian Contract Act, sections 5, 9, 53A, 54 and 49 of the Transfer of Property Act and section 17 of the Indian Registration Act and several judgements that a contract for sale of immovable property is required to be not only in writing but also the same is required to be registered, otherwise, the

same will have no legal effect and will not be enforced in a court of law and the same shall not be admissible in evidence except in a suit for specific performance of a contract or as evidence of any collateral transaction not required to be affected by registered instrument. It was further held by the learned lower appellate court that a licence does not create a right or interest in the property and the licensee is not legally entitled to a notice to quit before eviction, even then, the plaintiff served a legal notice dated 2.9.2011 revoking the licence and to vacate and deliver the possession of the shop after restoring the intervening shop status quo anti before filing of the suit. After service of this notice, the defendant was legally expected to vacate and deliver back the possession of the disputed shop.

26. As pointed out earlier in this judgement, the moment it was held concurrently by both the courts below that the appellant-defendant was a licensee in the disputed shop, the issue of revocability of the license ought to be determined whether the defendant denied or accepted the plea of license or not. Section 60 of the Easement Act reads as follows:

*"**License when revocable.**- A license may be revoked by the grantor, unless-*

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution."

27. The very provision of section 60 shows that license is revocable in the first case when coupled with transfer of the property which is subject matter of such license. Needless to mention that transfer means a transfer which is legally effected and enforceable within the provisions of the Indian Contract Act read with the Transfer of Property Act and the Indian Registration Act. Therefore, in the facts of this case section 60(a) is not applicable. In this case the provision of section 60(b) has been sought to be applied from the side of the appellant-defendant which relates to the execution of work of permanent character in the disputed shop.

28. The submission of the learned counsel for the appellant is that the learned trial court after considering the pleadings and evidence on record, gave a categorical finding that the licence in favour of the appellant-defendant had become irrevocable because of permanent construction made therein. Another argument which has been advanced by the appellant is that after taking disputed shop from the plaintiff, he made development of permanent nature in the said shop. He has submitted that plaintiff respondent has himself admitted this fact. Moreover, the defendant-appellant has made categorical pleading and has tendered positive evidence to show that construction of permanent nature was made in the disputed shop. This fact has not been controverted by the plaintiff respondent, either in pleading or in evidence.

29. Learned counsel to the appellant has also submitted that in order to determine the nature of construction, whether it is permanent or temporary, the nature of the constructed structure and the intention with which it was made, is relevant factor. Evidence on record clearly indicates that the construction of permanent nature has been made in the shop with the intention of using the same

for a long period. It has been further submitted that the learned trial court, after considering the pleadings and evidence of the parties gave a finding that the defendant-appellant made construction of permanent nature in the disputed shop but, the learned appellate court has ignored this fact and has even not considered this aspect. Admittedly, the wall between the two shops was removed in order to make the same a single showroom and this shows that the disputed shop was materially altered and permanent construction was raised which is continuing since the year 2003. In support of this contention, the learned counsel has taken reference of the judgement in **Venkatalal G. Pittie v Bright Bros (Pvt) Ltd., AIR 1987 SC 1939**. He has also referred two other judgements on this aspect of two different High Courts in **Surya Properties Pvt. Ltd. v Vimalendu Nath Sarkar, AIR 1964 CAL 1** and **Leena Roy Choudhary v Indumati Bose, AIR 1980 Patna 120**

30. In **Venkatalal (supra)**, the Supreme Court has discussed the principle for determination of a permanent construction. A perusal of the facts of the case shows that the suit was filed for arrears of rent and vacation of the tenanted premises on the basis of unauthorized construction of permanent nature, damage to wall and floor. A suit was also filed for removal of the unauthorized construction and to restore the suit premises in its original condition. The Supreme Court held that the court has to come to the conclusion regarding work of permanent character on the examination of the nature of structure, the nature of the duration of structure, the annexation and other relevant factors for erecting the constructions by the tenant on the demised premises and the mere fact that a different view can be taken by the trial court, the appellate court cannot interfere with such finding. It is very much clear from the perusal of the said judgement that on fact, judgement was delivered in a very different scenario and there was not much dispute with regard to the fact that permanent construction was raised by the tenant which included new and permanent flooring, tenant had sunk in pillars and stanchions into the flooring for the support of cabins and several rooms, therefore, the learned trial court came to the conclusion that the cabin lofts and pillars supporting the same were attached to the flooring as well as to the walls and columns of the made structure, therefore, it was found to be a permanent structure. In my view, **Venkatalal (supra)** has been decided on different facts as it was found that construction of permanent nature was erected by the tenant. In the case in hand before this Court, except removal of intervening wall and some fixture, there is no construction made as such by the appellant-defendant inside the disputed shop.

31. In **Surya Properties (supra)**, as referred in **Leena Roy Choudhary (supra)** while defining 'permanent structure', the Calcutta High Court remarked that 'structure' must be distinguished from the words like 'fixture' and it means something constructed as 'building.' The Court held,

".....in deciding whether a construction is permanent or temporary two factors are of primary importance namely, the nature of structure and the intention with which it is made. If the nature of the structure is such that the structure will endure for a long time, i.e.

so long as the tenant expects to remain there as a lessee, and the intention of the lessee in constructing the structure is that he shall use it as long as he remains a lessee, the construction will be regarded as a 'permanent construction' within the meaning of S. 108(p) of the T.P. Act even though the consideration may be capable of removal without causing permanent damage to the leased premises."

32. In **Leena Roy Choudhary (supra),** the issue of breach of terms of tenancy was involved as the appellant had constructed without permission of the landlord a kitchen of brick wall on open terrace demolishing side walls of the old kitchen and also made unauthorized alteration in the stair case and varandah. The first appellate court held this construction and demolition to be material alteration in the tenanted portion and directed for eviction of the tenant. The second appeal against this decision was dismissed by the High Court. Needless to mention here that all the above referred cases were factually different as admittedly permanent construction was found to have been raised.

33. Reference has been also taken of the two judgements of this court in **Amjad Khan v Shafiuddin AIR 1925 All 203** and **Sitara Shahjahan Begam v Munna AIR 1927 All 342**, the first relating to licensee and the other was a case of lessee and in both the cases permanent construction was admittedly raised and therefore, no benefit would result to the appellant-defendant in the facts of the case in hand except that in the first case, the legal position has been reiterated that a license cannot be revoked, if the licensee acting upon the license had executed a work of a permanent character. The same view has been further affirmed in **Manzoor Ahamad v Muhammad Abdul Jamil AIR 1933 All 842.**

34. In **Ram Sarup Gupta v Bishun Narain Inter College (1987) 2 SCC 555**, a building and attached open land was leased and the same was converted into a licence in order to facilitate the recognition of the school. Thereafter, the grantor revoked the licence and asked to vacate and deliver possession. It was found that to meet the needs of school, permanent construction was raised on open land. The trial court dismissed the suit and the same was affirmed by the High Court. Matter reached to the Supreme Court. Keeping in view that the licence was granted to school of the building and attached open land for the purpose of imparting education, the Court dismissed the appeal and laid down as under:

"The principle behind section 60 is that if a person allows another to build on his land in furtherance of the purpose for which he had granted licence, subject to any agreement to the contrary, he cannot turn round later on to revoke the licence. Section 60 is not exhaustive. The parties may agree expressly or impliedly that a licence which is prima facie revocable not falling within either of the two categories of licence as contemplated by section 60 of the Act shall be irrevocable. Similarly, even if the two clauses of section 60 are fulfilled to render the licence irrevocable yet it may not be so if the parties agree to the contrary. Such agreements may be in writing or otherwise and their terms and conditions may be express or implied. A licence may be oral also and in that case terms, conditions and the nature of the licence can be gathered from the purpose for which the licence is

granted coupled with the conduct of the parties and the circumstances which may have led to the grant of licence."

35. The learned counsel to the respondent-plaintiff has pointed out that it was on the appellant-defendant to show by cogent evidence that the alteration made by him in the disputed shop was of permanent character and mere fixture inside on the walls befitting the same for the purpose of running shop, will not be taken to be an improvement of permanent nature. He has also submitted that it was the incumbent duty of the appellant-defendant to bring on record through commission or otherwise, the position of alteration claimed to be permanent in nature. In support of his arguments, the learned counsel has referred the judgement in **Shanker Gopinath Apte v Gangabai Hariharrao Patwardhan AIR 1976 SC 2506, Sant Lal Jain v Avtar Singh AIR 1985 SC 857.**

36. In **Shanker Gopinath Apte (supra)**, the appellant claimed to be in possession of disputed land as tenant under a power of attorney on the basis of a written letter sent by the appellant to the respondent accepting the terms of power of attorney and agreeing to pay Rs. 2000/- per year, though the object of the power of attorney was to arm the appellant with a written authority to evict unauthorized occupants and to put appellant in possession as a potential purchaser. The appellant failed to prove himself tenant. He thereafter raised the plea in appeal of being licensee, without any such plea taken or evidence given before the courts below, and claimed that the license was irrevocable as he had executed the work of permanent character. The Supreme Court observed as under:

"But having spent some time in chasing the argument, we are constrained to say that such evidence as there is on the record seems inadequate to prove the improvements made or expenses incurred by the appellant. He has admitted in the evidence that the figures which he gave in his examination-in-chief as regards amount spent on improvements were stated from memory and that he has not produced his accounts to corroborate the oral word. Only one thing need to be stated: even assuming that the appellant has executed work of a permanent character on the land it cannot be said that he has done so "acting upon the licence" as required by section 60(b) of the Easement Act. If he really improved the land by executing a work of a permanent character, he did so in the belief that being a tenant he will become a statutory purchaser of the land, or that the oral agreement of sale will one fine day be implemented. The execution of work would therefore be in his capacity as a tenant or a prospective purchaser and not in his capacity as a licence."

37. In **Sant Lal Jain (supra)**, the licensor instead of filing a suit for possession, filed a suit for permanent injunction after revocation of licence. It was held as under by the Supreme Court:

"Further, the respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him during subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the

property subsequently through some other person."

38. In the present case, no such construction has been shown to have been erected by the defendant. It was alleged in the plaint by the plaintiff that the wall between the two shops was removed in order to make it one shop. Removal of wall and raising of wall are two different things. Raising of wall may amount to a permanent structure, whereas, removal of existing wall between two shops may not amount to permanent structure as there is no construction on the surface area of the shop nor there is any reduction in the surface area.

39. In this case, the disputed property is a shop constructed and allotted by ADA to be used as shop. Therefore, presumably, the surface area was covered by construction and because it was constructed by ADA, it can be inferred that the same must have been constructed according to approved plan and map. Admittedly, the intervening wall of the disputed shop and the adjacent shop was removed by the defendant. There appears to be no material on record to show that any construction was made inside the disputed shop. Fixture on the wall is not at all an improvement of permanent character. As such, the license in favour of the appellant-defendant remains of revocable nature and the conclusion arrived at by the learned lower appellate court is legally sustainable.

40. On the basis of above discussion, I find that all the questions raised by the appellant-defendant involves only question of fact which have been adequately addressed by the learned lower appellate court. There is no concealment of any such fact with regards to the terms of allotment which was not in the knowledge of the appellant-defendant. There is no vagueness in the plaint assertion. The judgement of the learned lower appellate court is based on the material on record and nothing substantial has been missed, misread and ignored so far as pleading and the evidence of the parties is concerned. There is no error in the finding that the defendant is not entitled to the benefit of section 60(b) of the Easement Act. Despite the fact that the same was not discussed in depth and detail, as discussed above, the finding recorded so by the learned lower appellate court is a pure question of fact and on the basis of above discussion, I find that no otherwise conclusion was possible on the basis of facts alleged and evidence produced by the parties. The learned lower appellate court, by impugned judgement, has reversed the judgement of the learned lower court so far as it was decided against the respondent-plaintiff, on the sound reasons considering the evidence and law applicable to the facts and circumstances of the case.

41. On the basis of above discussion, I find that no substantial question of law is involved in this second appeal. The appeal lacks merit and is liable to be dismissed.

42. Accordingly, this second appeal is **dismissed**. The appellant-defendant shall vacate the disputed shop within 4 months and deliver back the possession thereof to the respondent -plaintiff.

43. The office is directed to transmit a certified copy of this judgement to the court below forthwith.

(2020)1ILR 1486

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.11.2019

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

FAFO No. 1016 of 2015

Smt. Ranjana Rawat ...Appellant
Versus
M/S Flora & Fauna Housing & Land Dev. Pvt. Ltd. & Ors. ...Respondents

Counsel for the Appellant:
Shakeel Ahmad Ansari, Amit Tripathi

Counsel for the Respondents:
Inder Preet Singh Chadha

A. Motor Accident Act, 1988 – Purpose of compensation under the Act - Is fully and adequately restore the aggrieved to the position prior to the accident - The award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident - Object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. (Para 16)

B. Motor Accident Act, 1988 – Appeal - Section 173 – Determination of Compensation – Tribunal denied future prospects to the claimants – Contrary to the Principle settled by a Constitution Bench of the Apex Court in Pranay Sethi's case – Issue of addition of non-pecuniary damages towards loss of consortium, loss of estate and funeral expenses is also settled - Tribunal erred in assuming the notional income of the deceased and in not awarding any amount towards future prospects and conventional heads – Held, the compensation awarded by the Tribunal needs to be determined again. (Para 18, 20, 21 & 22)

First Appeal From Order allowed. (E-1)

List of cases cited :-

1. New India Assurance Co. Ltd. v. Smt. Resha Devi & Ors, 2017 (3) ALJ 199

2. New India Assurance Co. Ltd. v. Smt. Meena Devi, FAFO No. 2390 of 2015

3. National Insurance Co. Ltd. v. Shyam Lal, FAFO No. 2010 of 2016

4. Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343

5. Reshma Kumari v. Madan Mohan and others, (2013) 9 SCC 65

6. Hem Raj v. Oriental Insurance Co. Ltd., (2018) 15 SCC 654

7. Ranjana Prakash v. Divisional Manager, (2011) 14 SCC 639

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

1. List has been revised. Service on respondent no. 1 has been dispensed with. No one appears on behalf of respondent nos. 2 & 3 in spite of sufficient service.

2. This first appeal from order under Section 173 of the Motor Vehicles Act, 1988 (for short "Act'), has been filed by Smt. Ranjana Rawat, the wife of Brijesh Kumar (the deceased), against the judgment and award dated 31.07.2015 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No. VII, Faizabad in Claim Petition No.101 of 2014, (Smt. Ranjana Rawat v M/s. Flora and Fauna Housing and Land Development Private Limited and others), seeking enhancement of compensation.

3. On 04.03.2014, at about 5 p.m., a truck bearing Registration No. UP 22T 1211 owned by M/s Flora and Fauna

Housing and Land Development Private Limited (respondent no. 1) and driven by Santosh Kumar (respondent no. 2) dashed against a tractor trolley bearing Registration No. UP 51F 1948. The accident took place near Banveerpur crossing on National Highway 28. As a result of the said accident, Brijesh Kumar, Vijay Kumar, Gullan alias Ajay Kumar and Rajit Ram sustained grievous injuries. All the injured persons were taken to District Hospital, Faizabad, where Vijay Kumar died during treatment. The deceased was referred to Trauma Centre, Lucknow and during treatment at Lucknow, he too died in the intervening night of 04/05.03.2014.

4. Smt. Ranjana Rawat, the claimant-appellant, claiming herself to be the wife of the deceased, filed a claim petition under Section 166 of the Act. Through the claim petition, the appellant claimed compensation to the tune of Rs 19,21,000/-, alongwith interest @ 14% per annum. She pleaded that the accident was caused due to the rash and negligent driving on the part of driver of the truck owned by respondent no. 1. At the time of his death, the deceased was 25 years old and was a mason and a driver of a L.M.V. earning Rs 6,000/- per month. Kamlau (respondent no.3), the father of the deceased was impleaded as an opposite party in the claim petition.

5. In their written statement respondent nos. 1 & 2, the owner and driver of the truck, denied the averments made in the claim petition. It was inter alia stated by them that the alleged accident did not take place with the truck bearing Registration No. UP 22T 1211. They stated that the driver of the truck was a skilled driver who had a valid and effective driving licence. They additionally mentioned that the said truck was insured with the New India Assurance Company Ltd and hence, the insurance company would be liable to pay the compensation, if any. Respondent no. 4, the insurance company, also denied the averments made in the claim petition in its written statement.

6. Respondent no. 3, the father of the deceased, in his written statement, denied the right of the claimant to get compensation by alleging that the claimant was not married to the deceased and did not live in his house. He claimed that being the father of the deceased, he was entitled to get the compensation.

7. The Tribunal, on the basis of the pleadings of the parties, framed as many as five issues. In support of the claim petition, the appellant examined herself as PW 1 and Ranjit Ram as PW 2. The appellant also filed documentary evidence in support of her case. The respondents did not examine any witnesses in defence and also did not file any documentary evidence.

8. The Tribunal, after analyzing the oral and documentary evidence on record, and after considering the submissions advanced by the learned counsel for the parties, repelled the contention advanced on behalf of respondent no. 3 that the appellant was not the legally wedded wife of the deceased and was not entitled to compensation. The Tribunal further held that it was a case of composite negligence and relying upon the decision of the Apex Court in the case of *T.O. Antony v. Karvarnan, (2008) 3 SCC 748*, held that the petition was maintainable against the offending truck.

9. The Tribunal held that the deceased was an unskilled labourer and in the absence of any documentary evidence on record assumed the notional income of the deceased as Rs 3,000/- per month. It was also determined that the deceased was married to the appellant and his age was between 25 to 30 years. The Tribunal held that the appellant, as well as respondent no. 3, the father of the deceased, were entitled to compensation. Accordingly, the Tribunal deducted one-third (1/3rd) towards the personal and living expenses of the deceased, and determined that the effective loss of earnings to the family was Rs 2,000/- per month (or Rs 24,000/- per annum). The Tribunal then applied the multiplier of 18 and declared that the dependents were entitled to get the total compensation of Rs 4,32,000/- along with interest at the rate of 7% per annum from the date of the claim petition. It apportioned the compensation between the appellant and respondent no. 3 in the ratio of 70:30. Respondent nos. 1 & 2 were held to be liable and the insurance company (respondent no. 4) was directed to pay the aforesaid compensation to the appellant and respondent no. 3.

10. Sri Amit Tripathi, learned counsel for the appellant has submitted that the notional income awarded to the appellant is on the lower side. He has further submitted that the Tribunal committed an error of law in not awarding any amount towards future prospects and under the conventional heads. Sri Inderpreet Singh Chaddha, learned counsel for respondent no. 4 on the other hand has supported the impugned order.

11. Heard the learned counsel for the contesting parties and perused the impugned judgment and award as well as the material brought on record.

12. In so far as the income of the deceased is concerned, the Tribunal has held that the deceased was a labourer and since no positive proof of the income was lead, relying upon the case of *Laxmi Devi (supra)*, income of Rs 3,000/- per month was taken as notional income. The income assessed by the Tribunal appears to be on the lower side.

13. In *New India Assurance Co. Ltd. v. Smt. Resha Devi & Ors, 2017 (3) ALJ 199*, a Division Bench of this Court comprising of Hon'ble Krishna Murari and Prashant Kumar, JJ, in paragraph nos. 9, 10 & 11 of the said report has held as under:--

"9. The next submission of the learned counsel for the appellant that income of Rs.100/- per day presumed by the tribunal is extremely on higher side is without any force and not liable to be accepted. *Tribunal in recording the said claim has relied upon the judgment of the Hon'ble Apex Court in the case of Laxmi Devi and another v. Mohammad Tabbar and others, 2008 (2) TAC 394 SC wherein notional income to unskilled labour was presumed to be Rs.100/- per day. Much water has flown since 2008. It is a matter of common knowledge that with the rise in price index, there has been considerable increase in the wages of salaried as well as self employed person. The average income of even a daily labour in 2014 when the accident took place cannot be presumed to be less than Rs.200/- per day. In our considered opinion, the tribunal committed a manifest error of law in presuming the notional income of the deceased to be Rs.100/- per day.*

10. In the case of *Santosh Devi v. National Insurance Company Limited and others (2012) 6 SCC 421* in paragraph 17 of the reports has observed as under :

"17. Although the wages/income of those employed in organised sectors has not registered a corresponding increase

and has not kept pace with the increase in the salaries of the government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis of even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this contest, it may be useful to give an example of a tailor who earns his livelihood by stitching clothes. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason, etc.

11. There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations. Obviously award of damages would depend upon the particular facts and circumstances of the case but the element of fairness in the amount of compensation so determined is the ultimate guiding factor. *In such view of the matter, presumption of Rs.100/- per day as notional income even for a unskilled labour in the year 2014 appears to us to be frugal and by no stretch of imagination to be just even the minimum wages fixed by the State Government is much higher than that looking to the rise in cost index. We are of the considered upon that notional income of an unskilled labour could not be less than Rs.200/- per day.* (emphasis supplied)

14. In *New India Assurance Co. Ltd. v. Smt. Meena Devi, FAFO No. 2390 of 2015,* another Division Bench of this Court opined as under:-

"So far as the income of the deceased, as assessed by the Tribunal as Rs.3000/- per month, is concerned, learned counsel for the appellant has contended that even an iota of evidence was not produced with regard to the income of the deceased and such the Tribunal erred in assessing the income of the deceased to be at Rs.3000/- per month and awarding future prospects as the deceased was not in a permanent job. In this connection it is to be noted that as per the evidence on record, the accident occurred in the year 2014 and *now-a-days, an ordinary mason, skilled labour or coolie earns Rs.200-300/- per day and looking to the income as Rs.3000/- per month assessed by the Tribunal, it cannot be said that it was on higher side, rather it was on the lower side.* Further more, looking to the fact that the deceased might have spent 1/5th of the income upon him and taking his age between 35-40 years, as assessed by the Tribunal, at the time of his death, if the income is calculated, then the income assessed was rather on meager side."

(emphasis supplied)

15. Again in *National Insurance Co. Ltd. v. Shyam Lal, FAFO No. 2010 of 2016,* this Court has held as under:-

"In so far as the presumption of Rs.200/- per day as notional income is concerned, we do find any fault with the same. *It is a matter of common knowledge that in recent past there has been considerable increase in the wages and earning of the employee as well as self-employed person. Admittedly, the accident took place on 07.09.2014. A presumption of notional income of Rs.200/- per day even for unskilled daily labour can, by no stretch of imagination, be said to be on the*

higher side. Thus, we do not find any fault in the Tribunal presuming the said income for determination of compensation." (emphasis supplied)

16. The purpose of compensation under the Act is to fully and adequately restore the aggrieved to the position prior to the accident. The Apex Court in *Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343*, explained "just compensation" in the following words:-

"5. The provision of the Motor Vehicles Act, 1988 ("the Act", for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner."

17. In this case the accident and death occurred in the year 2014. In view of the discussions made above, it would be proper to assess the income of the deceased as Rs 200/- per day. It is true that a labourer may not get work every day, hence the income of the deceased is assessed as Rs 5,000/- per month.

18. The next question relates to the addition of future prospects. The Tribunal, in the present matter, has denied future prospects to the claimants by relying upon the judgment in *Reshma Kumari v. Madan Mohan and others, (2013) 9 SCC 65*. The issue regarding future prospects has now been settled by a Constitution Bench of the Apex Court in the case of *Pranay Sethi (supra)*. The relevant portion of the said report is being reproduced below for ready reference:

"56. *The seminal issue is the fixation of future prospects in cases of deceased who are self-employed or on a fixed salary. Sarla Verma v. DTC, (2009) 6 SCC 121*, has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

57. *Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act."*

and then

"We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of

percentage. *Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."*
(emphasis supplied)

19. In *Hem Raj v. Oriental Insurance Co. Ltd., (2018) 15 SCC 654*, the Apex Court has held as under:-

"6. The learned counsel for the Insurance Company submitted that in the absence of actual evidence of income the principle of adding on account of future prospects cannot be applied where income is determined by guesswork.

7. *We are of the view that there cannot be distinction where there is positive evidence of income and where minimum income is determined on guesswork in the facts and circumstances of a case. Both the situations stand at the same footing.* Accordingly, in the present case, addition of 40% to the income assessed by the Tribunal is required to be made. The Tribunal made addition of 50% while the High Court has deleted the same."
(emphasis supplied)

20. In so far as addition of non pecuniary damages towards loss of consortium, loss of estate and funeral expenses is concerned, this issue has also been settled in the case of *Pranay Sethi (Supra)*. The relevant portion of the said report is extracted below:-

"52. ...The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. *It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively.* The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."
(emphasis supplied)

21. In view of the foregoing discussions, it is apparent that the Tribunal has erred in assuming the notional income of the deceased as Rs 3,000/- per month and in not awarding any amount towards future prospects and conventional heads.

22. Thus, in the light of the above mentioned principles, the compensation awarded by the Tribunal needs to be determined again. Notional income of the deceased is assessed as Rs 5,000/- per month (or Rs 60,000/- per annum). Considering the principles of dependence, one-third (1/3rd) of the income of the deceased is liable to be deducted towards the amount which he would have spent upon himself, if he had remained alive. After deducting one-third from his annual income towards his personal and living expenses, his contribution to the family is assessed as Rs 40,000/- per annum. Since the age of the deceased was less than 40 years, an addition of 40% of the annual income should be made on account of future prospects on the basis of *Pranay Sethi (supra)*. The annual income of the deceased would thus be Rs 56,000/-. Considering the age of the deceased, a multiplier of 18 is to be applied. Accordingly, the loss of dependency is assessed as Rs 10,08,000/-. In addition to the above, the claimants are also entitled to Rs 15,000/- towards funeral expenses, Rs 15,000/- for loss of estate and Rs 40,000/- towards loss of consortium.

23. Thus the total compensation to which the claimants are entitled is Rs 10,78,000/- The compensation is accordingly increased from Rs 4,32,000/- to Rs 10,78,000/-. The increased amount shall carry interest @ 7% per annum from the date of claim petition.

24. At this juncture, it is relevant to refer to the judgment of the Apex Court in *Ranjana Prakash v. Divisional Manager, (2011) 14 SCC 639*, wherein it has been laid down that in the absence of an appeal on behalf of the claimants, the compensation awarded by the Tribunal cannot be enhanced. Paragraphs 7 and 8 of the judgment are reproduced below:

"7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. *Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for* the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. *If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer.* Similarly, if the compensation determined by the High

Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by the owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation." (emphasis supplied)

25. In the case at hand, the present appeal has been filed by Smt. Ranjana Rawat, the claimant-appellant alone. Neither any appeal has been filed by Kamlau (respondent no. 3, the father of the deceased) nor any cross objection has been preferred by him in the present appeal and, as such, in view of the law laid down by the Apex Court in the case of *Ranjana Prakash (supra)* the compensation awarded to Kamlau, respondent no. 3 cannot be enhanced in this appeal which has been filed only by widow of the deceased.

26. As already mentioned above, the Tribunal has apportioned the compensation between the appellant and respondent no. 3 in the ratio of 70:30. Thus, the appellant would be entitled to 70% of Rs 10,78,000/- along with interest as mentioned above, whereas the respondent no. 3 would be entitled to 30% of Rs 4,32,000/- along with interest as awarded by the Tribunal.

27. In view of the above, the appeal is allowed. The impugned judgment and award stands modified to the extent indicated above.

28. The parties shall bear their respective costs.

(2020)1ILR 1493

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2019

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

FAFO No. 1579 of 2016

National Insurance Company Ltd.
...Appellant
Versus
Smt. Kamlawati & Ors. ...Respondents

Counsel for the Appellant:
Sri Sushil Kumar Mehrotra

Counsel for the Respondents:
Sri Chandra Bhushan Prasad, Sri Lokesh Kumar, Sri Rajat Agarwal

A. Motor Accident Act, 1988 – Section 168-A – Claim Petition - Negligence – Assessment of compensation - Point of negligence need not be specifically established to the ambit claimed by the insurance company- Finding of Tribunal on issue no. 1 is just and consistent and the same need no interference by this Court - Tribunal has rightly applied multiplier of 15 and assessed the compensation - Compensation for loss of estate; for loss of love and affection; for funeral expenses and under head of loss of company of the husband was awarded – Held, it cannot be said to be either unreasonable or excessive. (Para 16 & 18)

First Appeal From Order dismissed. (E-1)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard learned counsel for the parties.

2. This first appeal from order has been preferred against the judgment and award dated 29.2.2016 passed in Motor

Accident Claims Tribunal/Additional District Judge (Court No.7) Muzaffar Nagar in M.A.C.P. No. 308 of 2014-Smt. Kamlawati and others Versus Versus Narbir Singh and another whereby the concerned tribunal awarded compensation amount to the tune of Rs. 4,34,000/- carrying on 7% interest to the claimant respondents under various heads.

3. The facts relevant for adjudication of this appeal discernible from the record appear to be that in this case allegations are that some accident took place on 30.12.2013 at 7.30 p.m. on distillery crossing by the side of G.T. Road in district Muzaffarnagar when a motorcycle Splendor Plus No . U.P. 15-A.B.3978 on which two persons were riding was about to stop then it was hit by some bus coming from Muzaffar Nagar side due to which the motor cycle went out of control and it collided with Virendra Kumar, who was standing by the side of the road due to which Virendra Kumar sustained several injuries on his person, he was taken to Muzaffar Nagar medical college where he was hospitalized on 30.12.2013 around 9 a.m. where he succumbed to his injuries on 31.12.2013 at 7.40 a.m. Post mortem examination on the dead body of the deceased was conducted.

4. In view of the aforesaid accidental death, claim was preferred by the present claimant-respondents before the aforesaid claim tribunal wherein the insurer of the aforesaid offending motorcycle U.P. 15-A.B. 3978 was also impleaded as opposite party no. 2 along-with owner of the vehicle as opposite party no. 1. The case was contested between the parties and written statement was filed whereupon the tribunal framed as many as five issues.

5. Issue no. 1 related to fact whether the accident in question was caused on 30.12.2013 at 7.30 a.m. and at that point of time aforesaid Virendra Kumar along-with Sudheer was standing hundred meters away from the distillery crossing at G.T. Road within police station Mansurpur, waiting for his son when a bus coming from Muzaffar Nagar side collided with one motorcycle No. U.P. 15-A.B. 3978 on which two persons were riding, when the motorcycle was about to stop and at that point of time the bus hit it due to which the motorcycle went out of control resultantly collided with Virendra Kumar due to which Virendra Kumar sustained injuries and died during the course of treatment. If yes, its effect ?

6. Issue no. 2 related to the fact whether the road accident was caused by the driver of the motorcycle No. U.P. 15-A.B. 3978 and the accident was the outcome of contributory negligence of the deceased Virendra Kumar, if yes its effect ?

7. Issue no. 3 related to the fact whether on the aforesaid date and time the driver of the aforesaid motorcycle No. U.P. 15-A.B. 3978 was possessing a valid and effective driving licence ?

8. Issue no. 4 related to the fact whether the aforesaid vehicle was insured with the present appellant on the date and time of the accident and the same was being given in accordance with the terms and conditions of the insurance policy?

9. Issue no. 5 related to the fact of quantum of compensation, as to what compensation and from whom and to what proportion the claimants are entitled to receive?

10. Both the sidesfiled their papers, which have been taken on record and

described in the body of the award of the tribunal, the same need not be repeated for the sake of convenience. However, in case as and when the context arises, the same will be referred.

11. The claimant got examined three witnesses P.W. 1 Kamlawati, P.W. 2 Jai Prakash and P.W. 3 Sudhir and the opposite party/owner got examined D.W. 1 Pawan Kumar. The tribunal after considering the merit of the case and after hearing the arguments allowed the claim petition to the aforesaid extent, consequently, this appeal.

12. Sri Sushil Kumar Mehrotra, learned counsel for the National Insurance Company Ltd. has vehemently contended that it is a case of blind accident, in fact, no one saw the accident having been caused by the involvement of the motorcycle in question. The story of accident was cooked up by the claimant in order to obtain compensation from a vehicle which was insured with some company and in their bid they somehow involved the present motorcycle, which was insured with the appellant company.

13. The learned counsel added that the entirety of the case, the evidence on record and the allegations if properly scrutinized give impression that it is purely a case of hit and run thus confined to the provisions of section 161 of the Motor Vehicles Act. Therefore, the compensation amount to the tune of over Rs. 4 lakhs is not justified and the amount which is admissible and permissible for cases confined to 'hit and run' alone should have been awarded, which the insurance company is ready, if so directed, though there is no responsibility on the insurance company because it was the unknown offending vehicle/bus which caused the accident. The investigation was done and final report was submitted. This aspect exposes the claim of the claimant-respondent. The testimony of P.W. 3 Sudhir does not inspire confidence. Further, the eye witness account of P.W. 3 Sudhir should have been interpreted and appreciated with utmost caution in view of the prevailing facts and circumstances of the case and the sanctity which is normally attached to the testimony of witnesses in the cases like the present one should not be presumed to be so and presumption of truthfulness of the testimony was erroneously taken to be the guiding factor while determining the point of the accident. The learned counsel concluded by claiming that assuming it to be that any such accident took place and it really hit the motor cycle as claimed then the things are obvious and the principal of *'Res ipsa loquitur' 'the thing cannot tell a lie, the person can'* will apply. The very manner of committing the accident presupposes negligence of the bus driver itself and thatis super added by the negligence of the motorcyclist. Someone claims that it was about to stop then the precautionary brakes as was expected to be applied to the motorcycle was not applied properly and in case it was parked, then it was not properly parked and the accident took place because of wrong parking. Viewing from any angle, the only outcome would be reflection of negligence of both the drivers of the offending vehicles involved in the accident then in this situation proportional damage should have been fixed on each of the two involved vehicles, which has not been done properly by the tribunal and the insurance company of the motorcycle cannot be solely made responsible to pay the compensation amount, as such. It is not a case of joint

trotfeasors but there are separate and different trotfeasors for which the responsibility of each trotfeasor is to be assessed on the basis of the respective claim. The deceased himself did not take precaution and exposed himself to the risk by standing nearer to the road, that way he also contributed towards the accident.

14. While replying to the aforesaid argument learned counsel for the claimant-respondent vehemently claimed that the case of the claimant-respondent has been proved satisfactorily beyond all doubt by production of eye witness account as P.W.3. P.W. 3 was cross examined extensively by the insurance company but nothing adverse emerged which may lead to accept the aforesaid contention raised by the insurance company that the accident was the outcome of the rash and negligent driving of the bus by the bus driver and no such accident ever took place and the driver of the insured vehicle was negligent and the deceased himself was negligent. On all these points there is no material emerging from the cross examination of P.W. 3 which can be considered to be favourable to the insurance company. May be that the circumstances are not consistent and there is some inherent improbability but that improbability cannot be stretched to a situation claiming that the deceased died in different manner rather than the one claimed by the claimant respondents. Had there been no accident, and had there been no situation as claimed by the claimant-respondents then the insurance company would have been competent enough and would have come out specifically with the testimony disclaiming the incident in question. Merely filing of the final report by police, would not be suffice to throw away the claim of the claimant-respondents. In such cases of motor accidentlodging of FIR and other police formalities are not necessary. The sanctity of the witnesses is given highest place and the witness produced by the claimant respondent side out and out proved the factum of the incident and the tribunal has rightly observed that the deceased did not contribute to the incident and the driver of the offending motor cycle also did not contribute to the accident.

15. Learned counsel for the claimant-respondents, however claimed that the amount of compensation awarded was reduced by the tribunal which is not justified. However, it should be just and proper as claimed by the claimant- respondent.

16. I have considered the respective submissions of the learned counsel and also perused the record and particularly the award in question. Learned counsel for the insurance company has also engaged the attention of this Court to the testimony of D.W. 1, and has claimed that this testimony of the driver of the motorcycle in question is relevant for defining the correct position. The correct position is that the motorcycle had been parked and on that point of time when the alleged incident took place, the driver of the motorcycle had in the meanwhile gone for toilet, therefore, the claim that the motorcycle was about to stop or it was parked stands refuted. On this point learned counsel for the claimant respondent engaged attention of this Court to the testimony of P.W. 3. Testimony of P.W. 3 is reflectory of fact that the incident in question was primarily originated by the bus, which was unknown, however, it hit the motorcycle from behind which in consequence dashed with the deceased Virendra Kumar, due to which he sustained injuries and died during course of treatment. On this point the cross examination done has not come out with any perceptible flaw or error to be construed in favour

of the appellant that the testimony is nottruthful on the point of accident. In view of the consistent testimony of P.W. 3 obviously, it cannot be said that the deceased ever contributed towards the accident. Further, it is a claim petition under section 163-A of the Motor Vehicle Act wherein the point of negligence need not be specifically established to the ambit claimed by the insurance company. Therefore, the finding in so far as on issue no. 1 is concerned as recorded by the tribunal is on the face just and consistent and the same need no interference by this Court.

17. In so far as the entire quantam of compensation is concerned, then the tribunal has rightly assessed the compensation and has under various heads assessed the monthly income to Rs.3,000/- which amount was reduced by 1/3 margin while assessing the annual income, thus, annual income was calculated to Rs. 24000/- and after adding 30% as future prospect say Rs.7200/- in the annual income, it was assessed to Rs. 31,200/-.

18. Thereafter, applying the multiplier of 15 the compensation amount was assessed to Rs. 4,14,000/- then Rs. 5,000/- was awarded for loss of estate, Rs.5,000/- for loss of love and affection and Rs. 5,000/- for funeral expenses and under head of loss of company of the husband Rs. 5000/- was awarded, thus aggregating to Rs. 4,34,000/-. This amount along-with 7% interest was awarded as over all compensation and under circumstances in cannot be said to be either unreasonable or excessive and the finding recorded by the tribunal on all the issues are liable to be confirmed. Consequently, the appeal being without any force is liable to be dismissed and the judgment and award dated 29.2.2016 passed in M.A.C.P. No. 308 of 2014 is hereby confirmed.

19. The entire amount of compensation shall be paid to the claimant respondent in the proportion as directed by the tribunal. At this stage, money deposited by the insurance company at the time of presentation of this appeal i.e. Rs. 25,000/- shall be remitted to the trial court if it has not been done so far and the insurance company is directed to deposit the remaining entire amount outstanding with the tribunal concerned within a period of 30 days from today by adjusting the amount, if any, already deposited and paid.

20. However, the learned counsel for the insurance company claimed that for completing official formalities, some more time is needed for ensuring the compliance for which he prays for two and half months period at least. The plea is sustained.

21. The amount of compensation may be deposited in two and half months from today.

22. Consequently, this appeal is dismissed.

23. Costs easy.

(2020)1 ILR 1497

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2019

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Misc. Bench No. 4529 of 2018

Mahindra & Mahindra Financial Services Ltd. ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amol Kumar

Counsel for the Respondents:
C.S.C.

A. Contract-Petitioner-financer extended loan to opposite party-for purchase of a transport vehicle-agreement to hypothecate-vehicle as security to loan advanced-loan defaulted-petitioner took possession of the vehicle-tax not paid fro the date of possession by petitioner-financier becomes owner from date of such possession-for payment of tax-Jointly and severely liable.

Place before appropriate Bench. (E-8)

List of cases cited: -

1. Daya Shanker Yadav Vs. St. of U.P. & anr. reported in 2008(1) AWC 801

(Delivered by Hon'ble Rajan Roy, J.)

1. The following questions have been referred for our consideration by a Division Bench of this Court vide reference order dated 24.05.2018 passed in Writ Petition No. 4529(M/B) of 2018; Mahindra & Mahindra Financial Services Ltd. Vs. State of U.P. through Principal Secretary, Transport & Others:-

"1. Whether in view of Sections 2(g), 2(h), 4, 9, 10, 12, 13, 14 and 20 of the Act, 1997 read with Sections 39, 50 and 51 of the Act, 1988 and other relevant provisions of the said enactments and the Rules of 1998 and 1989, a Financier of a motor vehicle/ transport vehicle in respect of which a hire-purchase, lease or hypothecation agreement has been entered, is liable to tax from the date of taking possession of the said vehicle under the said agreements, even if, its name is not entered in the Certificate of Registration or not? If not, who is liable in this regard?

2. Whether the judgments rendered in the case of ***Lakhimpur Finvest Company Ltd.*** *(supra),* ***Manish Mukhriya*** *(supra) and* ***Shri Prakash*** *(supra) and/or the judgments rendered in the case of* ***Amar Nath Chaubey*** *(supra) and* ***Shriram Transport Finance Company Limited*** *(supra), lay down the law correctly on the issue framed as Question No. 1 ?"*

2. The Court had issued notice to opposite party no. 4 but inspite of service being sufficient as per Rules of the Court no one has appeared before us to argue the matter on his behalf.

3. We have heard Shri Amol Kumar, learned counsel for the petitioner and Shri Amitabh Kumar Rai, learned Additional Chief Standing Counsel for the State.

Facts

4. Although, we are not required to decide any factual issues involved in the writ petition nevertheless a brief narration of relevant facts would help in understanding the issues before us. Petitioner is the Financier who had extended a loan to opposite party no. 4 for purchase of a transport vehicle. The terms of loan were reduced in writing in form of an agreement dated 26.06.2012. It is not in dispute that the agreement involved hypothecation of the vehicle, thereby creating a charge in respect thereof in favour of the Financier as security for loan advanced. It is also not in dispute that said agreement contained a condition entitling the petitioner to take possession of the hypothecated vehicle in the event of default and also the right to sell it. Opposite party no. 4 defaulted in payment of loan amount. Accordingly, Petitioner-

Financier took possession of the vehicle in question on 09.12.2014. Opposite party no. 4 informed the Registering Authority on 09.12.2014 about possession of the vehicle having been taken by Financier. Opposite party no. 4-registered owner had paid all taxes prior to the date of such possession. Tax in respect of the vehicle for the period 01.01.2015 to 31.12.2017 remained unpaid. Accordingly, a notice dated 06.07.2016 was issued to opposite party no. 4 i.e. registered owner, who, being aggrieved, filed a writ petition before this Court bearing No. 11147(M/B) of 2019; Jamil Ahmad Vs. State of U.P. challenging said notice on the ground that possession of the vehicle having been taken by the Financier he was not liable to pay tax for the period subsequent to such possession and it was the Finance Company which was under an obligation to pay the same. Writ Court, without issuing notice to the petitioner-Financier, who was a party therein, decided the petition vide judgment dated 22.05.2017 observing therein that it is not disputed by the learned counsel for the parties that controversy involved in the said writ petition is similar to the one decided in the case of ***Daya Shanker Yadav Vs. State of U.P. and Anr.*** reported in ***2008(1) AWC 801*** and is squarely covered by it and, accordingly, it disposed of the petition of opposite party no. 4 in terms of judgment in ***Daya Shanker Yadav' case*** (supra) by permitting the petitioner to submit a fresh representation before the Taxation Officer who was directed to take a decision thereon in terms of Para 28(1) of the judgment in ***Daya Shanker Yadav*** (supra). Petitioner, who is the Financier, was not heard in the said writ petition. Consequent to the above, a notice dated 06.01.2018 was issued to the petitioner-Financier under Rule 18(2) of the U.P. Motor Vehicles Taxation Rules, 1998 holding him liable to pay the tax due and it is this notice which is under challenge in the writ petition filed by the Financier out of which the instant reference has arisen for our consideration.

5. The vehicle in question is a public service vehicle as per Section 2(o) of the U.P. Motor Vehicles Taxation Act, 1997 read with Section 2(35) of the Motor Vehicles Motor Vehicles Act, 1988, therefore, it is a "transport vehicle' within the meaning of Section 2(n) of the Act, 1997.

Contention of rival parties

6. Contention of Shri Amol Kumar, learned counsel for the petitioner was that since transport vehicle in question was not registered in name of the petitioner-company and it continued to be registered in name of the borrower, therefore, he alone was responsible, and not the Company, for payment of any tax, additional tax and/or penalty. Fact that the vehicle had been possessed by the finance company on 09.12.2014 under a loan/hypothecation agreement was not relevant in this regard in view of Section 9(2) of the Act, 1997 and also in view of the fact that even as per definition of "Owner' and "Operator', it is the registered owner who is the "Owner'. It was also his contention that mere taking of possession by the Financier is not relevant unless Certificate of Registration and other documents are also surrendered by the registered owner and vehicle is registered in its name, as, otherwise, finance company would not be able to either use the vehicle or sell it. He took us through various provisions of Section 2(g), 2(h), 4, 9, 10, 12, 13, 14, 20 and Section 37, 50

and 51 of the Act, 1988. He relied upon various decisions rendered in the case of ***Lakhimpur Finvest Company Ltd. Vs. State of U.P. and Ors.*** reported in ***2005 (2) AWC 1608 All., Amar Nath Chaubey Vs. State of U.P. and Ors.*** rendered in ***Writ Tax No. 521 of 2017, Manish Mukhriya Vs. State of U.P.*** reported in ***2015 (4) ALJ 248, Sri Prakash Vs. State of U.P. and Ors.*** rendered in ***Writ Tax No. 41 of 2016, Radhika Prasad Vs. State of U.P. and Ors.*** rendered in ***Writ Petition No. 333 (M/B) of 2015, Sriram Transport Finance Company Ltd. Vs. State of U.P. and Ors.*** rendered in ***Writ Tax No. 217 of 2017, HDFC Bank Ltd. Vs. Reshma and Ors.*** reported in ***2013 (3) SCC 679, Purnya Kala Devi Vs. State of Assam and Anr.*** reported in ***2014 (4) SCC 142, Naveen Kumar Vs. Vijay Kumar and Ors.*** reported in ***2018 (3) SCC 1***. His contention was that it is the registered owner who was liable to pay tax even for the period subsequent to the date of taking possession by the Financier till the vehicle was got registered in the name of the Financier. It was also his contention that for the period prior to such possession also it was the registered owner who was responsible to pay tax.

7. On the other hand Shri Amitabh Kumar Rai, learned Additional Chief Standing Counsel appearing for the State also took us through various provision of the Act, 1997 as referred hereinabove, especially Section 9(2), 9(3), 13 and 20. He contended that Section 9(2) was not attracted in the present case as it did not involve transfer of vehicle. He relied upon decision of the Supreme Court in the case of ***Purnya Kala Devi*** (supra), wherein, definition of "Owner' contained in Section 2(30) of the Act, 1998, similar to the definition in Section 2(h) of the Act, 1997, was considered and it was held that person in possession and control of the vehicle under an agreement of lease, hypothecation or hire-purchase would be the owner. Based on it he contended that finance company having taken possession of the vehicle on 09.12.2014 was liable to tax from date of such possession, it being the owner, as, after such possession the registered owner was neither in possession nor in control of the vehicle and the fact that he was the registered owner or had a permit in his name, was irrelevant. In this regard he also relied upon definition of "Operator' in Section 2(g) of the Act, 1997 which according to him supported his contention. He referred to provisions of Section 13 of the Act, 1997 to contend that after having taken possession of the transport vehicle, petitioner-Financier should have submitted a declaration in Form-A as per Rule 7 of the Rules, 1998 and if it failed to do so it can not take any advantage of its lapse. In this context he also contended that if the petitioner-Financier claims that the vehicle is not in use as such no tax is required to be paid, then it had to take recourse to Section 12 of the Act, 1997.

8. With reference to Section 20 of the Act, 1997 Shri Rai contended that Section 20 of the Act, 1997 provides for recovery of tax/additional tax/ penalty as arrears of land revenue. Section 20(3) of the Act, 1997 provides that the Taxation Officer shall raise a demand in the form as may be prescribed, from the "Owner' or "Operator', as the case may be, for arrears of tax and additional tax and penalty of each year, which shall also include arrears of tax/ additional tax/ penalty, if any, of the preceding years. Section 20(3) is the only provision requiring the Taxation Officer to raise a demand for payment of taxes and

penalty. It is so, because the liability is already fixed on the "Owner' or "Operator' to make a declaration in the prescribed form and to pay taxes according to the declaration as per Section 13 of the Act, 1997 read with Rule 7 and 8 of the Rules, 1998. Rule 18 (1) of the Rules, 1998 envisages a situation when the "Owner' or the "Operator' has not made any declaration under Section 13 of the Act, 1997 and in such a situation the Taxation Officer on receiving information shall require the concerned person to file declaration in Form "A' (as provided under rule 7) and may further serve upon the person a special notice in Form "E'. The notice in Form "E' requires filing of declaration and also to pay the tax due within 15 days from the date of service of the notice, meaning thereby, that the person not filing the declaration under Section 13 of the Act, 1997 is given a notice under rule 18(1) by the Taxation Officer for filing a declaration and to pay the taxes which are due, within 15 days. The notice under rule 18(1) also does not postulate determination of taxes by the Taxation Officer, but, it requires payment of taxes which are due as per the declaration to be filed in pursuance to the notice in Form "E'.

9. Section 20(3) of the Act, 1997 read with rule 18(2) and (3) envisages a situation when despite service of notice under rule 18(1) or in case of default of owner operator in payment of taxes despite making declaration under Section 13, the Taxation Officer is required to raise demand in the prescribed Form E-1. Form E-1 requires the Taxation Officer to raise a specific demand with respect to tax/ additional tax and penalty and hence, while issuing notice under Section 20(3) and raising a demand in "Form E-1', the Taxation Officer has to determine the liability to tax and penalty.

10. It was further submitted that in a case where a declaration is filed under Section 13, the Taxation Officer under Section 20(3) is in a position to raise demand for each year, otherwise, in a case where no such declaration is filed, the demand can be raised on receiving information as provided under rule 18(1) of the Rules, 1998. Section 20(3) of the Act, 1997, thus, provides for raising of a demand from the "Owner' or "Operator, determining their liability, as the case may be, which means that the Taxation Officer while raising a demand has to fix the liability of payment of tax under the scheme of the Act, 1997 otherwise, the definition of "Operator' or "Owner' in the Act, 1997 as in the manner defined may have no relevancy. It was submitted that thus, while raising a demand under Section 20(3), Taxation Officer is required to fix liability of the person liable to pay the tax for the period it is due.

11. According to him Section 50 of the Act, 1988 relates to transfer of ownership of motor vehicle which does not get attracted in the present case and the relevant provision which is attracted is Section 51 relating to motor vehicles under hypothecation/lease/hire purchaseagreement. In this regard he contended that Petitioner-finance company did not take any steps in terms of Section 51(5), as such, it is not open for it to say that unless the Financier becomes the registered owner it is not liable to pay taxes, specially as, being in possession of the vehicle, a Financier is liable to pay such tax and penalty, if any, for the period vehicle is in its possession.

12. In the context of Section 9(3) he contended that the expression "jointly and

severally' for the purpose of fixing liability of taxes and penalty used in Section 9(3) of the Act, 1997 connotes that the owner and operator are liable for payment of tax to the extent of their liability, however, the State Government is authorized to recover the liability of taxes from either of them. However, the Taxation Officer while raising a demand for payment of taxes and penalty under Section 20(3) has to determine the liability of each separately. Section 20(3) of the Act, 1997 categorically provides that the Taxation Officer shall raise a demand in the form as may be prescribed from the owner or operator, as the case may be, meaning thereby that the Taxation Officer has to determine the liability of each separately and raise a demand accordingly, however, recovery by the State Government can be made from either of them. Section 13 and 20 of the Act, 1997 read with rule 7, 8 and 18 of the Rules, 1998 also postulate raising a demand separately from the owner/operator. In the present case, it is not disputed that by virtue of definition of the term "operator' and "owner' in the Act, 1997 it is the petitioner-company which is solely liable for payment of tax from the date of taking possession of the vehicle. He submitted that none of the decisions relied upon by learned counsel for the petitioner supported the petitioner-Financier's case. Section 9(2) of the Act, 1997 is not attracted in a case where the vehicle after possession by the Financier is not transferred. It is attracted only when the vehicle is transferred by the registered owner or by the Finance Company after possession. In ***Amar Nath Chaubey's case*** (supra) Section 9(3) of the Act, 1997 was not taken into consideration. In ***Kamil Hussain's case*** (supra) Section 51(5) of the Act, 1988 as well as Section 9(3) of the Act, 1997 were not taken into consideration. He relied upon the decisions rendered in the case of ***Purnya Kala Devi*** (supra), ***Manish Mukhriya*** (supra), ***Lakhimpur Finvest Company Ltd. Vs. State of U.P. and Ors.; 2011 (29) LCD 2601, Lakhimpur Finvest Company Ltd.*** (supra), ***Shriram Transport Finance Company Ltd.*** (supra), ***Khenyei Vs. New India Assurance Company Ltd. and Ors.; 2015 (9) SCC 273*** and ***J. Jeyasingh Vs. Deputy Commercial Tax Officer; 1993 Legal Eagle 837.***

Discussion on Question No. 1

13. U.P. Motor Vehicles Taxation Act, 1997 (hereinafter referred to as "the Act, 1997') is a Taxing Statute which as per its long title provides for imposition of tax and additional tax in the State of Uttar Pradesh on motor vehicles engaged in transport of passengers and goods for hire. Motor vehicles to which it applies, are regulated by an enactment of Parliament known as the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act, 1988'). Rules known as Central Motor Vehicles Rules, 1989 (hereinafter referred to as "the Rules, 1989) have been made by the Central Government, under the Act, 1988. U.P. Motor Vehicles Rules, 1998 (hereinafter referred to as "the Rules, 1998) have also been made by the State Government under the Act, 1988.

14. Before referring to provisions of the Act, 1997 it would be fruitful to refer to relevant provisions of the Act, 1988 especially those relating to registration of motor vehicles as contained in Chapter-IV and some of the definitions contained in Chapter-I.

The Act, 1988 and Rules, 1989

15. Section 39 of the Act, 1988 prohibits use and driving of any motor

vehicle in any public place or any other place unless the vehicle is registered in accordance with Chapter- IV of the Act, 1988. Section 40 obligates every owner of a motor vehicle to get it registered in terms thereof.

16. An application for registration of a vehicle is required to be moved under Section 41 by or on behalf of the owner of a motor vehicle. As per Rule 47 of the Rules, 1989 an application for registration of a motor vehicle is to be made in Form-20 to the Registering Authority and it should be accompanied by the documents mentioned in the said Rule including a Sale Certificate in Form-21. At Serial No. 1 of Form-20 full name of the person to be registered as registered owner is required to be mentioned. At the bottom there is a "Note' wherein it is to be mentioned as to whether the motor vehicle is subject to hire-purchase agreement/lease agreement or hypothecation, with details of the Financier with whom such agreement is entered. After these details the Financier has to put his signature.

17. Form-21 i.e. the Sale Certificate also contains a stipulation as to whether the vehicle is held under an agreement of hire-purchase/lease/ hypothecation, if so, the person with whom such agreement has been entered.

18. On completion of formalities in terms of Section 41 of the Act, 1988 read with Rule 48 of the Rules, 1989, the Registering Authority is required to issue to the owner of the motor vehicle a Certificate of Registration in Form-23 which contains name of the registered owner and at the bottom there is a "Note' with regard to the motor vehicle being subject to hire-purchase/lease/hypothecation agreement and the Financier with whom such agreement has been entered, if it is so. Below these details, the specimen signature of the Financier has to be affixed. This is in keeping with the requirement of Section 51(1) and (2). Similar provision exists in Section 43(3) for temporary certificate of registration.

19. Thus, the name of the Financier is not entered in the Certificate of Registration as the registered owner. It is the name of the hirer, lessee or hypothecator which is mentioned as registered owner where the vehicle is subject to such agreement.

20. Section 50 deals with action to be taken by the transferor and transferee consequent to transfer of ownership of a motor vehicle for recording transfer of ownership in the Certificate of Registration by the registering authority. This is required when the motor vehicle changes hands due to sale, or inheritance or purchase in public action conducted by the Government. It lays down penal consequences for non reporting of such transfer. The Rules corresponding to Section 50 are Rules 55, 56 and 57 of the Rules, 1989.

21. Section 50 is as under:-

***"50. Transfer of ownership.**--(1) Where the ownership of any motor vehicle registered under this Chapter is transferred,--*

(a) the transferor shall,--

(i) in the case of a vehicle registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be

prescribed by the Central Government to the registering authority within whose jurisdiction the transfer is to be effected and shall simultaneously send a copy of the said report to the transferee; and

(ii) in the case of a vehicle registered outside the State, within forty-five days of the transfer, forward to the registering authority referred to in sub-clause (i)--

(A) the no objection certificate obtained under section 48; or

(B) in a case where no such certificate has been obtained,--

(I) the receipt obtained under sub-section (2) of section 48; or

(II) the postal acknowledgment received by the transferee if he has sent an application in this behalf by registered post acknowledgment due to the registering authority referred to in section 48,

together with a declaration that he has not received any communication from such authority refusing to grant such certificate or requiring him to comply with any direction subject to which such certificate may be granted;

(b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.

(2) Where--

(a) the person in whose name a motor vehicle stands registered dies, or

(b) a motor vehicle has been purchased or acquired at a public auction conducted by, or on behalf of, Government,

the person succeeding to the possession of the vehicle or, as the case may be, who has purchased or acquired the motor vehicle, shall make an application for the purpose of transferring the ownership of the vehicle in his name, to the registering authority in whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, in such manner, accompanied with such fee, and within such period as may be prescribed by the Central Government.

(3) If the transferor or the transferee fails to report to the registering authority the fact of transfer within the period specified in clause (a) or clause (b) of sub-section (1), as the case may be, or if the person who is required to make an application under sub-section (2) (hereafter in this section referred to as the other person) fails to make such application within the period prescribed, the registering authority may, having regard to the circumstances of the case, require the transferor or the transferee, or the other person, as the case may be, to pay, in lieu of any action that may be taken against him under section 177 such amount not exceeding one hundred rupees as may be prescribed under sub-section (5):

Provided that action under section 177 shall be taken against the transferor or the transferee or the other person, as the case may be, where he fails to pay the said amount.

(4) Where a person has paid the amount under sub-section (3), no action shall be taken against him under section 177.

(5) For the purposes of sub-section (3), a State Government may prescribe different amounts having regard to the period of delay on the part of the transferor or the transferee in reporting the fact of transfer of ownership of the motor vehicle or of the other person in making the application under sub-section (2).

(6) On receipt of a report under sub-section (1), or an application under sub-section (2), the registering authority may cause the transfer of ownership to be entered in the certificate of registration.

(7) A registering authority making any such entry shall communicate the transfer of ownership to the transferor and to the original registering authority, if it is not the original registering authority."

22. Rule 55 of the Rules, 1989 which is relevant, is as under:-

"55. Transfer of ownership.- *(1) Where the ownership of a motor vehicle is transferred, the transferor shall report the fact of transfer in Form 29 to the registering authorities concerned in whose jurisdiction the transferor and the transferee reside or have their places of business.*

(2) An application for the transfer of ownership of a motor vehicle under sub-clause (z) of clause (a) of sub-section (1) of section 50 shall be made by the transferee in Form 30, and shall be accompanied by--

(i) the certificate of registration;

(ii) the certificate of insurance; and

(iii) the appropriate fee as specified in rule 81.

(3) An application for transfer of ownership of a motor vehicle under subclause (ii) of clause (a) of sub-section (1) of section 50 shall be made by the transferee in Fonn 30 and shall, in addition to the documents and fee referred to in sub-rule (2), be accompanied by one of the following documents, namely:--

(a) a no objection certificate granted by the registering authority under subsection (3) of section 48; or

(b) an order of the registering authority refusing to grant the no objection certificate under subsection (3) of section 48; or (c) where the no objection certificate or the order, as the case may be, has not been received, a declaration by the transferor that he has not received any such communication together with--

(i) the receipt obtained from the registering authority under subsection (2) of section 48; or

(ii) the postal acknowledgement received from the registering authority where the application for no objection certificate has been sent by post."

23. Transfer of ownership under Section 50(a)(i) and (ii) read with Rule 55 also covers a transfer of ownership of a vehicle by the borrower with consent of the Financier to a third person free from encumbrances as is evident from Form 29 and 30.

24. Transfer of ownership of a motor vehicle is not dependent upon compliance of Section 50. It is complete when ingredients of transfer as prescribed in law are satisfied. In case of Sale such transaction is regulated by the Sale of Goods Act. Non compliance of Section 50 merely makes the transferor or transferee, as the case may be, liable to penal action under the Act, 1988 but it does not avoid liability to tax etc. nor does it make the transfer invalid or void. Section 50 (Old

Section 31 of the Act, 1939) is attracted only as a consequence of such transfer of ownership of motor vehicle.

25. A separate and special provision has been made regarding motor vehicles subject to hire-purchase, lease or hypothecation agreement and transactions based thereon, in Section 51. Rules corresponding to it are Rule 60 and 61 of the Rules, 1989.

26. Section 51 is as under:-

*"**51. Special provisions regarding motor vehicle subject to hire-purchase agreement, etc.**-- (1) Where an application for registration of a motor vehicle which is held under a hire-purchase, lease or hypothecation agreement (hereafter in this section referred to as the said agreement) is made, the registering authority shall make an entry in the certificate of registration regarding the existence of the said agreement.*

(2) Where the ownership of any motor vehicle registered under this Chapter is transferred and the transferee enters into the said agreement with any person, the last registering authority shall, on receipt of an application in such form as the Central Government may prescribe from the parties to the said agreement, make an entry as to the existence of the said agreement in the certificate of registration and an intimation in this regard shall be sent to the original registering authority if the last registering authority is not the original registering authority.

(3) Any entry made under sub-section (1) or sub-section (2), may be cancelled by the last registering authority on proof of the termination of the said agreement by the parties concerned on an application being made in such form as the Central Government may prescribe and an intimation in this behalf shall be sent to the original registering authority if the last registering authority is not the original registering authority.

(4) No entry regarding the transfer of ownership of any motor vehicle which is held under the said agreement shall be made in the certificate of registration except with the written consent of the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement.

(5) Where the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement, satisfies the registering authority that he has taken possession of the vehicle from the registered owner owing to the default of the registered owner under the provisions of the said agreement and that the registered owner refuses to deliver the certificate of registration or has absconded, such authority may, after giving the registered owner an opportunity to make such representation as he may wish to make (by sending to him a notice by registered post acknowledgment due at his address entered in the certificate of registration) and notwithstanding that the certificate of registration is not produced before it, cancel the certificate and issue a fresh certificate of registration in the name of the person with whom the registered owner has entered into the said agreement:

Provided that a fresh certificate of registration shall not be issued in respect of a motor vehicle, unless such person pays the prescribed fee:

Provided further that a fresh certificate of registration issued in respect

of a motor vehicle, other than a transport vehicle, shall be valid only for the remaining period for which the certificate cancelled under this sub-section would have been in force.

(6) The registered owner shall, before applying to the appropriate authority, for the renewal of a permit under section 81 or for the issue of duplicate certificate of registration under sub-section (14) of section 41, or for the assignment of a new registration mark under section 47, or removal of the vehicle to another State, or at the time of conversion of the vehicle from one class to another, or for issue of no objection certificate under section 48, or for change of residence or place of business under section 49, or for the alteration of the vehicle under section 52, make an application to the person with whom the registered owner has entered into the said agreement, (such person being hereafter in this section referred to as the financier) for the issue of a no objection certificate (hereafter in this section referred to as the certificate).

Explanation.--For the purposes of this sub-section and sub-sections (8) and (9), "appropriate authority" in relation to any permit, means the authority which is authorised by this Act to renew such permit and, in relation to registration means the authority which is authorised by this Act to issue duplicate certificate of registration or to assign a new registration mark.

(7) Within seven days of the receipt of an application under sub-section (6) the financier may issue, or refuse, for reasons which shall be recorded in writing and communicated to the applicant, to issue, the certificate applied for, and where the financier fails to issue the certificate and also fails to communicate the reasons for refusal to issue the certificate to the applicant within the said period of seven days, the certificate applied for shall be deemed to have been issued by the financier.

(8) The registered owner shall, while applying to the appropriate authority for the renewal of any permit under section 81, or for the issue of a duplicate certificate of registration under sub-section (14) of section 41, or while applying for assignment of a new registration mark under section 47, submit with such application the certificate, if any, obtained under sub-section (7) or, where no such certificate has been obtained, the communication received from the financier under that sub-section, or, as the case may be, a declaration that he has not received any communication from the financier within the period of seven days specified in that sub-section.

(9) On receipt of an application for the renewal of any permit or for the issue of duplicate certificate of registration or for assignment of a new registration mark in respect of a vehicle which is held under the said agreement, the appropriate authority may, subject to the other provisions of this Act,--

(a) in a case where the financier has refused to issue the certificate applied for, after giving the applicant an opportunity of being heard, either--

(i) renew or refuse to renew the permit, or

(ii) issue or refuse to issue the duplicate certificate of registration, or

(iii) assign or refuse to assign a new registration mark;

(b) in any other case,--

(i) renew the permit, or

(ii) issue duplicate certificate of registration, or

(iii) assign a new registration mark.

(10) A registering authority making an entry in the certificate of registration regarding--

(a) hire-purchase, lease or hypothecation agreement of a motor vehicle, or

(b) the cancellation under sub-section (3) of an entry, or

(c) recording transfer of ownership of motor vehicle, or

(d) any alteration in a motor vehicle, or

(e) suspension or cancellation of registration of a motor vehicle, or

(f) change of address,

shall communicate by registered post acknowledgment due to the financier that such entry has been made.

(11) A registering authority registering the new vehicle, or issuing the duplicate certificate of registration or a no objection certificate or a temporary certificate of registration, or issuing or renewing, a fitness certificate or substituting entries relating to another motor vehicle in the permit, shall intimate the financier of such transaction.

(12) The registering authority where it is not the original registering authority, when making entry under sub-section (1) or sub-section (2), or cancelling the said entry under sub-section (3) or issuing the fresh certificate of registration under sub-section (5) shall communicate the same to the original registering authority."

27. Rule 60 and 61 of the Rules, 1989 are as under:-

"60. Endorsement of hire-purchase agreements, etc.-*An application for making an entry of hire-purchase, lease or hypothecation agreement in the certificate of registration of a motor vehicle required under sub-section (2) of section 51 shall be made in Form 34 duly signed by the registered owner of the vehicle and the financier and shall be accompanied by the certificate of registration and the appropriate fee as specified in rule 81."*

"61. Termination of hire-purchase agreements, etc.- *(1) An application for making an entry of termination of agreement of hire purchase, lease or hypothecation referred to in sub-section (3) of section 51 shall be made in Form 35 duly signed by the registered owner of the vehicle and the financier, and shall be accompanied by the certificate of registration and the appropriate fee as specified in rule 81.*

(2) The application for the issue of a fresh certificate of registration under sub-section (5) of section 51 shall be made in Form 36 and shall be accompanied by a fee as specified in rule 81.

(3) Where the registered owner has refused to deliver the certificate of registration to the financier or has absconded then the registering authority shall issue a notice to the registered owner of the vehicle in Form 37."

28. Section 51(1) requires that, where the application is for registration of a motor vehicle held under any of the agreements referred above, the registering authority shall make an entry in the Certificate of Registration regarding the existence of said agreement. Sub-section 2 of Section 51 relates to a situation where ownership of any motor vehicle registered under Chapter-IV of the Act, 1988 is transferred and the transferee enters into a hire-purchase, lease or hypothecation agreement with any person subsequent to

such registration and in such an eventuality the application as mentioned in Rule 60 of the Rules, 1989 is required to be made in Form-34 which should be duly signed by the registered owner of the vehicle and the Financier. Sub-section 3 of Section 51 relates to cancellation of entry made under Sub-section (1) and (2) on proof of termination of such agreement obviously on satisfaction of the conditions of such agreement. The result is striking off the "Note' in the Certificate of Registration regarding the vehicle being the subject of such agreement on an application being filed in terms of Rule 61(1) in Form- 35 which is as under:-

"FORM -35

[See Rule 51(1)]

Notice of termination of an agreement of Hire-Purchase/Lease/Hypothecation

(To be made in duplicate and in triplicate where the original Registering Authority is different, the duplicate copy and the triplicate copy with the endorsement of the Registering Authority to be returned to the Financier and Registering Authority simultaneously on making the termination entry in the Certificate of Registration and Form 24).

To

The Registering Authority

We hereby declare that the agreement of Hire-Purchase/Lease/Hypothecation entered into between us has been terminated. We, therefore, request that the note endorsed in the Certificate of Registration of Vehicle No.....in respect of the said Agreement between us be cancelled.

The Certificate of Registration together with the fee is enclosed.

Date.....

Signature or thumb impression of Registered owner

Date.....

Signature of the Financier with official seal and address

**Strike out whichever is inapplicable.*

Office endorsement

Ref. Number.....Office of the..... The cancellation of the entry of an agreement as requested above is recorded in this office Registration record in Form 24 and Registration Certificate on .....(date).

Date.....

Signature of Registering Authority

To

The Financier .....

.....

The Registering Authority .....

.....

(To be sent to both the above parties by Registered Post Acknowledgment Due)

Specimen signature of the Financier are to be obtained in original application for affixing and attestation by the Registering Authority with his office Seal in Forms 23 and 24 in such a manner that the part of impression of seal or stamp and attestation shall fall upon each signatures.

1. 2."

29. Sub-section 4 of Section 51 prohibits any entry regarding transfer of

ownership of a motor vehicle held under above-mentioned agreements without written consent of the "Financier'. This provision by itself does not bar an otherwise valid transfer nor does it invalidate such transfer.

30. Sub-section 5 of Section 51 deals with a situation where the "Financier' takes possession of the vehicle from the registered owner owing to default of the latter under provisions of the agreement and registered owner refuses to deliver the Certificate of Registration or has absconded. In this situation if the Financier satisfies the Registration Authority about existence of these facts then such authority can cancel the Certificate and issue a fresh Certificate of Registration in the name of the "Financier' in terms of the said provision. Though the word "Financier' has not been used as such in Sub-section (5), description of the person referred therein is of the "Financier' as defined in Rule 2(d) of the Rules, 1998. Corresponding Rule in this regard is Rule 61(2), which has already been quoted earlier. The relevant Forms in this regard are Form 36 and 37 which are as under:-

"FORM-36

[See Rule 61(2)]

Application for issue of a fresh Certificate of Registration in the name of the Financier

To

The Registering Authority .....

I/We.....(financier) have taken possession of motor vehicle No.....make.....model.....owing to the default of the Registered owner..... (name) .....(full address)

under the provisions of the agreement of hire-purchase/lease/hypothecation:

**(1) <u>The certificate of registration of the said vehicle is surrendered herewith.</u>*

** (2) <u>The registered owner has refused to deliver the certificate of registration to me/ us.</u>*

**(3) <u>The registered owner is absconding.</u>*

I/We request you to cancel the certificate and issue a fresh certificate of registration in my/ our name.

I/We enclose a fee of Rs.....

Date.....

Signature of the financier

Specimen signatures of the financier:

1.....

2.....

Copy to the original registering authority

** Strike out whichever is inapplicable."*

Form- 37 referable to Section 61(3) is as under:-

"FORM-37

[See Rule 61(3)]

Notice to the Registered Owner of the Motor Vehicle to surrender the Certificate of Registration for cancellation and issue of fresh Registration Certificate in the name of the Financier

(To be made in duplicate and duplicate copy to be sent to the financier simultaneously on issue of notice)

Office of the Registering Authority..... Ref.

Number.....

Dated..... Shri/Smt. /Kumari .....(Regd. Owner) is/are hereby informed that .....(financier) has/have reported that he/they have taken possession of the Motor Vehicle bearing registration number.....covered by an agreement of Hire-purchase/Lease/Hypothecation, owing to your default under the provisions of the said agreement and that;

**(l) You have refused to deliver the Certificate of Registration to him/her/them.*

**(2) You have absconded.*

He/She/They have requested to cancel the Certificate of Registration and issue a fresh Certificate of Registration in his/her/their name.

You are, therefore, directed to surrender the Certificate of Registration of the said motor vehicle which has been retained by you inspite of your having lost the possession and hereby the ownership of the Motor Vehicle under section 2(30) and to send your representation in this regards, if any, to this office within seven days from the date of receipt of this notice by you, failing which a fresh Certificate of Registration will be issued in the name of the Financier, cancelling the Certificate of Registration held by you, in accordance with section 51(5).

Date.....

Signature of Registering Authority

**Strike out whichever is inapplicable.*

To

The

Financier.....

(To be sent by registered post acknowledgment due)"

31. Even at the cost of repetition it needs to be stated that section 51 is a special provisions dealing with motor vehicles subject to hire-purchase, lease and hypothecation agreement and is separate from Section 50 which deals with transfer of ownership by sale, inheritance or purchase in public auction.

32. We may also refer to definition of "Owner' contained in Section 2(30) of the Act, 1988, which is as under:-

"(30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement;"

33. The term "Financier' is defined in Rule 2(d) of the Central Motor Vehicle Rules, 1989 as under:-

*"**2. Definitions.**- In these rules, unless the context otherwise requires,-*

(a) .....

(b) .....

(c) .....

(d) "financier' means a person with whom the registered owner of a motor vehicle has entered into an agreement of hire-purchase, lease or hypothecation in respect of such vehicle and whose name is entered in the certification of registration as referred to in Form 34;"

34. This discussion of the provisions of the Act, 1988 would be relevant when we consider the liability to tax and penalty under the Act, 1997.

The Act, 1997 and Rules, 1998

35. Tax on such motor vehicles which are registered under the Act, 1988, is required to be paid as per the Act, 1997.

36. Section 4 of the Act, 1997 is the taxing provision. In respect of motor vehicles other than a transport vehicle a one-time tax is to be paid at the rate applicable in respect of such motor vehicles subject to the provisos to the said section. In respect of other vehicles, monthly, quarterly, or annual tax is required to be paid under Section 4(1-A) to (3), subject to the provisos to the said provisions.

37. Section 4-A deals with levy of special tax in respect of certain vehicles covered by temporary permit. Section 6 deals with additional tax on public service vehicle.

Section 4 of the Act, 1997 is as under:-

*"**4. Imposition of tax.-** (1) Save as otherwise provided in this Act or the rules made thereunder, no motor vehicle other than a transport vehicle, shall be used in any public place in Uttar Pradesh unless a one-time tax at the rate applicable in respect of such motor vehicle, as may be specified by the State Government by Notification in the Gazettee has been paid in respect thereof:*

Provided that in respect of an old motor vehicle instead of a one time tax, annual tax applicable to such motor vehicle as may be specified by the State Government by Notification in the Gazette may be paid.

Provided further that in respect of an old motor vehicle instead of a one-time tax, annual tax applicable to such motor vehicle, as specified in Part "C' of the First Schedule may be paid.

Provided also that from the date of commencement of the Uttar Pradesh Motor Vehicles Taxation (Amendment) Act, 2014 no motor vehicles other than a transport vehicle shall be sued in any public place after the expiry of validity of registration under the Motor Vehicles Act, 1988 unless a green tax at the rate applicable to such motor vehicles as may be specified by notification, by the State Government has been paid in respect thereof.

(1-A) Save as otherwise provided in this Act or the rules made thereunder no three wheeler motor cab and goods carriage having gross vehicle weight not exceeding 3000 kilograms, shall be used in any public place in Uttar Pradesh unless yearly tax at such rate of such motor vehicle, as may be specified by the State Government by notification in the Gazette, has been paid in respect thereof:

Provided that in respect of a motor vehicle under this sub-section in lieu of yearly tax such amount of one time tax may be payable as specified by the State Government by notification in the Gazette.

(2) Save as otherwise provided by or under this Act no goods carriage other than those specified in sub-section (1-A), construction equipment vehicles, specially designed vehicles, motor cab (other than three wheeler motor cab), maxi cab and public service vehicles owned or controlled by the State Transport Undertaking, shall be used in any public place in Uttar Pradesh unless a quarterly tax at the rate applicable to such motor vehicle as may be specified by the State Government by notification in the Gazette, has been paid in respect thereof.

Provided that in respect of a motor vehicle under this sub-section instead of quarterly tax, an yearly tax at

such rate as may be specified by the State Government may be payable.

(2-A) Save as otherwise provided by or under this Act no public service vehicle other than those referred in sub-section (1-A) and sub-section (2) shall be used in any public place in Uttar Pradesh unless a monthly tax at such rate as may be notified by the State Government is paid in respect thereof:

Provided that in respect a motor vehicle under this sub-section instead of monthly tax, a quarterly or an yearly tax at such rate as may be notified by the State Government may be payable.

(2-B) Where any reciprocal agreement relating to taxation of goods carried by road is entered into between the Government of Uttar Pradesh and any other State Government or a Union Territory, the levy of a tax under sub-section (1-A) or sub-section (2) shall, notwithstanding anything contained in the said sub-section, be in accordance with the terms and conditions of such agreement:

Provided that the tax so levied shall not exceed the tax which would otherwise been levied under the Act.

(3) Where any motor vehicle other than a transport vehicle is found plying as a transport vehicle, such tax therefore as may be notified by the State Government, shall be payable."

38. Various Sub-sections of Section 4 deal with various categories of vehicles. Sub-section 1 deals with motor vehicles other than transport vehicles. Sub-section (1-A) to (3) deals with transport vehicles of various categories such as three wheeler motor cab and goods carriage; construction equipment vehicles; specially designed vehicles; motor cab (other than three wheeler motor cab); maxi cab and public service vehicle owned and control by the State Transport Undertaking; public service vehicle other than those referred in Section (1-A) and Sub-section (2). Sub-section (2-B) and (3) relate to taxation of goods carrier and taxation of a motor vehicle other than a transport vehicle which is found plying as a transport vehicle.

39. Tax is in respect of a motor vehicle and is required to be paid before its use. If one keeps a vehicle liable to tax without paying tax or taking recourse to section 12 then he is liable to tax.

40. As per Sections 4, 9 and 10 of the Act, 1997 no motor vehicle including a transport vehicle can be used unless tax payable under Section 4 read with Section 9 of the said Act, has been paid. Such tax is required to be paid at the time of registration in the event of one-time tax, as also in the event of first payment of tax in cases where tax is to be paid on monthly, quarterly or annually basis, as the case may be.

41. Section 9 of the Act, 1997 deals with **payment of tax and penalty**. It reads as under:-

"9. Payment of tax and penalty.-*(1) Subject to the provisions of Section 11 :*

(i) the tax payable under sub-section (1) of Section 4 shall be paid at the time of the registration of the vehicle under the Motor Vehicles Act, 1988 :

Provided that in respect of an old motor vehicle, the tax shall be payable in advance on or before the fifteenth day of January in each year;

(ii) the tax payable under sub-section (1-A) of Section 4, shall be payable

in advance for one year at the time of the registration of the vehicle under the Motor Vehicles Act, 1988 and thereafter on or before the fifteenth day of the first calendar month of each year next following;

(iii) the tax payable under sub-section (2) Section 4 shall be payable in advance for one quarter at the time of registration of the vehicle under the Motor Vehicles Act, 1988 and thereafter on or before the fifteenth day of the first calendar month of each quarter next following.

(iv) (a) the tax payable under sub-section (2-A) of Section 4 shall be payable in advance for one year calendar month at the time of the registration of the vehicle under the Motor Vehicles Act, 1988 and thereafter on or before the fifteenth day of each calendar month next following;

(b) the special tax payable under Section 4-A in respect of vehicles covered by temporary permit issued for the conveyance of passengers on special occasions, such as to and from fairs and religious gathering or to carry marriage parties, tourist parties or such other reserved parties shall be paid at the time of issuance of such temporary permit.

(2) When any person transfers a motor vehicle registered in his name to any other person, then without prejudice to the liability of the transferor in this regard, the transferee shall be liable to pay the arrears of tax, additional tax and penalty, if any, in respect of motor vehicle so transferred, due on or before the date of its transfer, as if the transferee was owner of the said motor vehicle during the period for which such tax, additional tax or penalty is due.

(3) Where the tax or additional tax in respect of a motor vehicle is not paid within the period specified in sub-section (1), in addition to the tax or the additional tax due, a penalty at such rate not exceeding the due amount as may be prescribed, shall be payable, for which the owner and the operator if any shall be jointly and severally liable.

(4) In computing the amount of tax, additional tax or penalty under this Act, the amount shall be rounded off to the nearest rupee, that is to say a fraction of a rupee being fifty paise or more shall be rounded off to the next higher rupee and any fraction less than fifty paise shall be ignored."

42. As per **Section 9(1)**, Tax referred in Section 4(1) i.e. one-time tax in respect of motor vehicles other than transport vehicles, is payable at the time of registration of the vehicle under the Act, 1988 subject to the proviso contained therein. Tax under Sub-section 1 of Section 4-A- in respect of other vesicles (Transport Vehicles) referred therein is payable in advance for one year at the time of registration of the vehicle under the Act, 1988 and thereafter, on or before the 15th day of the first calendar month of each year next following. Such tax as referred in Sub-section (2) of Section 4 is payable in advance for one quarter similarly at the time of registration and, thereafter, on or before the 15th day of the first calendar month of each quarter next following. The tax referred under Sub-section (2-A) of Section 4 is accordingly payable for one calendar month at the time of registration and thereafter, on or before the 15th day of each calendar month next following. Special tax under Section 4-A is to be paid at the time of issuance of temporary permits.

43. **Section 9(2)** deals with liability to pay tax, additional tax and penalty **due on or before the date of transfer** of a motor vehicle which is **transferred by the**

registered owner to any other person i.e. it deals with arrears of such tax and penalty pertaining to the period prior to such transfer. It does not deal with liability to tax due after the date of such transfer.

44. This provision makes the transferee liable to arrears of tax and penalty due on or before the date of transfer of a motor vehicle deeming him to be owner of the said motor vehicle for the period relating to which such tax and penalty is due, although, he was not actually the owner of it during such period. A legal fiction has thus been created treating the transferee to be the owner for the said period. This, however, is without prejudice to the liability of transferor in this regard.

45. In cases covered by transfers referred in Section 9(2) both the transferor (registered owner) and the transferee (deemed owner) are liable to pay tax, additional tax and penalty **due on or before the date of its transfer** as per option of the Taxation/Recovery Officer, leaving them to sort out their claims *inter se*, as per law.

46. The object of the provision is to facilitate smooth realization of tax/revenue by the State in a case of transfer of a vehicle. The rationale behind such provision is that whosoever purchases a vehicle should satisfy himself that all taxes etc. in respect thereof have been duly paid by the transferor. If not, he should ask him to do so before the transfer takes place. This secures the interest of revenue under the Act, 1997. However, if he does not do so, then, he buys not only the vehicle but also the liability to pay tax etc. even for the period prior to such transfer, knowingly.

47. The *sine qua non* of Section 9(2) is that it applies to transfer of a vehicle by the registered owner, to any other person. If the transfer is not by the registered owner and it is not to any other person then Section 9(2) will not apply. Secondly, it deals with liability to pay tax etc. due on or before the date of such transfer but not after such transfer.

48. The term "Transfer' used in Section 9(2) is not defined under the Act, 1997 nor the Act, 1988 or the Rules made thereunder. In a case involving sale of a motor vehicle it would be regulated by the Sale of Goods Act.

49. The transfer envisaged under Section 9(2) is not dependent on compliance of Section 50 of the Act, 1988 and Rule 55 of the Rules, 1989 nor is it invalidated or incomplete for this reason, meaning thereby, even if such transfer is not recorded in the registration records and Certificate of Registration, it is still valid and consequences will follow in law accordingly. Reference may be made in this regard to the decisions reported in ***AIR 1986 AP 62;Madineni Kondaiah and others etc. Vs. Yaseen Fatima and others, etc., AIR 1980 SC 871;Panna Lal Vs. Chand Mal and Ors., 1992 Cr.L.J. 2476;Virendrakumar J. Handa Vs. Dilawarkhan Alij Khan and Ors., 1985 Cr.L.J. 951 (Para 17);V. Parakashan Vs. K.P. Pankajakshan and Anr., (1979) 16 ACC 274; Kalpnath Singh Vs. Sheo Nath Rai, 1977 MhLJ 656; Kishan Panduranj Kagde Vs. Baldev Singh Gian Singh and Ors.*** *and* ***(1999) 3 SCC 754; G. Govindan Vs. New Assurance Co. Ltd. and ors. (Para 14 and 18)*** wherein the Full Bench of Andhra Pradesh High Court in the case of ***Madineni Kondaiah*** (supra) has been approved. All these decisions relate to the

Old Act, 1939 and Section 31 thereof but the observations and principles expounded apply to the New Act of 1988 also, as the provision is similar to Section 51 thereof.

50. This, however, does not take away the obligation under Section 40 of the Act, 1988 upon the owner to get the vehicle registered nor does it avoid other consequences including penal consequences which may follow under the Act, 1988 or the Act, 1997 for failure to do so.

51. What it means is that if a motor vehicle has been validly transferred, liability under Section 9(2) will get attracted irrespective of non compliance of Section 50 and Rule 55 referred above. Section 50 and Rule 55 are only a consequence of such transfer which is also evident from the language used therein.

52. **Section 9(3)** deals with non payment of tax or additional tax within the period specified under Section 1 of Section 9 and the liability in this regard. In such an eventuality it provides that in addition to the tax or the additional tax due, a penalty, as may be prescribed, shall be payable for which the owner and the operator, if any, shall be jointly and severally liable. The use of the words "in addition to the tax or the additional tax due' followed by the words "a penalty.....' leaves no doubt that the provision not only makes the "Owner' and "Operator', if any, jointly and severally liable with regard to the "penalty' but also with regard to "tax or additional tax due'. The use of the words - "where the tax or additional tax in respect of a motor vehicle is not paid within the period specified in Sub-section 1.....' is indicative of the fact that the provision speaks of liability to pay arrears of tax and additional tax.

53. Thus, it is the "Owner' and the "Operator', if any, of a motor vehicle who is liable to pay the tax or the additional tax due within the period specified in Section 9(1) in respect of a motor vehicle, and the penalty, if any, as well as the arrears thereof in the event of its non payment within such period. If in respect of a vehicle there is an "Owner' and an "Operator', both, then they are jointly and severally liable.

54. Section 9(3) speaks of "Owner' and "Operator'. It does not speak of registered owner alone.

55. This is in consonance with Section 13 which requires the "Owner' or "Operator' of every motor vehicle to make a declaration in respect of such vehicle and makes them liable to pay tax, accordingly. The procedural provision corresponding to Section 13 is contained in Rule 7.

56. **Section 13** of the Act, 1997 reads as under:-

"13. Declaration by person keeping vehicle, for use.-*(1)The owner or operator of every motor vehicle shall make a declaration in respect of it in the prescribed form and shall deliver the declaration within the prescribed time to the Taxation Officer and shall pay to him the tax or the additional tax which he appears by such declaration to be liable to pay in respect of such vehicle, as required by or under this Act.*

(2) Where a motor vehicle is altered so as to render the owner or operator thereof liable to payment of enhanced tax or additional tax under Section 14, such owner or operator shall make, within the prescribed time, an additional declaration in the prescribed

form showing the nature of the alteration made and shall deliver it to the Taxation Officer and shall pay to him the difference in tax or additional tax payable under Section 14."

57. **Rule 7** of the Rules, 1998 as substituted by the notification dated 28.04.1999 reads as under:-

*"**7. Presentation of declaration.**- (1) Every person who either on the commencement of the Act or thereafter, on becoming possessed of a motor vehicle which becomes liable to tax shall within fifteen days of such vehicle becoming so liable, complete, sign and deliver to the Taxation Officer the declaration in Form A.*

(2) A separate declaration shall be made in respect of every motor vehicle."

58. Rule 7 as substituted vide Notification dated 28.04.1999 requires every person who either on the commencement of the Act or thereafter, on "becoming possessed' of a motor vehicle which becomes liable to tax, to complete, sign and deliver to the Taxation Officer the declaration in Form "A' within 15 days of such vehicle becoming so liable.

59. Form-A referred in Rule 7 of the Rules, 1998 is as under:-

"FORM A

[See Rule 7]
Declaration by Owner of a Motor Vehicle under Section 13
Part I
(To be completed by the owner of the motor vehicle)

I, ... residing at ..... hereby apply for issue of a token under Section 13 of the Uttar Pradesh Motor Vehicle Taxation Act in respect of the motor vehicle described below and for the registration of the said motor vehicle under the Motor Vehicles Act.

1. Full Name of owner.....son/daughter/wife/husband of.....

2. Permanent Address.....

3. Temporary address (if any) .....

4. Year of manufacture .....

5. Engine Number or Motor number in respect of Battery operated vehicle .....

6. Chassis Number .....

7. Category of Vehicle .....

(If motorcycle, then with gear or without gear)

8. Type of vehicle -

(a) Non-transport vehicle (Motorcycle/Motor car/Omni/Bus/Tractor-trailer/Institutional Bus/Private service vehicle/Construction equipment vehicle/Specially designed vehicle.

9. Unladen weight .....

10. Laden weight .....

11. Seating capacity (including driver) .....

12. Engine Capacity (c.c.) .....

13. Fuel used.....

14. Type and colour of body.....

15. For transport vehicle only -

(a) front axle

(b) rear axle
(c) any other axle
(d) tandem axle
(e) number, description and size of tyre on each axle.
16. The Motor vehicle is -
(a) new vehicle
(b) ex-army vehicle
(c) imported vehicle
(d) migrated from other State.
17. Validity of insurance .....(Enclose certificate, if any)
18. In case of exemption in tax, indicate it .....(Enclose certificate)
19. Validity of permit, if any.....(Enclose certificate)
I claim exemption from payment of the tax under rule..... and attach hereto proof of my claim.
I hereby declare that my name, address and other particulars described hereinabove are true.
Date.....
Signature of the applicant
(cut, which is not applicable)

Part II
(To be completed by the Taxation Officer)

Certified that the motor vehicle described above is exempted from tax under rule and that tax certificate has been issued on date.....
Or
Certificate that according to the above declaration the tax payable on the motor vehicle described therein in Rs.....
Certified also that a sum of Rs..... Has been paid as tax in respect of the said vehicle for the period ending..... and that, subject to the correctness of the above declaration, tax certificate has been issued to the applicant on date.....
Date.....
Signature of Taxation Officer
Region/Sub-region.....

Part III
(To be completed by the Registering Authority)
Certified also that motor vehicle herein described has been registered under the Uttar Pradesh Motor Vehicles Rules, 1998 and that a Registration Certificate valid until..... Has been issued and that the registration number of the vehicle has been entered in the Certificate of Tax. Registration number of vehicle.....
Date.....
Signature of Registering Authority
Region/sub-region....."

60. Thus, as per Section 13, the "Owner' or "Operator' of every motor vehicle is required to make a declaration in respect of it in Form A, deliver it within the prescribed time (as per Rule 7) to the Taxation Officer and pay to him Tax which he appears by such declaration to be liable to pay in respect of such vehicle as required by or under the Act, 1997.

61. Provisions of Section 13 and Rule 7 apply when any person comes into possession of a motor vehicle which becomes liable to tax, which will include a Financier in possession of such vehicle under a lease, hire-purchase or hypothecation agreement as also the borrower in such possession. This aspect shall be further dealt with hereinafter while considering Section 2(h) and 2(g) which define "Owner' and "Operator'.

62. The contents of Form-A are also indicative of the fact that it is imperative

on the part of such person to get the vehicle registered in his name and submit such declaration. Its contents are to be read in consonance with the substantive provision contained in Section 13 read with Rule 7 and not in conflict with it.

63. Thus, tax under the Act, 1997 is on the vehicle and has to be paid before its use.

64. The tax payable is thus determined in terms of Section 4 read with Section 9 based on the aforesaid declaration under Section 13 read with Rule 7 depending upon the category of the vehicle and the use to which it is to be subjected.

65. Reference may also be made in this regard to Rule 18(1) and (2) according to which the Taxation Officer on receiving information that a person is keeping or operating a motor vehicle, may require him to furnish a declaration in Form- "A' in respect thereof and may serve upon him at once a special notice in Form- "E'. Rule 18(1) and (2) read as under:-

*"**18. Notice to owners or operators of Motor Vehicles.**- (1) The Taxation Officer on receiving information that a person is keeping or operating a motor vehicle, may require him to complete, sign and deliver a declaration in Form "A' in respect thereof, and may serve upon him at once a special notice in Form "E'. Such notice may be sent to the person by registered post or may be served personally on him or if the service cannot be affected personally on him, on any adult male member of his family residing with him. If the notice cannot be served in the manner aforesaid, it may be served by affixing it to some conspicuous part of his place of residence or business, or in such other manner as the Taxation Officer may think fit.*

(2) Nothing in this rule shall be deemed to absolve any person who keeps or operates a motor vehicle from the obligation imposed upon him by sub-section (1) of Section 13 and Rule 7 in respect of making a declaration in the event of no notice having been served."

66. Form- E is as under:-

*"**Form - E***
[See Rule 18]
Notice to Owner of a Motor Vehicle

To,
.....
Address.....

Take notice that you are hereby required to fill up, sign and deliver to the undersigned the form of declaration enclosed in respect of every motor vehicle kept by you for use, and to pay the tax due on every such vehicle before the expiration of 15 days from the date of service of this notice.

Failure to deliver the declaration or to pay the constitutes an offence under Section 10 of the Uttar Pradesh Motor Vehicles Taxation Act.

Date.....20.....

Signature of Taxation Officer"

67. Reference may also be made in this regard to Rule 9(3) of the Rules, 1998 which in the context of method of payment of tax mentions that every person who is required to make a declaration under Rule 7 or additional declaration under Rule 8 shall pay the tax due on the motor vehicle at the time of presenting the declaration in respect thereof. **Rule 9(3)** is as under:-

*"**9. Method of payment of tax.**- (1).....*

(2) Every person who is required to make a declaration under Rule 7 or additional declaration under Rule 8 shall pay the tax due on the motor vehicle at the time of presenting the declaration in respect thereof."

68. As already stated the "person' required to make the declaration under Rule 7 or 8 has to be the one who has "become possessed' of the motor vehicle as is mentioned in Rule 7 which will include a possession by the Financier under a hire-purchase, lease or hypothecation agreement as also such possession by the borrower. This aspect shall be further dealt with hereinafter.

69. Another provision which is relevant for our purpose is **Section 20** which reads as under:-

*"**20. Recovery of tax.**--(1) Arrears of any tax or additional tax or penalty payable under this Act shall be recoverable as arrears of land revenue.*

(2) The tax, the additional tax and penalty payable under this Act shall be first charge on the motor vehicle including its accessories, in respect whereof it is due.

(3) The Taxation Officer shall raise a demand in the form as may be prescribed from the owner or operator, as the case may be, for the arrears of tax and additional tax and penalty of each year, which shall also include the arrears of tax, additional tax or penalty, if any, of preceding years."

70. The recovery envisaged under Section 20 therein is of arrears of tax, additional tax or penalty. These are recoverable as arrears of land revenue. The arrears of such tax as is mentioned in Section 20(3) include arrears for the preceding years. Thus, arrears can be of the same year and also of the preceding years.

71. The arrears of such tax are "first charge' on the motor vehicle under Sub-section 2 of Section 20, meaning thereby, in the event of non payment of arrears of tax, the motor vehicle in respect to which the tax is payable can be attached or detained and put to sale so as to recover the dues as arrears of land revenue, as, this is one of the modes prescribed for recovery of arrears of land revenue.

72. Even as per Section 22(1) of the Act, 1997 if it is found that a motor vehicle has been or is being used without payment of tax, additional tax or penalty it can be detained under Section 22(1) and if the tax etc. due in respect thereof is not paid within forty-eight hours of its seizure, the Transport Commissioner, apart from other action under the said Act, can cause the vehicle to be sold by public auction in the manner prescribed and sale proceeds of such vehicle shall be adjusted towards the tax etc. which is due as per Section 22(3). **Section 22** is as under:-

"*__22. Detention of a motor vehicle in case of non-payment of tax.__- (1) Where an officer authorized by the State Government in this behalf, has reason to believe that a motor vehicle has been or is being used by a person without payment of tax, additional tax or penalty if any, he may seize and detain the a motor vehicle and for the purpose take, or cause to be taken, such steps as may be considered, by him necessary, for the safe-custody of the motor vehicle and, in*

particular, require the driver of such vehicle to convey it to the nearest police station or any other place specified by him :

Provided that the officer seizing the vehicle, shall, within forty-eight hours of such seizure, send a report of such seizure to the concerned Taxation Officer.

(2) A motor vehicle seized or detained under this section shall be released by the Taxation Officer immediately on payment of the tax, additional tax, penalty or other amount due for the non-payment whereof the vehicle was so seized or detained.

(3) Where the tax, additional tax, penalty or other amount due for the non-payment whereof a motor vehicle has been seized or detained under this section, is not paid under sub-section (2) within the period of forty-five days from the date of seizure or detention of the Vehicle, the Transport Commissioner may, without prejudice to any other action that may be taken under this Act, cause the vehicle to be sold by public auction in the manner prescribed and the sale proceeds of such vehicle shall be adjusted towards the tax, additional tax, the penalty or the other amount due in respect of such vehicle and the expenses, if any, of such auction and the balance, if any, shall be refunded to the owner of the operator of the vehicle."

73. Section 20(3) of the Act, 1997 is also in consonance with the provisions contained in Section 9(3), as, it obligates the Taxation Officer to raise a demand for tax etc. in the form as may be prescribed from the "Owner' or "Operator', **as the case may be**. Now, the words **''as the case may be'** have been understood to mean "depending upon the circumstances' or "as the situation may be' or "whichever is appropriate in the events which happen'. Reference may be made in this regard to the decision of the Supreme Court in the case of ***Subramaniam Shanmugham Vs. M.L. Rajendran and Ors.*** reported in ***(1987) 4 SCC 215.***

74. Thus, the language used in Section 20(3) is also indicative of the fact that if in a given situation there is an "Owner' as also an "Operator' then the demand could be raised from either of them as their liability under Sub-section 3 of Section 9 is joint and several, however, in a given case, such as that of a "motor vehicle other than a transport vehicle', where there is no operator, the Taxation officer will raise a demand from the owner alone. This is what the words "as the case may be' mean and they convey the same meaning as is the consequence of use of the words "if any' in Sub-section 3 of Section 9. The words **''as the case may be'** are indicative of a scenario where there is an owner as also an operator or only an owner or an operator, and action to be taken under Section 20(3) accordingly. This is how we understand the provision contained in Section 20(3).

(Emphasis supplied by us)

75. On similar lines the corresponding Rule to Section 20(3) is **Rule 18(3)** wherein also the Taxation Officer is required to send a notice under Sub-section (3) of Section 20 in Form E-1 to the owner or operator, **as the case may be**, of the vehicle.

76. Rule 18(3) records as under:-

"18. Notice to owners or operators of Motor Vehicles.-

(1) .....

(2) .....

(3) The Taxation Officer, for arrears of tax or additional tax or penalty,

shall send a notice under sub-section (3) of Section 20 in Form -1 to the owner or operator, as the case may be, of the vehicle. The notice shall be served in the manner prescribed under sub-rule (1)."

77. Form E- 1 is as under:-

"FORM E-1
Notice in case of dues on Motor Vehicles
[See Rule 18(2)]

1. Name of the Registered Owner.....

2. Full Address.....

The due tax/additional tax of vehicle no.....has not been paid after..... an amount of Rs.....as tax/additional tax is due under Section 4/Section 6 of the Uttar Pradesh Motor Vehicles Taxation Act, 1997 and an amount of Rs.....as penalty is due under sub-section (3) of Section 9 of the aforesaid Act read with Rule 24 of the Uttar Pradesh Motor Vehicles Taxation Rules, 1998.

Therefore, a notice is, hereby, sent to you for payment of due amount/production of payment certificate (if already paid) within 15 days from the date of issue of this notice. If the due amount is not paid/payment certificate (if any) is not produced within the above prescribed time, the due amount shall be recovered as arrears of land revenue under the provisions of Section 20 of the aforesaid Act.

Date.....
Signature of Taxation Officer
Region/Sub-region.....

Copy to Financer (if any) for information and necessary action.

1. Name of the Financer
2. Address.....
Date.....
Signature of Taxation Officer
Region/Sub-region....."

78. Although, Section 20(3) refers to owner or operator, as the case may be, the notice issued under corresponding Rule 18(3) in Form-E-1 is addressed to the "registered owner' obviously as the Registering Authority's/ Taxation Officer's records would contain his name.

79. Thus, even under Rule 18(3) there is a reference to liability of "Owner' or "Operator', as the case may be, as is referred in Section 20(3), which is tune with the use of the words "Owner or Operator', if any, in Section 9(3).

80. This view is further fortified by a reading of **Section 12** of the Act, 1997. Sub-section 1 of Section 12 speaks of "any person' in the context of non use of vehicle and refund of tax relating to transport vehicles but in Sub-section 2 which applies to motor vehicles, including a transport vehicle, the words **''operator or, as the case may be, owner.....'** have been used which leave no doubt that the provision will apply **''as the case may be'**, which means depending upon the circumstances, meaning thereby, depending whether in a given case there is an operator (as in the case of transport vehicle) or only an owner (as in the case of other vehicles) or both (Transport vehicles). While referring to a "motor vehicle other than a transport vehicle' in Sub-section (5) only the word **''owner'** has been used obviously as the Act, 1997 does not envisage an "operator' in respect of such vehicles. Again in Sub-section 7 the words **''an operator of a transport**

vehicles' are used. In Sub-section 8, with reference to motor vehicle, which includes a transport vehicle, the words **''operator, or, as the case may be, the owner.....**' have been used and the rationale behind it has already been explained earlier in the context of discussing Section 9(3) and 20(3). Corresponding Rule 22 of the Rules, 1998 however refers to the term "owner' only. The rule however can not be read in conflict with the substantive provision contained in Section 12 and has to be read, understood and applied in consonance with it and not otherwise.

81. Under Section 9(3) it is the "Owner' and the "Operator', if any, of the motor vehicle who shall be jointly and severally liable. Likewise under Section 20(3) it is the "Owner' or "Operator', as the case may be, who can be proceeded for recovery of arrears of tax etc. Section 13 also refers to liability of "Owner' or "Operator' in this regard. Rule 7 and Rule 9(3) have also to be understood and applied accordingly. It is therefore imperative to consider the terms "owner' and "operator' as defined in the Act, 1997.

82. The term **''owner'** has been defined in **Section 2(h)** of the Act, 1997 as under:-

"(h) "owner" in respect of motor vehicle means the person whose name is entered in the Certificate of Registration issued in respect of such vehicle, and where such vehicle is the subject of an agreement of hire purchase or lease or hypothecation, the person in possession of the vehicle under that agreement and where any such person is a minor, the guardian of such minor;"

83. The definition of "Owner' applies to "motor vehicles'. As the term "motor vehicle' occurring in Section 2(h) of the Act, 1997 in the context of the definition of "Owner' has not been defined in the Act, 1997 it takes within its sweep all motor vehicles irrespective of their sub-categories in view of Section 2(28) of the Act, 1988 read with Section 2(o) of the Act, 1997. It includes transport vehicles.

84. In the definition of "Owner' in Section 2(30) of the Act, 1988, which has been quoted earlier, the words "and in relation to a motor vehicle' have been used, whereas, in Section 2(h) of the Act, 1997 the words "where such vehicle is' have been used in the context of a vehicle being under a hire-purchase, lease or hypothecation agreement. In Section 2(30) the opening line starts with the words "unless the context otherwise requires' whereas, it is not so in Section 2(h). Except for these differences, which are not relevant in the context of the questions referred to us, the two definitions are similar.

85. The definition of "owner' contained in Section 2(30) of the Act, 1988 came up for consideration before the Supreme Court in the case of ***Purnya Kala Devi Vs. State of Assam and Anr.*** report in ***(2014) 14 SCC 142*** in the context of liability in an accident claim and the Supreme Court explained the provision and the intent of the legislature in this regard in Paragraph 16 as under:-

"The High Court failed to appreciate that at the relevant time the offending vehicle was under the requisition of Respondent No. 1 State of Assam under the provisions of the Assam Act. Therefore, Respondent No. 1 was squarely covered under the definition of "owner" as contained in Section 2(30) of

the 1988 Act. The High Court failed to appreciate the underlying legislative intention in including in the definition of "owner" a person in possession of a vehicle either under an agreement of lease or agreement of hypothecation or under a hire-purchase agreement to the effect that a person in control and possession of the vehicle should be construed as the "owner" and not alone the registered owner. The High Court further failed to appreciate the legislative intention that the registered owner of the vehicle should not be held liable if the vehicle was not in his possession and control."

86. Thus, the Supreme Court while considering the provision of Section 2(30) took note of the underlying legislative intention in including in the definition of "Owner' a person in possession of a vehicle under the agreements referred therein to the effect that a person in control and possession of the vehicle should be construed as the "Owner' and not alone the registered owner. Thus, both were to be the owners but in the facts of the said case which related to a motor accident claim the person in possession and control of the vehicle was held liable.

87. As per Section 2(h) "Owner' in respect of a motor vehicle is its registered owner and if such vehicle is the subject of an agreement of hire-purchase or lease or hypothecation, the person in possession thereof under that agreement is also its owner. Thus, the registered owner alone is not the owner. It depends upon the factual position, whether the vehicle is the subject of hire-purchase, lease or hypothecation agreement or not ? If it is, then the person in possession of such vehicle under that agreement would be the owner, irrespective of the fact whether his name is entered in the Certificate of Registration or not. If the vehicle is not the subject of such agreement it is the person whose name is entered in the Certificate of Registration who is the owner. The analogy is the same as in ***Purnya Kala Devi's case*** (supra), though, the context is different.

88. The intention of the Legislature is clear that the registered owner should not be held liable to tax etc. if the vehicle is not in his possession and control instead it is in the possession of someone else under the agreements referred hereinabove who would become its owner based on such possession, except of course if there are arrears of tax etc. for the period during which he was in possession and control.

89. The provision contained in Section 2(h) is in two parts. The first part refers to the registered owner, whereas, the second part refers to the person in possession under the agreements referred therein. There is no reference to "registered owner' in the second part of Section 2(h). Thus, the person in possession under the second part even if he is not the registered owner, yet, he falls within the definition of "Owner' as contained in Section 2(h). It does not require the person in possession of the vehicle under such agreements to be its registered owner also so as to qualify as "Owner'. Further, possession under such agreement under Section 2(h) refers to actual possession of the vehicle whether it be of the borrower or Financier. This is how a similar definition contained in Section 2(30) of the Act, 1988 has been understood by the Supreme Court. Rule 7 of the Rules, 1998, as discussed earlier, needs to be seen in this regard. A contrary understanding of Section 2(h) by a Division Bench of this Court in ***Amar***

Nath Chaubey's case (supra) is, thus, incorrect.

90. Thus, the first part of section 2(h) applies to a scenario where there is no such agreement nor any possession under it and the second part applies where the vehicle is under such agreement and its possession is under such agreements, whether of the borrower or Financier.

91. Possession under such agreements as is referred in the second part of Section 2(h) does not mean only the possession of the "Financier' consequent to a breach of agreement by the borrower based on the existence of a clause permitting such possession. It also covers possession of the vehicle by the borrower (registered owner) himself, if it is also under such agreement, which is possible, as, normally, such agreements are entered prior to purchase (except when they are entered subsequently as per Section 51(2) of the Act, 1988) and a reference to such agreement is made in the Sale Certificate in Form-21 referred in Rule 47(1)(a). Reference may be made in this regard to Form-21 as it indicates that it is to be issued by the Manufacturer/Dealer who delivers the vehicle to the purchaser with an endorsement thereon that the vehicle is held under an agreement of hire-purchase/ lease/hypothecation, therefore, the possession referred in the second part of Section 2(h) includes the possession of the borrower in the normal course under such agreement (who may also be the registered owner) and also the possession taken by the Financier consequent to breach of such agreements, as the case may be.

92. At this stage, it is necessary to clarify that in the definition of "Owner' whether contained in Section 2(30) of the Act, 1988 or Section 2(h) of the Act, 1997, the reference in the first part of definition to the person whose name is entered in the Certificate of Registration or a person in whose name the motor vehicle has been registered refers to the registered owner and not the entry made in such Certificate with regard to the Financier as is mentioned in Section 41 of the Act, 1988 which has already been discussed earlier. Any other understanding of the said words would be incongruous to the object and scheme of the Act, the provision contained therein and would make it unworkable.

93. **''Operator'** is defined in **Section 2(g)** of the Act, 1997 as under:-

"(g) "operator" in respect of a transport vehicle means a person whose name is entered in the permit or in an authorisation certificate issued under the Uttar Pradesh Motor Vehicles (Special Provisions) Act, 1976, and where there is no such permit or authorisation certificate, the person whose name is entered in the Certificate of Registration in respect of such vehicle, and where the transport vehicle is the subject of a hire purchase agreement, the person in possession of the vehicle under that agreement and where any such person is a minor, the guardian of such minor;"

94. The definition of operator applies only to transport vehicles.

95. The term "transport vehicle' is defined in Section 2(n) of the Act, 1997 to mean a goods carriage or a public service vehicle. Goods carriage is further defined in Section 2(d) of the said Act. Public service vehicle is not defined in the Act, 1997, therefore, in view of Section 2(0) of

the said Act the meaning assigned to it under Section 2(35) is to be applied to the Act, 1997.

96. On a reading of Section 2(h), what comes out is that "Operator', in respect of a transport vehicle, is the person whose name is entered in the Permit or Authorization Certificate. If not, then the person whose name is entered in the Certificate of Registration in respect of such vehicle and if such vehicle is the subject of a hire-purchase agreement then the person in possession of it under that agreement is the owner. This is based on the same analogy as referred in the context of Section 2(h). Thus, if the vehicle is under a hire-purchase agreement the person in possession of the vehicle under such agreement, who could be the borrower (registered owner) or the Financier, is the owner, otherwise it is the permit holder or authorization certificate holder and in its absence the registered owner who is the owner.

97. Although, under Section 66 of the Act, 1988 a permit is mandatory for using the vehicle as a transport vehicle, Section 2(g) covers a situation where there is no such permit, such as, in the case of illegal plying of a vehicle as a transport vehicle. Moreover, the registered owner and the permit holder may be two different persons, as such, this possibility has also been taken into account.

98. Noticeably, the third part of Section 2(g) is confined to a transport vehicle which is the subject of a hire-purchase agreement and does not extend to a transport vehicle which may be the subject of other two types of agreements referred in the definition of "Owner' in Section 2(h) i.e. a lease or hypothecation.

99. The definition of operator in Section 2(4) of the Bombay Motor Vehicles (Taxation of Passengers) Act, 1958 which was considered by the Supreme Court in the case of ***State of Maharashtra and Ors. Vs. Sundaram Finance and Ors.*** reported in ***(1999) 9 SCC 1*** is different from the definition of "Operator' contained in Section 2(g) of the Act, 1997, therefore, reliance placed on the said decision by Shri Amol Kumar learned counsel for the petitioner, is misplaced.

Joint and Several liability of ''Owner' and Operator under Section 9(3) of the Act, 1997.

100. Having discussed the term "Owner' and "Operator' as appearing in the Act, 1997, their meaning and scope, we proceed to discuss their joint and several liability as prescribed in Section 9(3).

101. As per Section 9(3) the liability to pay tax, additional tax and penalty under the Act, 1997 is upon the owner and the operator, **if any**, jointly and severally.

102. Joint and several liability referred in Section 9(3) applies when there is an "Owner' and "Operator' both. It is only when both of them exist that the concept has any application, not otherwise. This is borne out from the use of the words **''if any'** after the words "Owner' and "Operator' in Section 9(3), which means, **''if there is any such operator'**, as, the Legislature was conscious of the fact that the Act, 1997 did not envisage an "Operator' in respect of "motor vehicles other than transport vehicles', though it did so in respect of a "Transport Vehicle'. Hence, the use of the words "if any' in Section 9(3).

103. The Act, 1997 does not envisage an "Operator' for the purposes of "motor vehicles other than transport vehicles', as such, there is no question of joint and several liability in respect of such vehicles under Section 9(3) and it is the "Owner' alone who would be liable.

104. This principle is thus restricted in its application to "transport vehicles', as, the Act, 1997 envisages an "Owner' and "Operator' both, only in respect thereof as per Section 2(h) and Section 2(g).

105. Principle of "joint and several liability' as applicable in the field of contract, Tort, taxation etc. has been applied statutorily through Section 9(3) of the Act, 1997. The rationale behind such a principle is to facilitate easy realization and recovery of tax. What if, one of them (owner or operator) is an insolvent? Hence, such a provision.

106. Reference may be made in this regard to ***Jowitt's Dictionary of English Law*** wherein the term "Joint and Several' has been explained as under:-

*"**Joint and several.** An obligation entered into by two or more persons is joint and several when each is liable severally and all are liable jointly. A liability may be imposed, whether by statute, contract or otherwise, on two or more persons jointly and severally; in which case, again, each is liable severally and all are liable jointly. For judicial and statutory constructions and definitions in different contexts see Stroud's Judicial Dictionary."*

107. Same term has been explained in ***Black Law Dictionary*** as under:-

*"**joint and several**, (Of liability, responsibility, etc.) apportionable at an adversary's discretion either among two or more parties or to only one or a few select members of the group; together and in separation."*

108. The term Joint and Several liability has been explained in ***Advanced Law Lexicon*** as under:-

*"**Joint and several liability.** A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately or all of them together at his option"*

109. When the liability is joint and several it is open to the claimant to claim relief against both or either one of them, may be, the softer target, as regards the entire claim and not merely his share, leaving the two who are jointly liable to work out there relative liability or responsibility. This is what is meant by liability being joint and several. This legal proposition is borne out from a reading of the decision of the Supreme Court in the case of ***Khenyei*** (supra) wherein the phrase "jointly and severally liable', its purport and import came up for consideration. The decision of the Madras High Court in the case of ***J. Jeyasingh*** (supra) is also relevant in this regard.

110. Now, in a scenario involving "transport vehicles', in respect to which, the Act, 1997 envisages two persons i.e. the owner and operator, liability to arrears of tax, additional tax and penalty being joint and several under Section 9(3) of the Act, 1997 as already discussed, considering the object and rationale behind such principle of joint and several liability and its incorporation by the Legislature in Section 9(3) of the Act, 1997, which is a taxing statute, either can be held liable for

the entire liability irrespective of his/their share of the liability, leaving the parties to sort out and work out their relative and respective liabilities inter se, as per law.

111. As already stated, as per Section 20(3) read with Rule 18(3), the Taxation Officer is required to raise a demand in prescribed Form from the "Owner' or "Operator', as the case may be. No doubt the prescribed Form E-I is addressed to the registered owner but this, as stated earlier, is only on account of the fact that it is the registered owner alone who would be recorded in the records of the Registering Authority and Financier would only be mentioned in the "Note' and there would be no mention of possession having been taken by the Financier unless intimation in this regard is given either by the registered owner or the Financier himself or otherwise but as and when such information is given by the concerned person, may be after issuance of notice to the registered owner or is otherwise received, the Taxation Officer would come to know about the aforesaid facts and would be at liberty to proceed against either the registered owner or the one in possession of the transport vehicle under an agreement of hire-purchase/lease/ hypothecation, as per his choice, especially as, the contents of Form E-1 will not supersede or override the substantive provision contained in Section 9(3) and 20(3) nor the provision of Rule 18(3).

112. As regards contention of Shri Amitabh Kumar Rai, learned Additional Chief Standing Counsel for the State in this regard that the Taxation Officer can determine their proportionate liability, well, if both the parties are available and there is material which enables him to do so, he can do it, especially where indisputably the liability is of arrears of tax and/or penalty for the period prior to the date of possession of the vehicle by the Financier, when the vehicle was in possession of the registered owner, as, there is no bar in the Act, 1997 in this regard. However, in the event he is unable to do so, he has the option to proceed against either of them i.e. the owner or operator where both exit, as in the case of a transport vehicle, for the entire liability as per his choice, leaving it open to them to settle their inter se claim separately as per law.

113. Thus, the concept of joint and several liability for the reasons already mentioned, will not have any application in respect of "motor vehicle other than transport vehicle'. It will apply in case of "transport vehicle', as aforesaid.

Current liability to tax, additional tax and penalty from the date of possession by Financier

114. Now, the Question No. 1, which has been referred to us, is essentially as to whether the Financier is liable to tax from the date of taking possession of the vehicle under the agreements referred earlier, even if, its name is not entered in the Certificate of Registration, or not ? If not, who is liable in this regard.

115. As regards liability to pay tax etc. from the date of taking possession, in respect of a **''motor vehicle other than a transport vehicle'**, the Financier becomes its owner under Section 2(h) when he takes possession of the vehicle under an agreement of hire-purchase, lease or hypothecation, irrespective of the fact whether he is the registered owner or not

as already discussed, and as thereafter he alone can use it, as such, he is liable to pay tax, additional tax and penalty which fall due for payment after such possession i.e. current tax and additional tax including arrears arising in respect thereof and penalty if any from the date of such possession.

116. He is in possession of the vehicle on which there is a statutorily ordained "first charge' for the tax etc. due under the Act in view of Section 20(2) of the Act. 1997, therefore, he is liable from the date of possession.

117. Moreover, as already discussed, even as per Rule 7 of the Rules, 1998 once the Financier **''becomes possessed'** of the vehicle he is required to submit a declaration in Form- A and as per Rule 9(3) of the Rules, 1998 and one who presents the declaration referred in Rule 7 has to pay the tax. This declaration is obviously in the context of current liability to tax from the date of possession and arrears which arise therefrom.

118. Language of Section 9(3) determines current liability to pay tax, additional tax etc. and arrears thereof, both.

119. In respect of a **''transport vehicle'** also, the Financier on taking possession of such a vehicle under a hire-purchase, lease or hypothecation agreement, becomes its "Owner', and also its "Operator' if the agreement is of hire-purchase. Even if it is not a hire-purchase agreement, and the Financier does not becomes its operator from the date of such possession, it is still its owner under Section 2(h) who is in possession under the other two types of agreement, and, thus, would be liable along with the permit holder/authorization certificate holder or the registered owner, as the case may be, who, in this case, would be the "Operator', jointly and severally, in terms of Section 9(3), as discussed earlier. Their liability would be in keeping with the concept of joint and several liability as elucidated in the earlier part of this judgment.

120. The fact that the Financier's name is not yet entered in the Certificate of Registration would be of no consonance as it is not a prerequisite for being the "Owner' or "Operator' in such a scenario under Section 2(h) and 2(g). In fact "Ownership' and "Operatership' based on possession of a vehicle which is subject to the aforesaid agreements and that with reference to entry in the name of Certificate of Registration have been defined separately and distinctly in Section 2(g) and Section 2(h).

121. The Financier is thus liable to pay tax etc. as aforesaid.

122. In this context, the Financier can very well say that the Certificate of Registration or permit, not being in his possession and the same being in possession of the borrower who has not delivered the same to the Financier, inspite of possession of the vehicle being taken by the latter, it is therefore not liable to pay tax even from the date it takes possession of the vehicle unless it is registered in its name and till then liability will continue with the registered owner, as was in fact argued by Shri Amol Kumar, especially when, it did not intend to use the vehicle and intended to get the benefit of Section 2 of Section 12 of the Act, 1997. However this argument is fallacious for the reason which follows.

123. Apart from the reasons already given, this argument would not be available to the Financier for the simple reason that from the date of such possession of the vehicle it becomes the owner under Section 2(h) and if the vehicle is under a hire-purchase agreement its "Operator' also under Section 2(g), may be, along with the registered owner or permit holder or holder of authorization certificate, as the case may be. The ownership or operatorship based on possession as is referred in Section 2(h) and Section 2(g) is not dependent on the name of such person in possession being entered in the Certificate of Registration as its registered owner etc., as already discussed, and as is also evident from the provisions themselves.

124. Moreover, if the Certificate of Registration or token is not given by the registered owner, such Financier, under Sub-section 5 of Section 51 of the Act, 1988 read with Rule 61 of the Rules, 1989, can satisfy the Registering Authority that he has taken possession of the vehicle from the registered owner owing to his default under the said agreement and that the registered owner refuses to deliver the Certificate of Registration or has absconded, and such authority, may, after giving the registered owner an opportunity to make such representation as he may wish to make and notwithstanding that the Certificate of Registration is not produced before it, cancel the Certificate and issue a fresh Certificate of Registration in the name of the person with whom the registered owner had entered into such agreement, but, if the Financier does not take recourse to Section 51(5) then he can not take advantage of his lapse, especially in view of Section 2(g), 2(h), 9(3), 20(3) and Section 13 of the Act, 1997 read with Rule 7, 9(3) and 18 of the Rules, 1998 as discussed hereinabove. As stated earlier Form-A referred in Section 13 read with Rule 7 is also indicative of the requirement of the Financier, in such a situation, to get its name entered in the Certificate of Registration in respect of the vehicle in question and submit a declaration in Form-A. This is also the requirement under the Act, 1988.

125. Section 51(5), it appears, applies, even in cases where, on possession being taken by the Financier, as aforesaid, Certificate of Registration is handed over by the registered owner to it, as is evident from the contents of Form-36, as already quoted, which is referred in Rule 61(2) of the Rules, 1989 read with Section 51(5) of the Act, 1988.

Liability to pay arrears of tax, additional tax and penalty from the date of possession by the Financier

126. The words "from the date of taking possession of the said vehicle' occurring in Question No. 1 can not only be understood as a reference to current liability to pay tax etc. arising from the date of such possession which has already been dealt with by us, but, it can also be understood as a reference to liability to pay tax etc. as existing on the date of taking possession i.e. arrears of tax etc., which may become payable by the Financier once it takes possession of the vehicle. As for example, if there are arrears of tax of Rs. 1 lac in respect of a motor vehicle, as also penalty thereon, which had not been paid by the registered owner (borrower) and the Financier takes possession of such vehicle on account of breach of agreement by the borrower (registered owner), then, whether in this

scenario the Financier would be liable for these arrears in respect of such vehicle under Section 9(3) and 20(3) ?

127. Section 9(3) and 20 of the Act, 1997 speak of liability to pay tax etc. which has not been paid in time i.e. arrears thereof and recovery of such arrears of tax etc., not only of the current year, but, also of preceding years. The liability is on the "Owner' or "Operator', if any, jointly and severally, under Section 9(3) and "as the case may be' under Section 20(3). These phrases have already been discussed by us earlier.

128. As already stated, in the case of "a motor vehicle other than a transport vehicle, as, one time tax is required to be paid, that too, at the time of registration of the vehicle, without which, it would not be registered nor can it be used, there would normally not be any dispute relating to liability to pay such arrears nor regarding their recovery.

129. In the case of a "transport vehicle', both the "Owner' and "Operator' would be jointly and severally liable under Section 9(3) and 20(3) as per the application of this concept, which has already been discussed in the earlier part of the judgment.

130. In case of arrears of tax etc. pertaining to the period prior to taking of possession of vehicle by Financier i.e. the period during which the registered owner/ permit holder etc. was in possession and control of it, as the latter was the owner or operator, as the case may be, during such period, and must have furnished a declaration in this regard in Form-A under Section 13 read with Rule 7, he was liable to pay such tax etc., therefore, recovery of such arrears should primarily and firstly be made from him. The Taxation Officer should proceed to recover such arrears from such registered owner or permit holder or authorization certificate holder, who was primarily liable in this regard. Only when it is not possible to recover it from such a person, may be on account of the fact that he is absconding or is untraceable or his whereabouts are not known or he has become insolvent or there are similar other reasons jeopardizing the interest of revenue, Taxation Officer can proceed to recover such arrears from the Financier who has taken possession of the vehicle, in respect of which such arrears are due.

131. It could be asked why should the Financier be made liable for recovery of arrears of tax and penalty for a period prior to such possession merely because he had taken possession of the vehicle on account of breach of agreement, that too, subsequently ? Would it not be unfair and equitable ? Would it not put a premium on default by the registered owner (borrower), by making the Financier unfairly liable ?

132. This is where Section 20(2) becomes relevant. According to this provision, such tax, additional tax and penalty payable under Act, 1997, which has not been paid i.e. the arrears thereof, as is mentioned in Section 20(1), shall be the **''first charge'** on the motor vehicle including its accessory under Section 20(2). Thus, the "first charge' regarding arrears of tax etc. being on such motor vehicle, possession of which has been taken by the Financier, his liability in this regard is self evident for this very reason. If such arrears can not be recovered from the registered owner as aforesaid then recovery of arrears of tax etc. as arrears of

land revenue under Section 20 may have to be effected by attachment and sale of the motor vehicle which is in possession of the Financier. In such a scenario the Taxation Officer can proceed against the Financier to recover the arrears accordingly. The Financier may in order to avoid attachment and sale of the vehicle pay the arrears and, if possible, recover the amount from the borrower by adopting such legal remedies as may be prescribed and permissible, but, it can not escape the rigour of Section 20(2) read with Section 22 of the Act, 1997.

133. As stated earlier, under Section 22 if such a vehicle regarding which tax etc. have not been paid has been or is being used it can be detained and if the tax due is not paid within forty-eight hours it can be put to public auction and sale proceeds derived from it can be used to satisfy the dues.

134. Thus, process of recovery can be adopted for arrears of tax due in respect of such vehicle, including arrears for the period prior to taking of possession of the transport vehicle by the Financier in this manner by detaining and selling the vehicle in possession of the Financier, unless the Financier chooses to avoid such action by paying the arrears. In such an eventuality he can, if possible, recover the payment from the registered owner, as per law. This is the scheme of the Act, 1997, which is a taxing statute.

135. In view of the above discussion, the decisions relied upon by Shri Amol Kumar, learned counsel for the petitioner, including the decisions in the case of ***Naveen Kumar*** (supra) and ***HDFC Bank Ltd.*** (supra), do not lead us to any other view of the matter, especially in view of the scheme of the Act, 1997 and Rules, 1998 and as the liability which has been considered herein is tax liability.

Liability under Section 9(2)

136. Although we are of the view that a transaction such as the one under the agreements referred above attracts the definition of owner and operator under section 2(g) and 2(h) and not the concept of "deemed ownership' under Section 9(2) and consequently it attracts the liability under section 9(3)and 20(3) and not section 9(2) as it is not a voluntary act of transfer of ownership by the registered owner, assuming that it is covered under the term "transfer' under section 9(2), the financier, as transferee/ deemed owner, would still be liable to pay tax etc due on or before the date of such transfer i.e. arrears of tax as already discussed. The rationale behind the provision has already been mentioned. Here again this would be without prejudice to liability of the transferor in this regard. Thus the taxation officer can proceed against both of them on almost the same analogy as discussed in the context of section 9(3).

137. The distinction if any between Section 9(2) and 9(3) in this regard is on account of existence of a deeming clause in Section 9(2) and the transfer referred therein being a voluntary act as already discussed earlier, whereas, taking of possession based on breach of agreement is more of a compulsion to avoid loss and secure the loan and there is no deeming clause applicable in this regard nor does the concept of joint and several liability come into play when the Financier was neither owner nor operator during the period of such arrears.

138. Whether it be the liability under Section 9(2) or 9(3), the fact that the name

of the transferee or Financier, as the case may, has not yet been entered in the Certificate of Registration, after such transfer or possession of the vehicle, is, for reasons already given, irrelevant so far as tax due on the vehicle is concerned.

139. As already stated, as regards "motor vehicles other than a transport vehicle' liability regarding arrears in respect thereof would be practically Nil as one time tax is paid. If a dispute regarding liability to pay arrears of tax etc. in respect of motor vehicles other than transport vehicles does arise it will have to be determined keeping in mind the enunciation of the law as aforesaid. The Financier on taking possession of the vehicle will be liable accordingly.

140. It is not out of place at this stage to mention that when the registered owner (borrower) is in arrears of tax etc. then intimation of such arrears and the liability of the registered owner to pay such arrears of tax is sent not only to the registered owner but is also sent to the Financier under Rule 18(3) read with Form E-I of the Act, 1997, as quoted earlier, on his address, meaning thereby, the Financier can avoid such further liability by taking suitable action either for possession of the vehicle treating it to be a breach of agreement, if there is any such condition in the agreement or, they can avoid such liability by ensuring such conditions being incorporated in the agreements with the borrower.

141. Question No. 1 is answered accordingly.

Discussion on Question No. 2.

142. In view of the discussion made by us in the context of Question No. 1 and after having gone through the judgments referred in Question No. 2 we are of the view that the decision of this Court in the case of ***Manish Mukhriya*** (supra) and another decision in both the cases of ***Lakhimpur Finvest Company Ltd.*** of 2005 and 2011 some of the provisions such as Section 9(2), 20(2), 51 and the concept of joint and several liability under Section 9(3), which we have considered, have not been considered, therefore, in so far as the said decisions are not in consonance with our judgment and are in conflict with it, they do not lay down the law correctly.

143. As regards decision of this Court in the case of ***Daya Shanker Yadav*** (supra), it does not decide any of the issues referred to us. It only considers the requirement of issuance of notice prior to recovery of tax, therefore, the said decision is not relevant to the questions which we have considered.

144. As regards decision in the case of ***Shri Prakash*** (supra) the petition in the said case was dismissed only on the failure of the petitioner to show to the Court the relevant provision under which a registered owner ceased to be liable to tax because possession of the vehicle had been taken over by the Financier. The decision does not consider relevant provisions of the Act and the Rules nor the law on the subject, as has been done by us, therefore, it does not contain any "ratio decidendi' which may constitute a binding precedent on the subject nor is it relevant in the context of the questions under consideration.

145. The Division Bench in ***Amar Nath Chaubey's case*** (supra) incorrectly introduced the concept *de jure* and *de facto* possession to the second part of the

definition of owner in Section 2(h) of the Act, 1997 requiring the person in possession to be its registered owner also. The Division Bench also erred in applying Section 9(2) the way it did ignoring the stipulation in the provision which makes the transferee i.e. the deemed owner, liable to arrears of tax for the period prior to transfer of the vehicle, without prejudice to the liability of the transferor i.e. the registered owner, as such, it is for the Taxation Officer to proceed against either of the two as per his choice keeping in mind the principle of fairness and reasonableness as also the interest of the revenue which the provision seeks to protect. The Division Bench in ***Amar Nath Chaubey's case*** (supra) did not consider Section 9(3) at all. The provisions of Section 50 and 51 are a consequence of an otherwise valid transfer of a movable property in law and they by themselves do not constitute a prior requirement for a valid transfer as already held by us hereinabove. There is nothing in Section 51 or any other provision of the Act, 1988 to persuade us to hold that a lease, hire-purchase or hypothecation agreement is determined or terminated only when recourse is taken to Section 51. In fact, Section 51(3) is to the contrary and it applies where both the parties to the agreement have determined the agreement and they are required to apply under the said provision with proof of termination of such agreement which negates the proposition advanced by the Division Bench. The liability of a Financier who takes possession of a vehicle to pay tax etc. including arrears thereof is unrelated to the factum of its name being entered in the Certificate of Registration, as already opined by us.

146. The Division Bench in ***Amar Nath Chaubey's case*** (supra) has also observed that in the event a person in physical possession of the vehicle is held liable to pay tax it may cause difficulties for the Transport Authorities to find out the person in possession of the vehicle in absence of any information or proper application regarding the use or transfer of the vehicle so as to saddle him with the liability, therefore, completion of formalities regarding transfer or change of possession are necessary before shifting the liability of payment of tax from the registered owner to any other person. No doubt, the view expressed by the Division Bench has practical relevance but in a taxing statute we are required to consider the liability to pay tax, additional tax, penalty etc. in the light of the provisions contained therein construing the statutory provisions strictly. While it is true that in the event a Financier takes possession of the vehicle but does not get a fresh Certificate of Registration issued in his name in terms of Section 51(5), then, the Taxation Officer would not be able to know of the said transaction so as to impose and enforce liability to tax upon the Financier but then in such an eventuality he would make the registered owner liable as per the Act, 1997 and the Rules, 1998 as already discussed in the context of question no. 1 whereupon, the registered owner would obviously come forward and inform him about the transaction, unless he disputes it. In the latter case he would be liable and in the former, the Taxation Officer, on getting knowledge of the possession by the Financier, will issue notice to him under Rule 18 of the Rules, 1998 for the tax payable from the date of such possession as the details of the Financier are also mentioned in the Certificate of Registration and registration records maintained by the Registering Authority. Moreover, intimation of arrears of tax is also sent to the Financier under Rule 18(3)

read with Form-E-1 of the Act, 1997 on his address.

147. The fact that the name of the Financier, after taking possession of such vehicle, is not entered in the Certificate of Registration as the registered owner, is of no consequence in this regard, as, the provisions contained in Sub-section (3) of Section 9, Sub-section (3) of Section 20 and Section 2(g) and 2(h) do not contemplate any such requirement in the case of a vehicle, covered under the relevant agreements, already discussed hereinabove, which is in possession of the Financier under such agreement. All that is necessary is the possession of the motor vehicle. If it has been taken by the Financier under such agreement, he would be liable, of course, along with the operator, if any, jointly and severally.

148. Moreover, for the reasons already given, neither the provisions of Section 50 and 51 nor the corresponding Rules contained in Rule 61 regarding entry of name in the Certificate of Registration or issuance of fresh certificate to Financier have any relevance whatsoever so far as liability in such a scenario to pay tax, additional tax or penalty under Sub-Section 3 of Section 9 read with Section 20 of the Act, 1997 is concerned. If the action under Section 51(3) and/or (3) read with Rule 61(2) is held to be a necessary prerequisite for liability to tax etc. then it would render part of definition of "Operator' and "Owner' regarding possession meaningless and superfluous in this context, as, such eventuality would in any case be covered by the first part of Section 2(h) and second part of Section 2(g). The words "Owner' and "Operator' occurring in Section 9 and 20 have to be read in consonance with the definition clause contained in Section 2(g) and (h) as already discussed.

149. The word used in Section 9(3) and 20 of the Act, 1997 is not "registered owner' but "Owner', therefore, for purposes of liability to tax etc., the Act, 1997, in view of Section 2(h) therein, envisages the onus not only on the "registered owner' but also on the person in possession under the agreements referred earlier. The same analogy/principle applies to the liability of "Operator' under Section 2(g). In the context of the questions referred to us the fact that the name of the Financier is not entered in the Certificate of Registration, is irrelevant. What is relevant is whether he has taken possession of the vehicle under the agreements referred earlier or not.

150. As such, for the reasons given hereinabove and the reason already given in the context of our discussion while answering Question No. 1, we are of the view that the decision in ***Amar Nath Dubey' case*** (supra), in so far as it is contrary to the law as clarified and declared by us by this judgment, can not be said to be good law.

151. For these very reasons the decisions in ***Writ Tax No. 201 of 2017; Kamil Hussain*** and ***Writ Tax No. 217 of 2017; Shriram Transport Finance Company Ltd.*** also do not lay down the law correctly.

152. Question No. 2 is answered accordingly.

153. Registry is directed to place the record of the writ petition along with our judgment before the appropriate Bench for further proceedings.

(2020)1ILR 1536

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.01.2020

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE CHANDRA DHARI SINGH, J.

Misc. Bench No. 5320 of 2017, 11652 of 2018, 18653 of 2016, 19580 of 2016, 18624 of 2016, 30621 of 2016, 6143 of 2018, 4349 of 2016
&
Service Single No. 19196 of 2016, 20082 of 2016, 18406 of 2016, 17366 of 2016, 11220 of 2016
&
Service Bench No. 36698 of 2018, 36694 of 2018, 4234 of 2019, 18370 of 2019

Ambrish Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Himanshu Raghave, Apoorva Tewari, Durga Prasad Shukla

Counsel for the Respondents:
C.S.C., Amrendra Nath Tripathi, Neeraj Chaurasiya, Pt. S. Chandra, Shashi Bajpai

A. Appointment- The Constitution of India- Art. 14, 15, 16 and 21-A - Assistant teachers in primary school-such candidates called for counselling in the district who have completed training from the very same district-a reasonable classification-children should begin their schooling through the medium of their mother tongue.

Held, the said provision has got a purpose and object i.e. the children are taught by a person who is very well familiar with the local habitat and also speaks local dialect. Further the first preference for appointment is given to the candidates who have undergone the training qualification from the district concerned because such candidates are already acquainted with the demographic conditions, local dialect and traditions from where the children who are to be taught come from. (Para 64)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Radhey Shyam Singh v. Union of India; (1997) 1 SCC 60

2. Subramaniam Swamy v. Director, CBI; (2014) 8 SCC 682

3. Govind A Mane v. State of Maharashtra; (2000) 4 SCC 200

4. State of U.P. Vs. Anant Kumar Tiwari; 2003 (3) AWC 2060

5. Deepak Kumar Suthar v. State of Rajasthan; (1992) 2 RLR 692

6. Harshendra Choubissa v. State of Rajasthan; (2002) 6 SCC 393

7. Dhanjay Malik and others Vs. State of Uttaranchal and others; (2008) 4 SCC 171

8. V.N. Sunanda Reddy and others Vs. State of A.P. and others; 1995 Supp (2) SCC 235

9. Union of India and others. v. N. Chandra Shekharan and others. 1998 (3) SCC 594

10. Inder Sen Mittal v. Housing Board, Haryana and others; 2002 (3) SCC 175

11. Manish Kumar Sahi v. State of Bihar and others; (2010) 12 SCC 576

12. D. Sarojakumari v. K. Helen Thilakom and others; (2017) 9 SCC 478

13. Dr. (Major) Meeta Sahi Vs. State of Bihar and others; 2019 SCC Online SC 1632

14. Balbir Kaur v. U.P. Secondary Education Services Selection Board, (2008) 12 SCC 1

15. Rajkumar and others vs. Stae of Rajasthan and others; AIR 2016 Rajasthan 176

16. Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others, (1991) 1 SCC 212

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. As common questions of law and facts arise in all writ petitions and as such all these writ petitions are being decided together by this common judgment and order.

2. In the instant bunch of writ petitions, all petitioners have assailed the validity of the Rule (14(1)(a) of the U.P. Basic Education (Teachers) Service Rules, 1981, (in short '1981 Rules') which provides the appointing authority to invite applications from candidates possessing prescribed training qualification from the district concerned.

3. Petitioners, inter alia, have also challenged the condition 6 (Kha) as contained in the guideline dated 26.12.2016 issued by the Secretary, U.P. Basic Shiksha Parishad, Allahabad to the extent that the candidates doing B.T.C. Training shall be allowed to apply in the district of their training alone in the first instance. They have also prayed that they may be permitted to appear in the counselling of the other district of their choice removing "District Preference".

4. Brief facts of the case are that vide Government Order No.3300/ 79-5-201604127/ 2013 dated 15.12.2016, a selection process for appointing 12,460 Assistant Teachers in the Primary Schools run under U.P. Basic Shiksha Parishad, Allahabad was initiated. In pursuance of the aforesaid Government Order dated 15.12.2016, the Secretary, U.P. Basic Shiksha Parishad, Allahabad issued a Letter No.Ba.Sh.Pa./ 12836 - 12932/ 2016-17 dated 20.12.2016 declaring the schedule as also the vacancies in the districts across the State of U.P. A guideline was also issued by the Secretary, U.P. Basic Shiksha Parishad, Allahabad in pursuance to the Government Order dated 15.12.2016. Thereafter, in compliance of the letter dated 20.12.2016, online applications were invited from the eligible candidates for the post of Assistant Teachers by the respective District Basic Education Officers. All the petitioners have applied in various districts against notified vacancies.

5. Vide Circular No.Ba.Sh.Pa./ 16887 - 17056/ 1216 - 17 dated 02.03.2017, the Secretary, U.P. Basic Shiksha Parishad, Allahabad had issued a definite schedule fixing 18.03.2017 to 20.03.2017 for First Counselling, 25.03.2017 for Second Counselling and 31.03.2017 was fixed for issuing appointment letters. In paragraph 2 of the Circular dated 02.03.2017, it has been provided that only such candidates shall be called for counselling in the district who have completed Training (B.T.C., V.B.T.C., Urdu B.T.C.) from the very district.

6. Petitioners have submitted on-line applications against the notified vacancies at various districts. Vide Circular No.Ba.Sha.Pa./16887-17056/1216-17 dated 02.03.2017, the Secretary, U.P. Basic Shiksha Parishad, Allahabad has issued a definite schedule fixing 18.03.2017 to 20.03.2017 for first counsel, 25.03.2017 for second counselling and 31.03.2017 for issuing appointment letters. In para 2 of the said Circular, it is provided that only such candidates shall be called for counselling in the district who have

done Training (BTC, VBTC, Urdu BTC) from the very district.

7. The instant bunch of writ petitions has been filed by petitioners with the object that the children are entitled for good quality of education under the provisions of Free and Compulsory Education Act, 2009 and the same cannot be achieved without appointing meritorious candidates.

8. Sri Anil Tiwari, learned Senior Advocate assisted by Sri Apoorva Tewari along with other learned Advocates appearing for petitioners has contended that the fundamental right to free and compulsory education to all children of 6 to 14 years of age is guaranteed by Article 21-A of the Constitution of India. The purpose of enacting Free and Compulsory Education is to provide good quality of education to the children but the same cannot be achieved without appointing meritorious teachers. If the procedure adopted for appointing Assistant Teachers fails to ensure the appointments of meritorious Teachers, it depicts arbitrariness and hit by Article 14 of the Constitution of India.

9. In support of his contention, learned Counsel has placed reliance to para 8 of ***Radhey Shyam Singh v. Union of India; (1997) 1 SCC 60***, which is as follows:

"8. It is needless to emphasis that the purpose and object behind holding a recruitment examination is to select suitable and best candidates out of the lot and such an object can only be achieved by making a common select list of the successful candidates belonging to all the zones. On the other hand if zone-wise selection is made then various candidates who appeared in some of the zones and secured more marks than those who are selected from other zones would be deprived of their selection resulting into great injustice and consequent discrimination. Thus there can be said to exist no nexus between the aforesaid process of zone-wise selection and the object to be achieved, that is, the selection of the best candidates. That being so the process of selection as envisaged in paragraph 16 of the advertisement in question and reproduced in the earlier part of this judgment would lead to discriminatory results because by adopting the said process of zone-wise selection would result in the devaluation of merit at the selection examination by selecting a candidate having lesser marks over the meritorious candidate who has secured more marks and consequently the rule of equal chance for equal marks would be violated. Such a process would not only be against the principles enunciated in Articles 14 and 16 of the Constitution but it would also result in heart burning and frustration amongst the young men of the country. The rule of equality of opportunity for every individual in the country is an inalienable part of our constitutional guarantee and that being so a candidate who secures more marks than another is definitely entitled to get preference for the job as the merit must be the test when selecting a candidate for recruitment for the posts which are advertised. In the present case admittedly the process of selection as envisaged in paragraph 16 of the advertisement in question is violative of Articles 14 and 16 of the Constitution of India as it has been demonstrated from the marks st of the appellants placed before us at the Bar during the course of arguments that they had secured more marks than those secured by some of the selected candidates."

10. Learned Counsel appearing for petitioners has also placed reliance to paragraph 58 of ***Subramaniam Swamy v. Director, CBI; (2014) 8 SCC 682***, which is as follows:

"58. The Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. However, such segregation must be rational and not artificial or evasive. In other words, the classification must not only be based on some qualities or characteristics, which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial."

11. During the course of argument, learned Counsel for the petitioner has also invited the attention of this Court towards *"The Right of Children to Free and Compulsory Education Act, 2009"* (in short RTE Act, 2009) and submitted that the Parliament has enacted the said Act with the following objects:

"1. and 2. ….

3. Consequently, the Right of Children to Free and Compulsory Education Bill, 2008 is proposed to be enacted which seeks to provide -

(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfied certain essential norms and standards;

(b) to (d) …..

4. The proposed legislation is anchored in the belief that the values of quality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from the disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government Funds.

5. and 6. ...

Further, Section 8(g) of the aforesaid Act is as under:

8. Duties of appropriate Government. - The appropriate Government shall -

(a) to (f) ….

(g) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;

(h) & (i) ..."

12. Learned Counsel appearing for the petitioner has next contended that the aforesaid discrimination shall defeat the intent of RTE Act, 2009. The petitioners apprehend that the instant selection process for appointment of 12,460 Assistant Teachers, due to strict adherence to Clause (a) of sub-Rule (1) of Rule 14 of 1981 Rules, would be plagued by the same illegal, unreasonableness and arbitrariness as were the earlier selection process for appointment of Assistant Teachers.

13. The learned Counsel appearing for petitioners has submitted that the condition for "inviting applications from candidates possessing prescribed training qualification from the district concerned" as contained in Clause (a) of sub-Rule (1) of Rule 14 of 1981 Rules is absolutely arbitrary as there is no reasonable nexus between the classification and the object sought to be achieved by inclusion of the condition. It is absolutely unreasonable and violation of Articles 14 and 16 of the Constitution. It has further been submitted that strict adherence to the aforesaid conditions amounts to violation of reservation policy which is detrimental to the General Category candidates as provided in Section 3(1) of the U.P. Public Service Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes Act, 1994.

14. Learned Counsel appearing for petitioners has invited attention of this Court towards paras 6 & 7 of the judgment of Hon'ble Supreme Court rendered in ***Govind A Mane v. State of Maharashtra; (2000) 4 SCC 200***. Para 6 and 7 read as under:

"6. The law, thus, having been laid down clearly by this Court, the High Court was not justified in dismissing the Writ Petition. Since it is not disputed by the respondents that for the purpose of admission to B.Ed Course, seats were distributed districtwise without indicating any material to show the nexus between such distribution and the object sought to be achieved, it would be violative of Article 14 of the Constitution.

7. Unfortunately, the whole matter relates to the year 1995 and, today, after a lapse of five years, it would not be possible to direct that the appellants may be admitted in B.Ed Course. All that can be said is that if any further steps are taken by the respondents for fresh admission to B.Ed Course, the appellants should also be given an opportunity to seek admission in that Course."

15. Learned Counsel appearing for petitioners has further submitted that vide Government Order dated 12.09.2012, online applications were invited for B.T.C., V.B.T.C. and Urdu B.T.C. Training but in paragraph 2 of the said Government Order, it has clearly been provided that for the aforesaid training, the applicant shall apply in the Training Institute located in the district of his domicile/ residence. It is compulsory to present domicile certificate from the district concerned or else the candidature shall be deemed cancelled. Thus necessarily the basis for B.T.C. Training in a district would remain the domicile/ residence in that district.

16. Sri Anil Tiwari, learned Senior Advocate has submitted that the preparation of merit list at district wise and restricting the selection of meritorious candidates, who belongs to other districts, amounts to a discrimination and such act of the State Government is in violation of Articles 15(1) and 16(2). In support of his submissions, Sri Anil Tiwari, learned Senior Advocate has relied upon paras 44 to 50 of ***State of U.P. Vs. Anant Kumar Tiwari; 2003 (3) AWC 2060***. Paras 44 to 50 reads as under:

*"**44.** A merit list of all the applications received will be prepared on the basis of quality points of the educational and other qualifications in accordance with the provisions given in*

the Government orders mentioned above at the State level, which will be prepared in proportion to the total vacancies for training. The above list will be arranged district-wise, in conformity with the vacancies available in the district and a provision of reservation as per the rules will be ensured. The candidates on the merit list shall be allotted as per the following, in order of merit:

(a) Home district of the candidate ;

(b) Another district of the Division, wherein home district is located ;

(c) Nearest Division to the home district Division of the candidate where the vacancy is available.

***45.** The plea taken by learned Advocate General that the students ought to be taught in the local dialect which differs from region to region in the State of U.P. is misconceived, inasmuch as, by restricting the prospective applicants of the home district to apply in that district only presumably by virtue of birth alone in that district does not serve the purpose, as that person may have studied elsewhere and may have forgotten the dialect of the home district. Further Art.15(1) and Art.16(2) of the Constitution put a complete prohibition upon the State from discriminating persons on the basis of birth and place of residence in the matter of employment within the State. In the case of English Medium Students Parents Association, ((1994) 1 SCC 550 : AIR 1994 SC 1702) (supra), the Hon'ble Supreme Court had held that:*

"All educational experts are uniformly of the opinion that pupils should begin their schooling through the medium of their mother tongue. There is great reason and justice behind this. Where the tender minds of the children are subject to an alien medium the learning process becomes unnatural, If inflicts a cruel strain on the children which makes the entire transaction mechanical. Besides, the educational process becomes artificial and torturous. The basic knowledge can easily be garnered through the mother tongue. The introduction of a foreign language tends to threaten to atrophy the development of mother tongue. When the pupil comes of age and reaches the Vth standard level, the second language is required to take it as a second language. At the secondary stage the three-language formula is introduced. However, in cases of non-Kannada speaking students grace marks up to 15 are awarded. Certainly, it cannot be contended that a student studying in a school from Karnataka need not know the regional language. It should be the endeavour of every State to promote the regional language of the State. In fact, the Government of Karnataka has done commendably well in passing this Government order. Therefore, to contend that the Imposition of study of Kannada throws an undue burden on the students is untenable. Again to quota Mahatma Gandhi :

"The medium of instruction should be altered at once and at any cost, the provincial languages being given their rightful place. I would prefer temporary chaos in higher education to the criminal waste that is daily accumulating."

As rightly contended by the learned Advocate General where the State by means of the Impugned Government order desires to bring about academic discipline as a regulatory measure it is a matter of policy. The State knows how best to implement the language policy. It is not for the Court to interfere."

***46.** Here, it is not the case that a different regional language is to be taught*

to the students in different local areas. The subject in the course is same throughout the State. The medium of teaching is also the same. Only the dialect differs which too has been taken care of by providing allocation of seats in the home district to the candidates under the Government order dated 14.9.2001 out of the merit list prepared at the State level. In the case of Arun Tiwari (supra), the facts were that the assistant teachers in Madhya Pradesh are governed by the Madhya Pradesh Non-Gazetted Class III Education Service (Non-Collegiate Service) Recruitment and Promotion Rules, 1973, which provided for direct recruitment by competitive examination followed by an interview. During the Eighth Plan period, i.e., from 1992 to 1997 the Central Government sponsored a scheme known as Operation Blackboard Scheme. Under this scheme the Government of India gave financial clearance to the State of Madhya Pradesh to implement this scheme by appointing additional teachers in all primary middle schools which had only one teacher In order to improve the standards of education. In order to implement the scheme the State of Madhya Pradesh decided to fill in about 7,000 to 11,000 posts of Assistant Teachers in such schools. The recruitment Rules of 1973 were amended on 10.5.1993 by adding a proviso, which empowers the State Government to prescribe the criteria and procedure for selection of candidates in any circumstances. The State Government provided that selection of Arts teachers in 1993 will be made by committee instead of Junior Service Selection Board by inviting applications from employment exchange and making selection district-wise. Certain persons, who did not even possess the prescribed qualifications, challenged the selection process. The Hon'ble Supreme Court held as follows :

"The next contention relates to inviting applications from employment exchanges Instead of by advertisement. This procedure has been resorted to looking to the requirements of a time bound scheme. The original applicants contended that if the posts had been advertised, many others like them could have applied. The original applicants, who so complain, however, do not possess the requisite qualifications for the post. As far as we can see from the record, nobody, who had the requisite qualifications has complained that he was prevented from applying because advertisement was not issued. What is ; more important, in the special circumstances requiring a speedier process of selection and appointment, applications were invited through employment exchanges for 1993 only. In this context, the special procedure adopted is not unfair. The State has relied upon the case of Union of India Vs. Hargopal, ((1987) 3 SCC 308 : AIR 1987 SC 1227) where Government institution enjoining that the field of choice should, in the first instance, be restricted to candidates sponsored by the employment exchanges, was upheld as not offending Arts. 14 and 16 of the Constitution. In the case of Delhi Development Horticulture Employees' Union v. Delhi Admn., ((1992) 4 SCC 99) (SCC at p 111) : (AIR 1992 SC 789), this Court approved of recruitment through employment exchanges as a method of preventing malpractices. But in the subsequent and more recent case of Excise Supdet. V. K.B.N. Visweshwara Rao, (1996 AIR SCW 3979) this Court has distinguished Unionof India v. Hargopal,((1987) 3 SCC 308 : AIR 1987 SC 1227), on the basis of special facts of that case. It has observed that the better course for the State would be to Invite applications from employment exchanges as well as to advertise and also give wide publicity through T.V., Radio, etc. The Court had to consider whether persons, who had applied directly and not through employment exchanges should be

considered. This Court upheld their claim for consideration.

There are different methods of inviting applications. The method adopted in the exigencies of the situation in the present case cannot be labelled as unfair, particularly when, at the relevant time, the two earlier decisions of this Court were in vogue." 46. The Apex Court in the case of Kailash Chand Sharma V. State of Rajasthan, (2002) 5 JT (SC) 591 : ((2002) 6 SCC 562 : AIR 2002 SC 2877) had that the award of bonus marks to the residents of the district and the residents of the rural areas of the district amounts to Impermissible discrimination and there is no rational basis for such preferential treatment. In paragraphs 14 and 15 of the reports, the Apex Court has held as follows : "Before proceeding further we should steer clear of a misconception that surfaced in the course of arguments advanced on behalf of the State and some of the parties. Based on the decisions which countenanced geographical classification for certain weighty reasons such as socio-economic backwardness' of the area for the purpose of admission to professional colleges, it has been suggested that residence within a district or rural area of that district could be a valid basis for classification for the purpose of public employment as well. We have no doubt that such a sweeping argument which has the overtones of parochialism is liable to be rejected on the plain terms of Art. 16(2) and in the light of Art. 16(3). An argument of this nature files in the face of the peremptory language of Art. 16(2) and runs counter to our constitutional ethos founded on unity and integrity of the nation. Attempts to prefer candidates of a local area in the State were nipped in the bud by this Court since long past. We would like to reiterate that residence by itself-be it be within a State, region, district or less area within a district cannot be a ground to accord preferential treatment or reservation, save as provided in Art. 16(3). It is not possible to compartmentalize the State into district with a view to offer employment to the residents of that district on a preferential basis. At this juncture it is appropriate to undertake a brief analysis of Art. 16".

Article 16, which under Clause (1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State reinforces that guarantee by prohibiting under Clause (2) discrimination on the ground only of religion, race, caste, sex, descent, place of birth, residence or any of them. Bee it noted that in the allied Article 15, the word 'residence' is omitted from the opening clause prohibiting discrimination on specified grounds. Clauses (3) and (4) of Article 16 dilute the rigour of Clause (2) by (i) conferring an enabling power on the Parliament to make a law prescribing the residential requirement within the State in regard to a class or classes of employment or appointment to an office under the State and (ii) by enabling the State to make a provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. The newly introduced Clauses (4A) and (4B), apart from Clause (5) of Article 16 are the other provisions by which the embargo laid down in Article 16(2) in somewhat absolute terms is lifted to meet certain specific situations with a view to promote the overall objective underlying the Article. Here, we should make note of two things, firstly, discrimination only on the ground of residence (for place of birth) in so far as

public employment is concerned is prohibited ; secondly, Parliament is empowered to make the law prescribing residential requirement within a State or Union Territory as the case may be, in relation to a class or classes of employment. That means, in the absence of Parliamentary law, even the prescription of requirement as to residence within the State is a taboo. Coming to the first aspect, it must be noticed that the prohibitory mandate under Article 16(2) is not attracted if the alleged discrimination is on grounds not merely related to residence, but the factum of residence is only taken into account in addition to other relevant factors. This effect, is the import of the expression 'only'."

47. *In paragraphs 24, 25 and 32 the Apex Court further held as follows :*

"24. Before examining the further pleas in support of the impugned action taken by the State it would be apposite to refer to the decision in State of Maharashtra v. Raj Kumar, on which reliance has been placed by the High Court and reference has been made in the course of arguments before us. In that case a rule was made by the State of Maharashtra that a candidate in order to be treated as a rural candidate must have passed S.C.C. examination which is held from a village or a town having only 'C' type municipality: The object of the rule, as pointed out by this Court, was to appoint candidates having full knowledge of rural life and its problems so that they would be more suitable for working as officers in rural areas. The rule was struck down on the ground that there was no nexus between classification made and the object sought to be achieved because "as the rule stands any person, who may not have lived in a village at all can appear for S.C.C. examination from a village and yet become eligible for selection,"The rule was held to be violative of Articles 14 and 16. Another point discussed by the Court about the propriety of giving bonus marks for the rural candidates and the Court held thus :

"The rules also provide that viva-voce board would put relevant questions to judge the suitability of candidate for rural areas and to test whether or not they have sufficient knowledge of rural problems, and this no doubt amounts to a sufficient safeguard to ascertain the ability of the candidate regarding his knowledge about the affairs of the village. In such a situation there was absolutely no occasion for making an express provision for giving weightage, which would virtually convert merit into demerit and demerit into merit and would be per se violative of Article 14 of the Constitution as being an impermissible classification. The rule of weightage as applied in this case is mainly unreasonable and wholly arbitrary and cannot be sustained."

25. This decision is not a direct authority for the proposition that a citizen cannot be preferred for employment under the State on the ground that he or she hails from rural area. However, what has been laid down in regard to the first point assumes some relevance in the cases on hand. The criterion for Identifying a rural candidate was held to be irrelevant, as it had no nexus with the object sought to be achieved. In the present case, the position is much worse as the impugned circular does not spell out any criteria or indicia to determine whether an applicant is a rural candidate."

32. The justifiability of the plea stemming from the premise that uplifting the rural people is an affirmative action to improve their lot can be tested from the

concrete situation which confronts us in the present cases. We are here concerned with the selections to the posts of teachers of primary schools, the minimum qualification being S.C.C. coupled with basic training course in teaching. Can the Court proceed on the assumption that the candidates residing in the town areas with their education in the schools or colleges located in the towns or its peripheral areas stand on a higher pedestral than the candidates, who had studied in the rural area schools or colleges? Is the latter comparatively a disadvantaged and economically weaker segment when compared to the former? We do not think so. The aspirants for the teachers jobs in primary schools be they from rural area or town area do not generally belong to affluent class. Apparently they come from lower middle class or poor background. By and large, in the pursuit of education, they suffer and share the same handicaps as their fellow citizens in rural areas. It cannot be said that the applicants from non-rural areas have access to best of the schools and colleges which the well-to-do class may have. Further, without any data, it is not possible to presume that the schools and colleges located in the town-small or big and their peripheral areas are much better qualitatively, that is to say, from the point of view of teaching standards or infrastructure facilities so as to give an edge to the town candidates over the rural candidates."

48. *The Apex Court also repelled the plea regarding local dialect and residence of rural area with the following observations ((2002) 6 SCC 562 : AIR 2002 SC 2877, Paras 36, 39):*

"Shri Rajeev Dhawan appearing for the selected candidates, who have filed S.L.P. (C) No. 10780 of 2001, did his best to support the impugned circular mainly on the second ground, namely, better familiarity with the local dialect. The learned counsel contends that when the teachers are being recruited to serve in gram panchayat areas falling within the concerned panchayat samiti, those hailing from the particular district and the rural areas of that district are better suited to teach the students within that district and the panchayat areas comprised therein. He submits that the local candidates can get themselves better assimilated into the local environment and will be in a better position to interact with the students at primary level. Stress is laid on the fact that though the language/mother tongue is the same, the dialect varies from district to district and even within the district. By facilitating selection of local candidates to serve the panchayat run schools, the State has not introduced any discrimination on the ground of residence but acted in furtherance of the goal to impart education. Such candidates will be more effective as primary school teachers and more suitable for the Job. It is therefore, contended that the classification is grounded on considerations having nexus with the object sought to be achieved and is not merely related to residence. We find it difficult to accept this contention, though plausible it is. We feel that undue accent is being laid on the dialect theory without factual foundation. The assertion that dialect and nuisances of the spoken language varies from district to district is not based upon empirical study or survey conducted by the State. Not even specific particulars are given in this regard. The stand in the counter-affidavit (extracted supra) is that each zone has its distinct language. "If that is correct the Zila Parishad should have mentioned in the notification that the candidates should know particular language to become

eligible for consideration. We are inclined to think that reference has been made in the counter to 'language' ; instead of dialect rather inadvertently. As seen from the previous sentence, the words dialect and language are used as Inter-changeable expressions, without perhaps understanding the distinction between the two. We therefore, take it that what is meant to be conveyed in the counter is that each zone has a distinct dialect or vernacular and therefore local candidates of the district would be in a better position to teach and interact with the students. In such a case, the State Government should have identified the zones in which vernacular dissimilarities exist and the speech and dialect vary. That could only be done on the basis of scientific study and collection of relevant data. It is nobody's case that such an exercise was done. In any case, if these differences exist zone-wise or region-wise, there could possibly be no justification for giving weightage to the candidates on the basis of residence in a district. The candidates belonging to that zone, irrespective of the fact whether they belong to X, Y or Z district of the zone could very well be familiar with the allegedly different dialect peculiar to that zone. The argument further breaks down, if tested from the standpoint of award of bonus marks to the rural candidates. Can it be said reasonably that candidates, who have settled down in the town will not be familiar with the dialect of that district? Can we reasonably proceed on the assumption that rural area candidates are more familiar with the dialect of the district rather than the town area candidates of the same district? The answer to both the questions in our view cannot be in the negative. To prefer the educated people residing in villages over those residing In towns-big or small of the district, on the mere supposition that the former (rural) candidates will be able to teach the rural students better would only amount to creating an artificial distinction having no legitimate connection to the object sought to be achieved. It would then be a case of discrimination based primarily on residence which is prescribed by Article 16(2)". "38. One more serious infirmity in the impugned circular is that it does not spell out any criteria or indicia for determining whether the applicant is a resident of rural area. Everything is left held with the potential of giving rise to varying interpretations thereby defeating the apparent objective of the rule. On matters such as duration of residence, place of schooling etc. there are bound to be controversies. The authorities, who are competent to issue residential certificates are left to apply the criteria according to their thinking which can by no means be uniform. The decision in State of Maharashtra v. Raj Kumar, is illustrative of the problem created by vague or irrelevant criteria. In that case a rule was made by the State of Maharashtra that a candidate will be considered a rural candidate if he had passed S.S.C. examination held from a village or a town having only 'C' type municipality. The object of the rule, as noticed by this Court, was to appoint candidates having full knowledge of rural life so that they would be more suitable for working as officers in rural areas. The rule was struck down on the ground that there was no nexus between classification made and the object sought to be achieved because "as the rule stands, any person, who may not have lived in a village at all can appear for S.S.C. examination from village and yet become eligible for selection." The rule was held to be violative of Articles 14 and 16. When no guidance at all is discernible

from the Impugned circular as to the identification of the residence of the applicants especially having regard to the Indefinite nature of the concept of residence, the provision giving the benefit of bonus marks to the rural residents will fall foul of Article 14.

49. *The aforementioned decision has been subsequently followed by the Apex Court in the case of Harshendra Choubissa v. State of Rajasthan, (2002) 6 JT (SC) 553: ((2002) 6 SCC 393 : AIR 2002 SC 2897). In paragraph 12 of the report, the Apex Court has held as follows :*

"12. The second ground urged by the State is equally Irrelevant and untenable. Most of the reasons given by us in the judgment just delivered in teachers' cases will hold good to reject this plea. No factual details nor material has been placed before us to substantiate that the spoken language and dialect varies from district to district. It will not be reasonable to assume that an educated person belonging to a contiguous district or districts will not be able to effectively communicate with the people of the district in which he is appointed or that he would be unfamiliar with the living conditions and culture of that district. He cannot be regarded as an alien in a district other than his native district. If any classification has to be done in this regard, it should be based on a scientific study but not on some broad generalization. If any particular region or area has some peculiar socio-cultural or linguistic features warranting a differential treatment for the purpose of deploying personnel therein, that could only be done after conducting a survey and identifying such regions or districts. That is the minimum, which needs to be done. There is no factual nor rational basis to treat each district as a separate unit for the purpose of offering public employment. Above all, it is wrong to assume that the candidates belonging to rural areas than the candidates living in nearby towns. The criteria of merit cannot be allowed to be diluted by taking resort to such artificial differentiation and irrelevant assumptions. On the material placed before us, we have no hesitation in holding that the addition of bonus marks to the applicants belonging to the same district and the rural areas of that district would amount to discrimination, which falls foul of Articles 14 and 16."

50. *Applying the principles laid down by the Apex Court in the aforementioned cases to the present case, we find that restricting the selection and preparation of merit list at the District level are not all justified and it amounts to discrimination. In the present case taking into consideration the exigencies the State Government had decided to prepare the merit list at the State level and for restoring it to District level the reasons advanced by the State Government are irrelevant. Thus, the action of the State in restoring the preparation of merit list from State level to District level is arbitrary and is violative of Articles 15(1) and 16(2) of the Constitution of India."*

17. Sri Anil Tiwari, learned Senior Advocate has next submitted that the merit of a candidate cannot be demerit merely on the ground that he is not the resident of the district for which the post has been advertised. The doctrine of equality enshrined under Article 16 cannot be let loose on considerations that are not permissible under the Constitution. Learned Senior Advocate has placed reliance in the case of ***Deepak Kumar Suthar v. State of Rajasthan; (1992) 2***

RLR 692 (Paras 35, 39, 40 & 42). He has further submitted that awarding bonus marks to the candidates who belongs to the same district is also violation of Articles 14 and 16. He has again placed reliance to para 12 and 13 of ***Harshendra Choubissa v. State of Rajasthan; (2002) 6 SCC 393***, which reads as under:

*"**12.** The second ground urged by the State is equally irrelevant and untenable. Most of the reasons given by us in the judgment just delivered in teachers' cases will hold good to reject this plea. No factual details nor material has been placed before us to substantiate that the spoken language and dialect varies from district to district. It will not be reasonable to assume that an educated person belonging to a contiguous district or districts will not be able to effectively communicate with the people of the district in which he is appointed or that he would be unfamiliar with the living conditions and culture of that district. He cannot be regarded as an alien in a district other than his native district. If any classification has to be done in this regard, if should be based on a scientific study but not on some broad generalization. If any particular region or area has some peculiar socio-cultural or linguistic features warranting a differential treatment for the purpose of deploying personnel therein, that could only be done after conducting a survey and identifying such regions or districts. That is the minimum which needs to be done. There is no factual nor rational basis to treat each district as a separate unit for the purpose of offering public employment. Above all, it is wrong to assume that the candidates belonging to rural areas will be better suited to serve those areas than the candidates living in nearby towns. The criterion of merit cannot be allowed to be diluted by taking resort to such artificial differentiation and irrelevant assumptions. On the material placed before us, we have no hesitation in holding that the addition of bonus marks to the applicants belonging to the same district and the rural areas of that district would amount to discrimination which falls foul of Articles 14 and 16.*

***13.** We now come to the question of relief. We are of the view that for the reasons set out in the judgment delivered by us today in Kailash Chand Sharma case [(2002) 6 SCC 562] the judgment of the High Court has to be given prospective effect so that its impact may not fall on the appointments already made prior to the date of judgment. That is also the view taken in Deepak Kumar Suthar case which has been followed in the impugned order of the High Court. However, in Writ Petition (C) No. 6256 of 1999, the High Court did not make it clear that the judgment will operate prospectively, though in the other impugned order the High Court gave effect to the judgment without touching the appointments made before 21-10-1999. We are of the view that the date of application of the judgment should be from 27-7-2000 which was the date on which Writ Petition No. 5 of 2000 was allowed by the learned Single Judge holding that the notification in regard to bonus marks for the purpose of selection of Gram Sewaks was invalid. The other important fact which should be taken into account in moulding the relief is that at the instance of three persons who applied for the posts advertised by the Zila Parishads of Barmer and Bikaner, it is not proper to set aside the entire selection, especially when none of the appointed candidates were made parties before the High Court. We are, therefore, inclined to confine the*

relief only to the parties who moved the High Court for relief under Article 226, subject, however, to the application of the judgment prospectively from 27-7-2000. Accordingly, we direct as follows:

1. The claims of the three writ petitioners who are respondents herein should be considered afresh in the light of this judgment vis-a-vis the candidates appointed on or after 27-7-2000 or those in the select list who are yet to be appointed. On such consideration, if those writ petitioners are found to have superior merit in case the bonus marks of 10% and/or 5% are excluded, they should be offered appointments, if necessary, by displacing the candidates appointed on or after 27-7-2000.

2. The appointments of Gram Sewaks made up to 26-7-2000 need not be reopened and reconsidered in the light of the law laid down in the judgment."

18. Per contra, learned Counsel appearing on behalf of the respondents has vehemently opposed the contentions made by the learned Counsel appearing on behalf of petitioners.

19. Sri Upendra Nath Misra, learned Senior Advocate assisted by Sri Neel Kamal Misra, learned Counsel appearing for private respondents has raised a preliminary objection towards the maintainability of the writ petitions on the ground that after participating in selection process, the petitioners cannot challenge the validity of selections. In support of his contention, he has placed reliance in the case of ***Dhanjay Malik and others Vs. State of Uttaranchal and others; (2008) 4 SCC 171,*** wherein the Hon'ble Apex Court has categorically held that where a person participates in a selection process without any demur, then in such a case, he is stopped from challenging the same.

20. Sri Upendra Nath Misra, learned Senior Advocate has further submitted that the petitioners are the participants of the selection held for the post of Assistant Teachers, which was advertised on 25.06.2016 against 16,448 vacancies. At that time the then existing Rule 14(1)(a) of U.P. Basic Education (Teachers) Service Rules, 1981, the candidates who were possessing the prescribed qualification and training, were asked to submit their applications for appointments from the concerned district. The petitioners who had already participated in the selection challenged the Circular dated 03.08.2016 whereby counselling was convened for the aforesaid selection. Simultaneously the petitioners had challenged the vires of Rule 14 (1)(a) of U.P. Basic Education (Teachers) Service Rules, 1981, as it was then existing. A writ of certiorari was prayed for quashing para 6 (Kha) of the guidelines dated 25.06.2016, inasmuch as, it provides that the candidates with BTC training will be considered in the district of training in the first counselling. Apart from that, a writ of mandamus was also prayed for allowing the petitioners to appear in the counselling of the district of their choice, instead of compelling to approach only in the district, from where they completed their BTC Training. The process of the selection was completed in August, 2016 in which all the answering respondents herein were duly selected for appointment as Assistant Teachers for different districts according to the then existing Rules. Therefore, it is not open for petitioners to challenge their appointment after participating in the aforesaid selection.

21. Sri Mishra has again submitted that the factual matrix of the case is that 1981 Rules was promulgated on 03.01.1981 and in the original Rule itself, provision for district preference was contained in Rule 14(1) (a). Rule 14 and

15(2) were amended on 17.07.1981 in which it was provided that for preparation of select list according to the place of residence, but under special circumstances, the candidate could have been sent to the other district but would be placed at the bottom of seniority. On 09.11.2011, 12th amendment took place and Rule 14(3) was amended providing weightage to the marks obtained by the candidate in the Teachers Eligibility Text (TET). On 30.11.2011 an advertisement for recruitment of 72,825 vacancies of assistant teachers was issued, which was to be held on the basis of Teachers Eligibility Test marks but in March 2012, the said advertisement was subsequently cancelled. After the change of Government in State of U.P. in March 2012, 15th amendment of the Service Rules took place on 31.08.2012, which changed the basis of selection from giving weightage to TET marks to "quality point marks" to be calculated on the basis of academic qualification. On 07.12.2012, a fresh advertisement was issued for recruitment for 72,825 vacancies of Assistant Teachers but then it was made on the basis of quality point marks, instead of TET marks. The said procedure of selection made on basis of *quality point marks* was challenged in the case of *Shiv Kumar Pathak Vs. State* which was allowed and Rule 14(3) was set aside as being *ultra vires* and simultaneously advertisement dated 7.12.2012 was also quashed. The Special Leave Petition against the aforesaid judgment dated 07.12.2012 was filed by the State, wherein Hon'ble Apex Court as an interim measure directed the State to fill up the vacancies as per advertisement dated 30.11.2011. In the year, 2015, the recruitment of 66,655 candidates was made against the advertised vacancies of 72,825 on the basis of TET marks. During the pendency of the aforesaid bunch of case (title State Vs. Shiv Kumar Pathak) pending in Hon'ble Apex Court, the State Government made about 99,132 more appointments in parts. The aforesaid appointment of 99,132 teachers was also challenged before this Hon'ble Court in the case of *Deepak Sharma v. State*, in which 15th and 16th amendment of the Rules were challenged and simultaneously the said appointment was also challenged on the ground that no weightage of TET marks was given though it was prescribed by NCTE under clause 9(b) of its statutory guidelines dated 11.02.2011. On 1.12.2016, a Division Bench of this Hon'ble Court, had struck down Rule 14(3) (a) in the case of *Deepak Sharma Vs. State*, on the ground that not giving weightage of TET marks was against the mandatory guidelines of National Council for Teachers Education (NCTE) and the said special appeals were disposed of and the selection of 99,132 teachers was not upheld by this Hon'ble Court, but status quo was directed to be maintained till disposal of pending special leave petitions in the case of State v. Shiv Kumar Pathak. Against the aforesaid judgment dated 01.12.2016, several special leave petitions were filed by the selected candidates of both 1st and 2nd selections, leading of which was Ram Kumar Patel Vs. State of U.P. Meanwhile, the NCTE filed an affidavit before Hon'ble the Apex Court for saying that the stipulation regarding weightage to TET marks under clause 9(B) of the NCTE guidelines was not mandatory. Thus, the Hon'ble Apex Court vide order dated 25.07.2017 held that since the notification of the NCTE dated 11.02.2011 to the extent of suggesting weightage to TET marks can be held to be merely a guideline, therefore, weightage to

TET marks was not mandatory and therefore, State Rules may not be held to be void. Thus, the judgment of the Divisions Bench of this Court dated 01.12.2016 was set aside vide order dated 25.07.2017. As a result of the aforesaid judgment, both 1st Selection (for 15,000 vacancies) and 2nd Selection (for 16,448 vacancies) stand protected/ saved by the Apex Court in which the applicants were appointed.

22. It is also submitted that in the meantime, the judgment in the pending case of *State Vs. Shiv Kumar Pathak* was also pronounced, in which, it was held that the computation of quality point marks was not violative of Article 14. Though 15th amendment about introducing quality point marks was upheld but since the 66,655 appointments were already made under the interim order of Hon'ble Apex Court against 72,825 post on the basis of the advertisement dated 30.11.2011 (i.e. on the basis of TET marks only therefore the same were protected without any interference).

23. Sri Upendra Nath Misra has urged that even if *vires* of any provision granting any preference is not approved and declared unconstitutional, the selections already made should not be disturbed in order to avoid multiplicity of litigation, therefore, the appointment already made in the first and second selection need not be disturbed and deserve to be protected without any interference. He also urged that despite declaring a particular provision as *ultra vires*, the Courts have protected the selections and appointments already made before the pronouncement of the judgment. He has relied upon the following judgments:

"V.N. Sunanda Reddy and others Vs. State of A.P. and others; 1995 Supp (2) SCC 235.

15. *Before parting we may mention one submission on behalf of the Telugu medium students. It was submitted that if the weightage given to them in recruitment is to be found fault with, those Telugu medium candidates who have already been appointed may not be disturbed otherwise irreparable injury will be caused to them. It was also submitted that those Telugu medium students whose appointments could not be made on account of the pendency of these proceedings may be given one more chance to compete for future recruitment on such posts and for that purpose suitable age relaxation may be given to them as otherwise they will be out of the employment market. In our view this request is quite reasonable and deserves to be granted. We, therefore, direct that despite our finding that 5 per cent weightage given to the Telugu medium graduates in the present case is violative of Articles 14 and 16(1) of the Constitution, those Telugu medium graduates who have already been appointed on the strength of such weightage and who are working on their posts concerned should not be disturbed and their appointments will not be adversely affected by the present judgment. On the other hand, those Telugu medium graduates who have been selected on the strength of the weightage but to whom actual appointments have not been given on account of pendency of the present proceedings should be given a chance to compete for such posts as and when future recruitment to such posts is resorted to and for that purpose only once suitable age relaxation may be given to them in case they are otherwise found*

suitable on merits to be appointed in such future direct recruitment to such posts. In other words, only on account of the fact that they have become age barred, they should not be enied appointments on the strength of their meritorious performance. This will be by way of only one-time concession about age relaxation.

Radhey Shyam Singh and others Vs. Union of India and others; (1997) 1 SCC 60

10. *The argument advanced by the learned counsel for the respondents that this process of zonewise selection has been in vogue since 1975 and has stood the test of time cannot be accepted for the simple reason that it was never challenged by anybody and was not subjected to judicial scrutiny at all. If on judicial scrutiny it cannot stand the test of reasonableness and constitutionality it cannot be allowed to continue and has to be struck down. But we make it clear that this judgment will have prospective application and whatever selections and appointments have so far been made in accordance with the impugned process of selection shall not be disturbed on the basis of this judgment. But in future no such selection shall be made on the zonal basis. If the Government is keen to make zonewise selection after allocating some posts for each zone, it may make such scheme or rules or adopt such process of selection which may not clash with the provisions contained in Articles 14 and 16 of the Constitution of India having regard to the guidelines laid down by this Court from time to time in various pronouncements. In the facts and circumstances of the case we make no order as to costs. The appeals and writ petitions are allowed as indicated above.*

Triveni Chandra Pandey Vs. State of Jharkhand (Uttarakhand High Court); Special Appeal No.360 of 2012 decided on 26.11.2013

25. *This Court has been informed that pursuant to the selections of the year 2011-2012, which have been challenged before this Court appointment has already been made and such appointed candidates are presently teaching as Primary School Teacher. Although the criteria fixed by the State authorities of residence was patently in violation of Article 16(2) of the Constitution of India, the fact remains that such teachers who have been teaching, their appointment will not be disturbed, but in future, the State Authorities shall not fix residence or place of birth, as a criteria of appointment in any public job. To that extent this order is made applicable prospectively. However, since the challenge to the criteria of residence was primarily by the appellant - Triveni Chandra Pandey, it is hereby directed that subject to the marks, which he has received and vacancy, candidature of the petitioner shall also be considered for appointment as a Primary School Teacher, in any other district in Uttarakhand as well, where a candidate having lower quality points then him has been given appointment. Needful be done within a reasonable time."*

24. Dr. L.P. Mishra, learned Counsel appearing for private respondents has argued that the children have right to free and compulsory education up to the age of 14 years and the said object can only be fulfilled if such children are imparted education in their mother tongue based on the local dialect of concerned district where children reside and take primary education. Section 29(2)(f) of the RTE Act, 2009 casts a duty on the teachers to impart education in mother tongue and in

view of the duties and functions in Section 24 of the RTE Act, 2009, every teacher can only fulfill the said object if such teacher is of the concerned district from where he has obtained the training because such person are already acquainted with the demographic conditions, local dialect and traditions, from where the children who are to be taught come from. The knowledge and understanding of local dialect is essential for a teacher in the rural areas for a better classroom transaction with small children and their parents.

25. Sri L.P. Mishra, learned Senior Advocate has submitted that the parliament had enacted the RTE Act, 2009 with an object to provide free and compulsory education to all children of the age of six to fourteen years. Section 2(c) defines the child and Chapter II provides for the right to free and compulsory education. Chapter III provides for the duties of the appropriate Government, local authority and parents. Chapter IV defines the responsibilities of schools and teachers whereas Chapter V provides curriculum and completion of elementary education. Chapter VI provides protection of rights of children and Chapter VII contains miscellaneous provisions.

26. Dr. L.P. Mishra, learned Senior Advocate has relied and emphasized on the provisions of Section 29 of the RTE Act, 2009 which is as follows:

*"**Curriculum and evaluation procedure.**-(1) The curriculum and the evaluation procedure for elementary education shall be laid down by an academic authority to be specified by the appropriate Government, by notification.*

(2) The academic authority, while laying down the curriculum and the evaluation procedure under sub-section (1), shall take into consideration the following, namely:-

(a) conformity with the values enshrined in the Constitution;

(b) all round development of the child;

(c) building up child's knowledge, potentiality and talent;

(d) development of physical and mental abilities to the fullest extent;

(e) learning through activities, discovery and exploration in a child friendly and child-centered manner;

(f) medium of instructions shall, as far as practicable, be in child's mother tongue:

(g) making the child free of fear, trauma and anxiety and helping the child to express views freely:

(h) comprehensive and continuous evaluation of child's understanding of knowledge and his or her ability to apply the same."

27. Dr. L.P. Mishra, learned Senior Advocate has also invited the attention of this Court towards relevant sections of The Right of Children to Free and Compulsory Education Rules, 2010, which is as under:

"3. Composition and functions of the School Management Committee

(1) A School Management Committee (hereinafter in this rule referred to as the said Committee) shall be constituted in every school other than an unaided school within six months of the appointed date, and reconstituted every two years.

(2) Seventy five percent of the strength of the said Committee shall be from amongst parents or guardians of children.

(3) The remaining twenty-five percent of the strength of the said

Committee shall be from amongst the following persons, namely:

(a) one-third members from amongst the elected members of the local authority, to be decided by the local authority:

(b) one-third members from amongst teachers from the school, to be decided by the teachers of the school;

(c) one-third members from amongst local educationists or children in the school, to be decided by the parents in the said Committee.

x x x x x x x x x x x x x x"

28. Dr. L.P. Misrha, learned Senior Advocate has contended that in an International research published in International Journal of Humanities and Management Sciences after an elaborate studies and recommendations of United Nations Organization, The United Nations Educational, Scientific and Cultural Organization and other International Agencies have recommended the Mother Tongue to be the medium of instructions for the children at Primary Level. Mother tongue is the first language which a child speaks. The mother tongue is used at home and in the community. He has further contended that the celebration of International Mother Language Day proclaimed in 1999 by UNESCO and marked on 21 February each year, is one of the examples. Encouraging education in the mother tongue, alongside bilingual or multilingual education, is one of the principles set out by UNESCO.

29. It has again been contended by Dr. L.P. Misrha, learned Senior Advocate that it is also a right of a child to be taught in his/her mother tongue at least at primary level because it is a language that he/she knows well and can use to form sentences and expresses himself/ herself. Those children understanding the instruction in mother tongue are more likely to enter the school at proper age, appropriate times, attend school regularly and less likely to drop out as compared to those who receive instruction in a foreign language. Experiments proved that a lack of education in a first language was a reason for children dropping out, while children having access to instruction in their mother tongue were more likely to be enrolled and attending school. Classroom using first language of children as instruction language were more than three times less likely to drop out and five times less likely to repeat the year. Thus mother tongue is the best key to success in education and to achieve the goal of RTE Act. So it is advised that the mother tongue should be used as a medium of instruction for educational achievements and growth as well as for national development and reconstruction.

30. Mr. Ramesh Kumar Singh, Learned Additional Advocate General has supported the arguments advanced by Sri Upendra Nath Misra and Sri L.P. Mishra and submitted that the State Government is well within its right to prepare merit list at the district level for the special reasons that teaching in Basic Primary Schools has to be made in the local dialect and the persons belonging to that district alone are well versed in the local dialect.

31. We have heard learned Counsel for the parties and perused the material available on record including the affidavits exchanged between the parties.

32. Petitioners have challenged the the provisions of Clause (a) of sub-Rule

(1) of Rule 14 of the U.P. Basic Education (Teachers) Service Rules, 1981, by which applications were invited from the applicants/ candidates possessing prescribed training qualifications from the district wise only, on the ground that it violates Articles 14, 15, 16, and 21-A of the Constitution of India as also the aim and objects of The Right of Children to Free and Compulsory Education Act, 2009.

33. The object of the RTE Act, 2009 is that every Indian citizen should have the right to get education which is not inferior to another and also to provide primary education to the children in their own local language as well as to ensure that the persons who have been appointed for giving the education at the primary stage should be familiar with the atmosphere and local culture and understanding. The moot question before us to consider is whether the provisions of the scheme are in violation of Article 21-A of the Constitution of India and whether the State has failed to establish just and reasonable classification with intelligible differentia to achieve the objects enshrined.

34. The instant bunch of writ petitions have been filed before this Court to answer the following substantial questions:

"(1) Whether in view of the frame and purport of The Right of Children to Free and Compulsory Education Act, 2009, the engagement or appointment of Assistant Teachers (Primary) by preparing a merit list at District Level, not at State Level is against the provisions of Articles 14, 15, 16 and 21-A of the Constitution of India as stated by the petitioners?

(2) Whether in view of the frame and purport of The Right of Children to Free and Compulsory Education Act, 2009, the engagement of the Assistant Teachers (Primary) giving preference to the place of domicile or residence and/ or local area is permissible in law?"

35. The crux of the argument advanced by learned Counsel appearing for the petitioners is that the district wise process of selection adopted by the State did not provide equal opportunity to the candidates appearing in different districts though the competitive examination was same in all the districts. Since the vacancies available in each districts were not indicated, the petitioners were denied the opportunity of appearing at the competitive examination from a centre of a district where the number of the vacancies was large there being more and better chances of selection. Thus the petitioners were denied the opportunity of competing with the candidates of other centres. It has also been submitted that the candidates appearing in a district having large number of vacancies were declared selected though they had secured marks less than the candidates in other district where the vacancies were less by reason of which the candidates securing even more marks than the candidates in other district could not be selected. He, therefore, urged that the process and method of district-wise selection of candidates adopted by the Commission was violative of Articles 14 and 16 of the Constitution of India as it had resulted in selection of candidates of inferior quality in one district while the candidates of superior merit in the other district could not be selected. On the other hand, learned counsel appearing for the respondents supported the process of selection and submitted that the district

wise selection was adopted in order to enable the candidates from a particular district to be absorbed in the same district and the State Government recruiting the candidates to the post of Assistant Teachers for primary schools on district basis and they were completed the same and the person who was selected has already been appointed and serving as Assistant Teacher in the same district since long, therefore, they could not be disturbed. It has also been submitted that the composition of district and scheme of holding the examination on district basis was given in the advertisement and the candidates were free to choose the district from which they desired to appear in the recruitment examination and to choose the centre. It has also been stated that since the petitioners had appeared in the examination, but could not be selected and as such they cannot be permitted to challenge the process of selection now.

36. The primary schools in the State of U.P. run by the U.P. Basic Education Board (hereinafter referred to as the Board) in the State of U.P. for the last several years and there had been a shortage of teachers, as a result of which, the State Government was finding it difficult to fulfill its obligations as mandated by Article 45 of the Constitution of India to provide free and compulsory education for all children until they complete the age of 14 years. It appears that in the State of U.P., the State Government runs a training college in each district, where the persons are given training in teaching and on successful completion thereof are awarded Basic Teacher's Certificate (in short "BTC").

37. As per the Government Order No.3300/ 79-5-201604127/ 2013 dated 15.12.2016, the selection process for appointing 12,460 Assistant Teachers in primary schools run by the Parishad/ Board in the State of U.P. was initiated. In pursuance of the aforesaid Government Order dated 15.12.2016, the Secretary, U.P. Basic Shiksha Parishad/ Board issued Letter No.Ba.Sh.Pa./ 12836 - 12932/ 2016-17 dated 20.12.2016 declaring the Schedule as also the vacancies in the district across the State. The Board has also issued Guidelines on 28.12.2016.

38. In pursuance of the aforesaid letter dated 20.12.2016 of the Secretary, U.P. Basic Shiksha Parishad, Allahabad, advertisement inviting on-line applications against the notified vacancies of Assistant Teachers were published by the respective District Basic Education Officer(s).

39. Advertisement published by the District Basic Education Officer, Varanasi is reproduced below for ready reference:

"कार्यालय जिला बेसिक शिक्षा अधिकारी जनपद–वाराणसी

पत्रांकः 17604–05/2016–17 दिनांक 21 दिसम्बर, 2016

विज्ञप्ति

जनपद वाराणसी में उत्तर प्रदेश बेसिक शिक्षा परिषद द्वारा संचालित परिषदीय प्राथमिक विद्यालयों में शासनादेश संख्या 3300/79–5–2016–4127/2013 दिनांक 15 दिसम्बर 2016 के अनुक्रम में 12460 सहायक अध्यापकों के रिक्त पदों के सापेक्ष शासनादेश निर्गत होने की तिथि दिनांक 15.12.2016 तक शैक्षिक/प्रशिक्षण द्विवर्षीय बी0टी0सी0/द्विवर्षीय उर्दू बी0टी0सी0/विशिष्ट बी0टी0सी प्रशिक्षण/डी0एड0 (विशेष शिक्षा)/चार वर्षीय बी0एल0एड0 उपाधिधारी तथा उत्तर प्रदेश राज्य अथवा केन्द्र सरकार द्वारा आयोजित कक्षा 1 से 5 हेतु अध्यापक पात्रता परीक्षा सफलतापूर्वक उत्तीर्ण कर चुके अभ्यर्थियों से कुल 36 रिक्त पदों पर नियुक्ति हेतु ऑनलाइन ई–आवेदन पत्र आमन्त्रित

किये जाते है। विज्ञापित पदों के प्रति रिक्तियों की संख्या बढ़–घट सकती है। ऑनलाइन ई–आवेदन पत्र का प्रारूप, आवश्यक दिशा निर्देश एवं जनपदवाद रिक्तियों का विवरण वेबसाईट h ttp://upbasiceduparishad.gov.in पर दिनांक 28.12.2016 अपरान्ह से दिनांक 09.01.2017 सायं 5 बजे तक उपलब्ध रहेगा। तदोपरान्त अभ्यर्थी 17. 01.2017 से 19.01.2017 सायं 5 बजे तक भरे गये ऑनलाइन आवेदन पत्र में त्रुटि सुधार कर सकेगें। परिषदीय प्राथमिक विद्यालयों में सहायक अध्यापक के पदों पर चयन/नियुक्ति अध्यापक सेवा नियमावली–1981 (अद्यतन यथा संशोधित) के अनुसार की जायेगी। परिषदीय प्राथमिक विद्यालयों में सहायक अध्यापक पद पर इच्छुक अर्ह अभ्यर्थियों द्वारा सर्व प्रथम निर्दिष्ट वेबसाइट पर निर्धारित प्रकियानुसार रजिस्ट्रेशन कर वांछित प्रविष्टियों को पूर्ण करना होगा। रजिस्ट्रेशन के उपरान्त ई–चालान से किसी भी जनपद के किसी भी भरतीय स्टेट बैंक की शाखा में सचिव, उ0प्र0 बेसिक शिक्षा परिषद के पद नाम पर निर्धारित शुल्क जमा कर ई–चालान आई–डी/जर्नल (Journal) नम्बर प्राप्त करना होगा। इसके अतिरिक्त अभ्यर्थी सभी बैंको के ATM Cum Debit Cards/Cradits Cards तथा SBI Internet Banking द्वारा भी आवेदन शुल्क का भुगतान कर सकते है। तदोपरानत अभ्यर्थी द्वारा पुनः निर्दिष्ट वेबसाइट पर ई–चालान आई–डी/जर्नल (Journal) नम्बर भरते हुए ऑनलाइन आवेदन पत्र का प्रिन्ट लेना अनिवार्य होगा। अभ्यर्थी द्वारा काउन्सिलिंग के समय रजिस्ट्रेशन ई–चालान रसीद, तथा आवेदन पत्र का प्रिन्ट आउट प्रस्तुत करना आवश्यक होगा।

(जयकरन यादव)
जिला बेसिक शिक्षा अधिकारी
वाराणसी"

40. Before us, the grounds of challenge is two-fold, firstly, whether the preparation of merit list district-wise is arbitrary and violative of Articles 14, 15, 16 and 21 of the Constitution of India and also contrary to the provisions of 1981 Rules. Secondly, whether causing discrimination on the basis of domicile or place of residence in the selection process is violative of Articles 14 and 16 of the Constitution of India.

41. Before us, it was argued by the State as well as by the private respondents that the petitioners, who have participated and remained unsuccessful cannot challenge the impugned advertisement and the selection process by filing the present bunch of writ petitions, the Government has taken a policy decision of recruitment and appointment of such persons, who possessed the qualifications as mentioned in the advertisement, which cannot be open to challenge being the policy decision, the successful candidates have not been impleaded and the writ petitions are liable to be thrown away on this ground alone and lastly that the State Government has also taken policy decision by issuing the Government order dated 15.12.2016 and the advertisement is in discharge of the State obligation under Article 45 the Constitution and cannot be challenged.

42. The petitioners are aggrieved by the Government order dated 15.12.2016 issued by the State Government by which the merit list was to be prepared at the district level. It is an admitted fact that the petitioners have appeared in the examination knowing the guidelines/ conditions as mentioned in the Government Order and the advertisement and after being unsuccessful, they approached this Court challenging the same.

43. Before analysis of legal issues involved, it is necessary to first address the preliminary issue. The maintainability of the very challenge by the respondents has been questioned on the ground that petitioners having partaken in the selection

process cannot later challenge it due to mere failure in the selection. It is well settled that the principle of estoppel prevents a candidates from challenging the selection process after having failed in it as reiterated by the Hon'ble Supreme Court in plethora of judgments.

44. Hon'ble Supreme Court in the case of ***Union of India and others. v. N. Chandra Shekharan and others. 1998 (3) SCC 594***, has held as under:

"It is not in dispute that all the candidates were made aware of the procedure for promotion before they sat for the written test and before they appeared before the Departmental Promotion Committee. Therefore, they cannot turn around and contend later when they found they were not selected by challenging that procedure and contending that the marks prescribed for interview and confidential reports are disproportionately high and that the authorities cannot fix a minimum to be secured either at interview or in the assessment or confidential report."

45. In the case of ***Inder Sen Mittal v. Housing Board, Haryana and others; 2002 (3) SCC 175***, the Hon'ble Supreme Court has also held as follows :

"In case the ground of attack flows from agreement between the parties which would undoubtedly be a lawful agreement, and the same is raised at the initial stage, the Court may set it right at the initial stage or even subsequently in case the party objecting has not participated in the proceedings or participated under protest. But if a party acquiesced to the invalidity by his conduct by participating in the proceedings and taking a chance therein cannot be allowed to turn round after the award goes against him and is estopped from challenging validity or otherwise of reference, arbitration proceedings and/or award inasmuch as right of such a party to take objection is defeated.

Where ground is based upon breach of mandatory provision of law, a party cannot be estopped from raising the same in his objection to the award even after he participated in the arbitration proceedings in view of the well-settled maxim that there is no estoppel against statute.

If, however, basis for ground of attack is violation of such a provision of law which is not mandatory but directory and raised at the initial stage, the illegality, in appropriate case, may be set right, but in such an eventuality if a party participated in the proceedings without any protest, he would be precluded from raising the point in the objection after making of the award."

46. In the case of ***Manish Kumar Sahi v. State of Bihar and others; (2010) 12 SCC 576***, in para 16, Hon'ble Supreme Court has held as under:

"16. *We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared*

by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in Madan Lal v. State of J&K [(1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603] , Marripati Nagaraja v. Govt. of A.P. [(2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68] , Dhananjay Malik v. State of Uttaranchal [(2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005] , Amlan Jyoti Borooah v. State of Assam [(2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] and K.A. Nagamani v. Indian Airlines [(2009) 5 SCC 515 : (2009) 2 SCC (L&S) 57] ."

47. In the instant case, it is clear that petitioners have impugned the legislation/ Scheme of the Government in question after having participated in the recruitment process. In ***D. Sarojakumari v. K. Helen Thilakom and others;*** (2017) 9 SCC 478, Hon'ble Supreme Court has held as under:

*"**4.** The main ground urged on behalf of the appellant is that Respondent 1 having taken part in the selection process could not be permitted to challenge the same after she was unsuccessful in getting selected. The law is well settled that once a person takes part in the process of selection and is not found fit for appointment, the said person is estopped from challenging the process of selection.*

***5.** In G. Sarana v. University of Lucknow [G. Sarana v. University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] , the petitioner after appearing in the interview for the post of Professor and having not been selected pleaded that the experts were biased. This Court did not permit the petitioner to raise this issue and held as follows: (SCC p. 591, para 15)*

"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee."

***6.** In Madan Lal v. State of J&K [Madan Lal v. State of J&K, (1995) 3 SCC 486 : 1995 SCC (L&S) 712] , the petitioner laid challenge to the manner and method of conducting viva voce test after they had appeared in the same and were unsuccessful. This Court held as follows: (SCC p. 493, para 9)*

"9. ... Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted."

48. In the latest judgment rendered in the case of ***Dr. (Major) Meeta Sahi Vs. State of Bihar and others; 2019 SCC***

Online SC 1632, Hon'ble Supreme Court has held as under:

*"**19.** However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process."*

49. However, this exception does not apply in the present case because no illegality or discrimination has been established by the petitioning candidates.

50. The cadre of Assistant Teachers in primary schools run by the Board, as mentioned in 1981 Rules, is a local cadre. The training in District Institute of Educational Training is a district-based training of teachers education at district level. It is to feed and provide teachers duly trained for primary education in its localities. The very purpose of District Institute is to establish an institute at District level so that sufficient number of local teachers are available to provide primary education in the vicinity. The very purpose is to localise the primary education and the area is also localised. After training, in case any candidate applies for appointment in any junior basic school, the application is to be moved to the District Basic Education Officer of the district and the selection committee is also comprised of the District Level education officers. The very purpose of the present special training is to have primary teachers of the District available to teach in primary schools in far remote areas of the district. Moreover, all the educational experts are uniformly of the opinion that pupils should begin their schooling through the medium of their mother tongue and there is a great reason of thinking behind this. Where the tender minds of the children are subjected to an alien medium, the learning process becomes unnatural and inflicts a cruel strain on the children, which makes the entire transaction mechanical. Besides, the educational process becomes artificial and torturous. The basic knowledge can easily be garnered through the mother tongue. It should be the endeavour of every State to promote the regional language of that State and that is why the Government Order provided for a district level selection of the candidates for being given training in special B.T.C. In view of above facts and prevailing situations, the State Government's decision to make selection on the basis of merit list prepared at the district level is justified.

51. In the instant case, the petitioners have challenged the *vires* of Rule 14(1)(a) of 1981 Rules and the guidelines issued on 26.12.2016 after having participated in the recruitment process. It is settled law that petitioners having taken part in the selection process and being found lower in merit to the selected candidates could not at this stage be permitted to turn around and that once a person takes part in the process of selection and is not found fit for appointment, the said person is estopped from challenging the process of selection. Therefore, having failed to challenge the legislation prior to taking part in the

selection process, the present petition must fail.

52. In the instant case, an issue was also raised that whether the petitioners were placed in a disadvantageous position, as compared to other candidates, simply because the qualifying/ cut-off marks may be different in different districts of the State.

53. In fact, in ***Balbir Kaur v. U.P. Secondary Education Services Selection Board, (2008) 12 SCC 1***, the Hon'ble Supreme Court held that:

"there is no warrant for accepting as a general proposition that a region wise or district wise selection is per se violative of equality clause enshrined in Articles 14 and 16 of the Constitution. It would be discriminatory only when the person, who alleges discrimination, demonstrates certain appreciable disadvantages, qua similarly situated persons, which he would not have faced but for the impugned State action. Therefore, the onus was on the writ petitioners to show by cogent material that by resorting to region wise selection, they were placed in some disadvantageous position as compared to their counterparts or that in this process merit was the casualty."

54. In the present case, it is understood that the petitioners have failed to discharge this onus since the region/ district wise selection process is open to all candidates. Therefore, it cannot be said that the petitioners were placed in a disadvantageous position, as compared to other candidates, simply because the qualifying/cut-off marks may be different in different districts of the State.

55. Now we have to examine that whether the Scheme of the Government for selection of the Assistant Teachers in the State on merit list prepared at District Level and not at State Level is violative of Articles 14, 15, 16 and 21-A of the Constitution of India.

56. To adjudicate the issue, it is necessary to examine the entire scheme floated by the Government of U.P.

57. The Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 was framed in exercise of the powers conferred under sub-section (1) of Section 19 of the Uttar Pradesh Basic Education Act, 1972. The relevant provisions of the said 1981 Rules are given below:

"2. Definitions - (1) In these rules unless the context otherwise requires:

(a) ...

(b) ...

(c) ...

(d) 'Board' means the Uttar Pradesh Board of Basic Education constituted under Section 3 of the Act;

(e) ...

(f) 'District Basic Education Officer and 'Additional District Basic Education Officer (Women)' means the officer appointed by the State Government as such for a particular district;

(2) The strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre shall be such as may be determined by the Board from time to time with the previous approval of the State Government:

Provided that the appointing authority may leave unfilled or the Board may hold in abeyance any post or class of

posts without thereby entitling any person to compensation:

Provided further that the Board may, with the previous approval of the State Government, create from time to time such number of temporary posts as it may deem fit.

14. Determination of vacancies and preparation of list.-(1) In respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under clause (a) of Rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes; Other Backward Classes and other categories under Rule 9 and notify the vacancies in at least two leading news papers having adequate circulation in the State as well as in the concerned district inviting application from candidates possessing prescribed training qualification from the district concerned and who have passed Teacher eligibility test, conducted by Government of Uttar Pradesh.

(2) The appointing authority shall scrutinize the applications received in pursuance of the advertisement and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment. (3) The names of candidates in the list prepared under sub-rule (2) shall then be arranged in such manner that their names shall be placed in descending order on the basis of the marks obtained in Teacher Eligibility Test conducted by the Government of Uttar Pradesh:

Provided that if two or more candidates obtain equal marks, the can didates senior in age shall be placed higher.

(4) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (2).

(5) The list prepared under sub-rule (2) and arranged in accordance with sub rule (3) shall be forwarded by the appointing authority to the Selection Committee.)

17. Procedure for direct recruitment to a post for teaching a langauge.-(1) The Selection Committee shall require the candidates mentioned in the lists referred to in sub-rule (6) of Rule 14 and sub-rule (2) of Rule 15, as the case may be, to appear at a written examination which shall be of one hundred marks.

(2) In the written examination under sub-rule (1). the candidates will be required to write an essay on a current topic in the language in respect of which the post is to be filled. A candidate who obtained less than fifty marks in the written examination shall be disqualified for appointment.

(3) The marks obtained by a candidate, who is not disqualified under sub-rule (2) in the written examination shall be added to his quality points awarded in accordance with the Appendix.

(4) The Selection Committee shall prepare a list of candidates, qualified in the written examination under Sub-rule (2) in such manner that the candidates who have passed the required training course carlier in point of time shall be placed higher than those who have passed the said training course later and the candidates who have passed the training course in a particular year shall be arranged in accordance with the aggregate of marks obtained by the said candidates in the written examination and quality points. If two or more such candidates obtain equal marks, the

candidate senior in age shall be placed higher in the list. The number of names in the list shall be larger (but not larger by more than twenty-five per cent) than the number of vacancies. The Selection Committee shall forward the list to the appointing authority.

(5) The list prepared under sub-rule (4) shall remain valid for one year from the date of its preparation.

'[17-A. Procedure for direct recruitment to a post for teaching sub-objects other than language.-(1) The Selection Committee shall consider the candidates for selection on the basis of the list referred to in sub-rule (6) of Rule 14 or sub-rule (2) of Rule 15, as the case may be, and prepare a list of selected candidates in the order in which their names appear in the said list. If two or more candidates have equal quality points, the name of the candidate who is senior in age shall be placed higher in the list. The Selection Committee shall forward the list to the appointing authority.

(2) The list prepared under sub-rule (1) shall remain valid for one year from the date of its preparation.

(3) Where the number of selected candidates is more than the number of vacancies and all the selected candidates do not get appointments under sub-rule (1) of Rule 19, the District Basic Education Officer shall forward the list of such selected candidates as have not been able to get appointment due to non-availability of vacancies, along with their applications and other particulars, to the Regional Assistant Director of Education (Basic), for the purposes of utilising the list in a district within his region where sufficient number of selected candidates are not available to fill the vacancies in such district.

(4) On receiving the list referred in sub-rule (3), the Regional Assistant Director of Education (Basic), shall forward the list along with the applications and other particulars of the selected candidates, to a District Basic Education Officer within his region, where sufficient number of candidates are not available to fill the vacancies. In so forwarding the list, the Regional Assistant Director of Education (Basic) shall take into account the options given by selected candidates in regard to his posting in districts.

(5) On receiving the list referred to in sub-rule (4), the District Basic Education Officer shall place the list along with applications and other particulars of the candidates, before the Selection Committee constituted under Rule 16.

(6) The Selection Committee shall consider the candidates mentioned in the list referred to in sub-rule (4) and prepare a list of selected candidates in accordance with sub-rule (1) and include their names at the bottom in the list prepared under sub-rule (1) and forward the entire list to the appointing authority.

(7) Where the list forwarded to the Regional Assistant Director of Education (Basic) under sub-rule (3) cannot be utilized in his region due lo non-availability of vacancies, the Regional Assistant Director of Education (Basic) shall forward the list to the Secretary of the Board who shall thereafter forward the list to a District Basic Education Officer in whose district sufficient number of candidates are not available to fill the vacancies. In so forwarding the list, the Secretary of the Board shall take into account the options given by selected candidates in regard to their postings in districts.

(8) On receiving the list referred to in sub-rule (7), the District Basic Education Officer shall place the list along with applications and other particulars of the candidates, before the Selection Committee constituted under Rule 16.

(9) The Selection Committee shall consider the candidates mentioned in the list referred to in sub-rule (7), and prepare a list of selected candidates in accordance with sub-rule (and include their names at the bottom in the list prepared under sub-rule (1) and forward the entire list to the appointing authority.]"

58. In exercise of the powers under sub-section (1) of Section 19 of the Uttar Pradesh Basic Education Act, 1972, the 1981 Rules was amended as The Uttar Pradesh Basic Education (Teachers) Service (Twenty Five Amendments) Rules, 2018. For ready reference, Rule 14 (1)(a) of 1981 Rules reproduced as under:

[14. Determination of vacancies and preparation of list - (1) *(a) in respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under clause (a) of Rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes and other categories under Rule 9 and in at least two newspapers having adequate circulation in the State as well as in the concerned district inviting applications from candidates possessing prescribed training qualification and Teacher Eligibility Test passed, conducted by the Government or by the Government of India and passed Assistant Teacher Recruitment Examination conducted by the Government.*

(b) The Government may from time to time decide to appoint the candidates, who are graduates along with B.Ed./ B.Ed. (Special Education)/ D.Ed. (Special Education) and who have also passed Teacher Eligibility Test conducted by the Government or by the Government of India, as Trainee Teachers. These candidates after appointment will have to undergo six months special training programme in elementary education recognised by National Council of Teacher Education (NCTE). The appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under Rule 9 and advertisement would be issued in at least two leading daily news papers having adequate circulation in the State as well as in concerned district inviting applications from candidates who are graduates along with B.Ed./B.Ed. (Special Education)/ D.Ed. (Special Education) and who have also passed Teacher Eligibility Test conducted by the Government or by the Government of India.

(c) The trainee teachers, after obtaining the certificate of successful completion of six months special training in elementary education, shall be appointed as assistant teachers in junior basic schools against substantive post in regular pay-scale. The appointing authority will be duty bound to appoint the trainee teachers as assistant teachers within one month of issue of certificate of successful completion of said training.

(2) *The appointing authority shall scrutinise the applications received in pursuance of the advertisement under*

clause (a) or clause (b) of sub-rule (1) of Rule 14 and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment.

(3)(*a). The names of candidates in the list prepared under sub-rule (2) in accordance with clause (h) of sub-rule (1) of Rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points and weightage as specified in the Appendix I:*

Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher:

(b) The names of candidates in the list prepared under sub-rule (2) in accordance with clause (c) of sub-rule (1) of Rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the Appendix II:

Provided that if two or more candidates obtain equal marks, the candidate senior in age. shall be placed higher.

(c) The names of candidates in the list prepared in accordance with clause (d) of sub-rule (1) of Rule 14 for appointment as assistant teacher shall be same as the list prepared under clause (b) of sub-rule (3) of Rule 14 unless the candidate under the said list is unable to successfully complete the six months special training course in elementary education in his first attempt. If the candidate successfully completes the six months special training in his second and final attempt, the candidate's name shall be placed under the names of all those candidates who have completed the said six months special training in their first attempt.

(4) *No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (2).*

(5) *The list prepared under sub-rule (2) and arranged in accordance with clauses (a) and (b) of sub-rule (3) of Rule 14 shall be forwarded by the appointing authority to the Selection Committee.]"*

59. From perusal of entire Scheme, it is apparent that the Scheme is to be implemented by taking care of the basic units of local areas with a view to teach the children in their mother tongue for developing their personalities and confidence. The Scheme is having a very wide amplitude with an aim and object to create an interest of education in the children below 14 years of age and to achieve the goal of education in the State of U.P. as per the Right to Education Act at foundation level. It is also found necessary in the Scheme that such an ambitious project to educate all the children even in most backward areas of the State of U.P., for implementation of such scheme, it is necessary that the children of such local areas should be taught in their own dialect and preferably by their own people. The Scheme requires knowledge of the area concerned from various aspects including its social, economical, local, cultural and specific regional dialect.

60. The same issue was already adjudicated by a Full Bench of Rajasthan High Court in the case of ***Rajkumar and others vs. Stae of Rajasthan and others; AIR 2016 Rajasthan 176***. Paras 26 to 32 reads as under:

*"**26.** In Chiranji Lal v. Union of India (AIR 1951 SC 41), Hon'ble Supreme*

Court held that mere differentiation or inequality of treatment does not per se amount to discrimination with the inhabitation of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the Legislature has in view. In the same case it was observed that the Court should not adopt a doctrinaire approach which might choke all beneficial legislation.

27. *The U.S. Supreme Court in Arkansas Gas Co. v. Railroad Commission (261 US 379, while discussing the concept of equality, held that mere production of inequality is not enough to hold that equal protection has been denied. For, every selection of person for regulation produces inequality in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually and palpably unreasonable and arbitrary". The governance is not a simple thing. It encounters and deals with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and, in making it a wide latitude of discretion and judgment must be given.*

28. *As already discussed, the object of the NRHM is to provide accessible, affordable and accountable quality health service to the poorest households in the remotest rural regions. To achieve this object the thrust of the mission is on establishing a fully functional community owned, decentralised health delivery system with inter sectoral conversance at all levels to ensure simultaneous action on a wide range of determinants of health like water, sanitation, education, nutrition, social and general quality. The scheme is having multi tasks and for that purpose local team headed by health and sanitation committee at panchayat level are to be formed. The scheme in so many words emphasise aid and assistance of local residents in its implementation and further to have their service as experts and resource persons. The scheme demands uninterrupted availability of the staff responsible to execute different programmes. It also requires setting up of planning teams and committees by local residents on habitation/village, gram panchayat, primary health centre and cluster level basis. Further pertinent to notice that the engagement of the staff in NRHM from locals is neither a concession nor a reservation, but a tactics for effective implementation of the scheme. The locals are certainly in better position to identify the specific health issues of the area concern with more effective persuasive value to bring the inhabitants of area within the fold of NRHM. The needs noticed indicate that engagement of para-medical staff by examining merit at district level is in accordance with the frame and purport of the National Rural Health Mission. It is a just and reasonable classification with intelligible differentia to achieve the objects enshrined. Accordingly, the first question referred to us is answered by holding that engagement of para medical staff with preparation of merit at District level does not violate Article 14 of the Constitution of India.*

29. *The second question is that whether while engaging para-medical staff in National Rural Health Mission, any reference the place of residence and or local criteria is permissible in law or not?*

30. *We are of the view that in light of the complete scheme of NRHM as discussed, the assistance and support of*

the locals in its implementation is essential and, therefore, for the purpose of engagement of staff, if preference is given on basis of the place of residence and/or local criteria among the equals, then that is not irrational or in violation of Article 14 of the Constitution of India. The engagement of staff under National Rural Health Mission at district level and by providing preference to the locals, equals have not been treated differently without any justifiable reasons. As such there is no violation of Articles 14 and 16 of the Constitution of India. The second question referred is also answered accordingly.

31. *The judgments given by learned single Bench in Dema Ram (supra) (SB Civil Writ Petition No.1120/2008), Manoj Kumar Sharma (Supra) (SB Civil Writ Petition No.4298/ 2008), Santh Lal Yadav (Supra) (SB Civil Writ Petition No.741/2008) and Division Bench in Dinesh Kumar (Supra) (DB Civil Special Appeal No.615/2008) do not lay down correct law.*

32. *Let the writ petitions SB Civil Writ Petition Nos.6207/ 2009, 6632/2009, 6770/2009, 6943/2009, 6978/ 2009, 9163 /2010 and 7995/2011 be listed before single Bench and DB Civil Special Appeals (Writ) No.113/2013, 114/2013 and 115/2013 be listed before Division Bench for their disposal on merits by keeping in mind the answers to the questions referred to the Larger Bench."*

61. In the case of ***Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others, (1991) 1 SCC 212***, Hon'ble Apex Court has held that *"the question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness" and that: "it is for the person alleging arbitrariness who has to prove it. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repel the attack by disclosing the material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable.*

62. Being a big State like Uttar Pradesh, several local dialects are in use in different zones and areas of the State. There are some important dialects which are spoken in the State of U.P. in different zones/ districts or local areas like *Awadhi, Braj, Bundeli, Bagheli, Kannauji, Khadi Boli and Bhojpuri.*

63. We have also considered the reasons behind the impugned legislation and Scheme. A number of educational experts are uniformly of the opinion that children should begin their schooling through the medium of their mother tongue. There is great reason and justice behind this. Where the tender minds of children are subjected to an alien medium, the learning process becomes artificial. It inflicts a cruel strain on the children which makes the entire transaction mechanical. The basic knowledge can easily be garnered through the mother tongue. It is a well settled law that Article 14 of the Constitution forbids class legislation but it does not forbids reasonable classification. The applications for appointment of Assistant Teachers in basic schools run

and managed by the U.P. Basic Shiksha Parishad, Allahabad are invited at the district level because there exists separate cadre of service of teachers under the 1981 Rules for each local area. The term *local area* as defined in Rule 2(i) means the area over which a local body exercises jurisdiction.

64. In view of the aforesaid discussions, we are of the view that the 1981 Rules contains a provision that a candidate who has obtained training from a district will be given preference in selection and appointment on the post of Assistant Teacher in the district concerned. The said provision has got a purpose and object i.e. the children are taught by a person who is very well familiar with the local habitat and also speaks local dialect. Further the first preference for appointment is given to the candidates who have undergone the training qualification from the district concerned because such candidates are already acquainted with the demographic conditions, local dialect and traditions from where the children who are to be taught come from. The knowledge and understanding of local dialect is essential for a teacher in the rural areas for a better classroom transaction with small children and their parents. The preference in appointment of a candidate who completed his training from a particular district is justified for the reason that if a candidate who has completed his training from Mathura where *Braj Bhasha* is spoken, is appointed in Gorakhpur where *Bhojpuri* is spoken will face difficulty in communicating the small children of that area and also their parents and due to lack of communication between the teacher and the child including parents, the quality of education will certainly be affected and, therefore, the provisions of preference is not at all violative of Article 14 and 16 of the Constitution of India.

65. In the present case, the State has shown that the purpose of a region/ district wise recruitment is to ensure that the teachers in local primary schools are attuned to the local requirements, which, needless to say, differs from district to district and region to region in a vast state like Uttar Pradesh. Moreover, to reiterate, the petitioners cannot contest that any discrimination has been meted out to them, since the region/ district wise selection process was open to all candidates. Therefore, the State has discharged its burden by demonstrating that there were cogent reasons for prescribing region/ district wise recruitment, which is open to all candidates, and that no discrimination/ arbitrariness resulted from prescribing such a process.

66. In view of the discussions made above, the preparation of merit list at District Level is not against the provisions of Articles 14, 15, 16 and 21-A of the Constitution of India and the engagement of the Assistant Teachers (Primary) on the basis of domicile or place of residence in the selection process is not violative of Articles 14 and 16 Constitution of India.

67. Accordingly, all the writ petitions being devoid of merit are hereby dismissed. No order as to costs.

(2020)1ILR 1568

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.11.2019

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 6325 of 2017

Ganga Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
M.K. Dixit

Counsel for the Respondents:
C.S.C., Anil Kumar Tiwari

A. Fair price shop-cancelled-considering statements-of card holders recorded behind the back-such copies not supplied-no opportunity of hearing to cross-examine witnesses-violation of natural justice-and of G.O dated 29.07.2004 - impugned order quashed.

B. Held, in view of the settled legal position, the cancellation of the petitioner's fair price shop agreement / license is ostensibly in contravention of the principles of natural justice and cannot be sustained. The Appellate Authority has also failed to rectify the error committed by the Sub-Divisional Magistrate and as such the order passed by the Appellate Authority is also liable to be set aside alongwith the order of the Competent Authority.

Writ Petition allowed. (E-8)

List of cases cited: -

1. Puran Singh v. State, (2010) 2 UPLBEC 947

2. Writ - C No. 3611 of 2014, Sanjay Kumar v. State

3. Laloo Singh v. State, (2015) 6 All LJ 613

4. Rajpal Singh v. State of U.P. and others, 2008 (26) LCD 891

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

1. Under challenge in this writ petition is an order dated 28.6.2016 passed by the Sub-Divisional Magistrate, Tehsil Rudauli, District Faizabad, respondent no. 3 herein, whereby the fair price shop license of the petitioner has been cancelled as well as the order dated 17.2.2017 passed by the Deputy Commissioner (Food), Faizabad Division, Faizabad, respondent no. 2 herein, whereby the appeal preferred by the petitioner against the said order has been rejected.

2. On the complaint made by M/s Raja Ram, Jhigai, Ganga Ram and others on 23.2.2016, the Regional Food Officer, Rudauli made a spot inspection and recorded the statements of card holders present and on the basis of the report submitted by him the respondent no. 2 by his order dated 27.2.2016 suspended the license / agreement of the petitioner. By the same order the petitioner was required to show cause within the time mentioned therein.

3. On 29.3.2016, the petitioner submitted his reply denying the charges levelled against him. Alongwith his reply the petitioner enclosed a letter of Gram Pradhan and 100 card holders to show that the charges leveled against him were unfounded. Thereafter, the respondent no.3, recorded the statement of some card holders behind the back of the petitioner and straightway proceeded to pass an order dated 28.6.2016 cancelling the license of the petitioner without holding any inquiry and without affording any opportunity of cross examination to the petitioner. The appeal preferred by the petitioner against the said order has been dismissed by the respondent no. 2 by his order dated 17.2.1017.

4. Heard Sri M.K. Dixit, learned counsel for the petitioner and the learned

Standing Counsel appearing on behalf of the State-respondents and perused the record. After hearing the counsel for the parties, this Court is of the considered opinion that the writ petition deserves to be allowed. There is substance in the submission of the learned counsel for the petitioner that the license of the petitioner has been cancelled without following the procedure laid down in the Government order dated 29.07.2004 as also in violation of the principles of natural justice.

5. The State Government has issued a Government order dated 29.07.2004, laying down the procedure for suspending/ cancelling the fair price shop license/agreement. As per clause 4 of the Government order dated 29.07.2004, before cancelling the fair price shop license, the Competent Authority is obliged to issue a show cause notice containing the charges levelled against the licensee. The Competent Authority is required to pass a speaking order after holding an oral inquiry in accordance with the principles of natural justice.

6. In *Puran Singh v. State, (2010) 2 UPLBEC 947*, a Full Bench of this Court has held that paragraph nos. 4 and 5 of the Government order dated 29.07.2004 contemplate a full fledged inquiry before the license/ agreement of a fair price shop is cancelled. The Full Bench has held that as per the Government order dated 29.07.2004 an opportunity of hearing is required before passing an order of cancellation.

7. In *Writ - C No. 3611 of 2014, Sanjay Kumar v. State, following Puran Singh (Supra)* a learned Single Judge of this Court has held as follows:

"The procedure for holding an inquiry for cancelling the licence of the fair price shop has been provided in the Government Order dated 29.07.2004 read with U.P. Essential Commodities Distribution Order 2004.

The aforesaid Government Order and Distribution Order came up for consideration before the Full Bench of this Court in case of Puran Singh Vs. State of U.P. and others 2010 (3) ADJ 659 (FB). The Court considering para 4 and 5 of the Government Order dated 29.07.2004 held that it contemplates a full-fledged inquiry pursuant to the show cause notice for cancellation and then a final decision in the matter.

The aforesaid decision was followed by the learned Single Judge in his judgement and order dated 28.11.2014 passed in Writ-C No. 12737 of 2013 and referring to paragraph 35 of the Full Bench decision in Puran Singh's case his Lordship observed that a full-fledged inquiry is necessary before cancelling the agreement and it would require service of the charges, along with material in support of each charge, the information about the place and date of inquiry, the statements of persons on whose complaint inquiry was started or in a case of suo-motu inquiry, the statements of the persons appearing before the Inquiry Officer.

In other words it means that *an independent inquiry before passing an order of cancellation of licence to run a fair price shop is mandatory and a show cause notice simplicitor is not sufficient to conform to the principles of natural justice.*

It is obligatory upon the authorities to hold a full-fledged inquiry against the fair price shop dealer, after serving of the charge sheet with regard to the date and place where the hearing will took place and to give an opportunity of hearing. This is in addition to the show

cause notice issued for the purposes of suspension of the licence of the fair price shop."
(emphasis supplied)

8. In *Laloo Singh v. State, (2015) 6 All LJ 613* this Court has held that the cancellation of an agreement/license of a party is a serious business and cannot be taken lightly. In order to justify the action taken to cancel such an agreement/license, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purposes including the principles of natural justice.

9. This Court in *Rajpal Singh v. State of U.P. and others, 2008 (26) LCD 891* has held that where fair price shop license of a dealer is cancelled by placing reliance on the report of the Supply Inspector and the copy of the report is not furnished to the dealer, such an order is in contravention of the principles of natural justice and is liable to be set aside.

10. In the present case, a perusal of the order dated 28.2.2016 would show that the license of the petitioner has been cancelled only on the basis of the statements of the card holders recorded behind the back of the petitioner and that too without supplying copies of the said statements to the petitioner and without affording an opportunity to the petitioner to cross examine the witnesses. A copy of the report submitted by the Area Food Officer has also not been supplied to the petitioner. Moreover, in his order, the respondent no. 3 has not at all discussed the grounds urged by the petitioner in his reply in support of his defence. Admittedly, the license of the petitioner has been cancelled without affording any opportunity of hearing to the petitioner and without holding any inquiry, whatsoever.

11. In view of the settled legal position, the cancellation of the petitioner's fair price shop agreement / license is ostensibly in contravention of the principles of natural justice and cannot be sustained. The Appellate Authority has also failed to rectify the error committed by the Sub-Divisional Magistrate and as such the order passed by the Appellate Authority is also liable to be set aside alongwith the order of the Competent Authority.

12. For the aforesaid reasons, the writ petition is allowed. The impugned order dated 28.06.2016 passed by the Sub-Divisional Magistrate, Tehsil Rudauli, District Faizabad and the order dated 17.02.2017 passed by the Additional Commissioner (Food), Faizabad Division, Faizabad are hereby quashed.

13. No order as to cost.

(2020)1ILR 1572

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2018

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 11311 of 2018

Jay Devi Dubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vishva Nath Pratap Singh

Counsel for the Respondents:
C.S.C., Aprajita Bansal

A. Election petition filed - challenging election on ground-some persons illegally elected in electoral roll-not maintainable-alternative remedy-Rule-10-objection-any entry in electoral roll-election petition rightly rejected.

B. Held, After exhaustively dealing with the provisions of the Act and the Rules pertaining to preparation and revision of electoral rolls mentioned above, a Division Bench of this Court in Mudi v. State Election Commission and others, AIR 2001 All 21 has opined that the election of a returned candidate cannot be challenged on the ground that the electoral roll was incorrectly prepared. Paras of the said report is being extracted below:

In view of the aforesaid provision, a challenge to the correctness of electoral roll cannot be permitted to be raised after the publication of the final electoral roll. If a person feels that name of a dead person or a person who is not eligible to be included in the electoral roll has been included in the electoral roll, his remedy lies in filing an application at the opportune time for correction of the entry. Similarly, if the name of someone has not been included in the electoral roll though he is eligible for the said purpose, he ought to make an application in that regard within the prescribed period. The decision of the Assistant Electoral Registration Officer in these matters is subject to an appeal and sub-rule (4) of Rule 21A attaches finality to the order passed in appeal. The provisions of the Act and the Rules thus provide a complete safeguard against any wrong inclusion or wrong omission of name in the electoral roll. After publication of the final roll, the same is immune from any challenge at a subsequent stage. Once the process of election has begun, they can neither be challenged by means of a writ petition under Article 226 of the Constitution nor in an election petition filed under Section 12C of the U. P. Panchayat Raj Act which gives the procedure for challenging the election of a person as pradhan.
Election Petition dismissed. (E-8)

List of cases cited: -

1. Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 691

2. Mudi v. State Election Commission and others, AIR 2001 All 21

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

1. Heard Shri Vishva Nath Singh, learned counsel for the petitioner, the learned Standing Counsel for the State-respondents and Ms. Aprajita Bansal, learned counsel appearing on behalf of respondent no. 2.

2. The order dated 11.08.2017 passed by the Prescribed Authority, dismissing the election petition filed by the petitioner as well as the order dated 10.10.2017 passed by District Judge, Ambedkar Nagar dismissing the revision preferred by the petitioner are under challenge in the present writ petition.

3. The petitioner contested the election for the office of Pradhan of Gram Panchayat, Mahmadpur Odarpur which was held in the year 2015. In the said election 1160 votes were cast out of which the petitioner secured 359 votes whereas the returned candidate Reena Dubey polled 372 votes. Reena Dubey was declared elected by 13 votes. The petitioner filed an election petition under Section 12-C of the U.P. Panchayat Raj Act, 1947 (for short "Act') challenging the election of Reena Dubey. The Prescribed Authority held that improper inclusion or exclusion of voters in the electoral roll could not be a ground for challenging the election. Consequently, the election

petition was dismissed as not maintainable. The revision preferred by the petitioner against the said order has been dismissed by the District Judge at the admission stage. Both these orders are under challenge in the present petition.

4. The learned counsel for the petitioner has submitted that the name of 22 persons who were minors was wrongly included in the electoral roll. The counsel submits that section 12-C of the Act does not prohibit the Prescribed Authority from entertaining any question regarding the validity of the electoral roll. His submission is that the electoral roll is prepared under Section 9 of the Act and proper procedure for preparing the electoral roll was not followed which attracts Section 12-C of the Act.

5. It is no more res integra that the right to contest in an election is a statutory right and the election of an elected candidate can be declared null and void only on the grounds provided in the statutory enactment. In *Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 691*, the Apex Court has opined as under:

"8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a strait-jacket." (emphasis supplied)

6. The grounds on which the election to the office of Pradhan could be challenged under Section 12-C of the Act have been enumerated in Section 12-C(1). Section 12-C(1) reads as under:

"12-C. Application for questioning the elections.--(1) The election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that--

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or

(b) that the result of the election has been materially affected--

(i) by the improper acceptance or rejection of any nomination; or

(ii) by gross failure to comply with the provisions of this Act or the rules framed thereunder."

7. In the present case, the election of respondent no. 7 has not been disputed on

the ground of corrupt practice or undue influence. The grievance of the petitioner is that gross illegality was committed in preparing the electoral roll as 22 minors have been included as voters although they were not eligible. The petitioner's submission may be correct or incorrect but the difficulty before the Prescribed Authority was that he was bound by the statutory provisions. Inclusion of ineligible voters in the electoral roll is not a ground on which the election of respondent no. 7 could be challenged.

8. Section 9 of the Act envisages an electoral roll for each territorial constituency and Section 9-A deals with the right to vote. Section 9 (relevant portion) and Section 9-A which have a bearing on the controversy at hand are being extracted below:

"**9. Electoral roll for each territorial constituency.-**(1) For each territorial constituency of a gram panchayat, an electoral roll shall be prepared, in accordance with the provisions of this Act and the Rules made thereunder, under the superintendence, direction and control of the State Election Commission.

(1A) Subject to the superintendence, direction and control of the State Election Commission, the Mukhya Nirvachan Adhikari (Panchayat) shall supervise, and perform all functions relating to the preparation, revision and correction of the electoral rolls in the State in accordance with this Act and the Rules made thereunder.

(1B)

.....

(2) The electoral roll referred to in sub-section (1) shall be published in the prescribed manner and upon its publication it shall, subject to any alteration. addition or modification made in accordance with this Act and the Rules made thereunder, be the electoral roll for that territorial constituency prepared in accordance with the provisions of this Act.

(3) Subject to the provisions of sub-sections (4), (5), (6) and (7) every person who has attained the age of 18 years on the first day of January of the year in which the electoral roll is prepared or revised and who is ordinarily resident in the territorial constituency of a gram panchayat shall be entitled to be registered in the electoral roll for that territorial constituency.

Explanation to sub-section 3 and sub-sections 4 to 7 omitted

(8) Where the State Election Commission is satisfied after making such enquiry as it may deem fit, whether on an application made to it or on its own motion that any entry in the electoral roll should be corrected or deleted or that the name of any person entitled to be registered should be added in the electoral roll, it shall, subject to the provisions of this Act and Rules and orders made thereunder, correct, delete or add the entry, as the case may be:

Provided that no such correction, deletion or addition shall be made after the last date for making nominations for an election in the gram panchayat and before the completion of that election:

Provided further that no deletion or correction of any entry in respect of any person affecting his interest adversely shall be made without giving him reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him.

(9) The State Election Commission may, if it thinks it necessary so to do for the purposes of a general or bye-election, direct a special revision of

the electoral roll for any territorial constituency of a gram panchayat in such manner as it may think fit :

Provided that subject to the other provisions of this Act, the electoral roll for the territorial constituency, as in force at the time of issue of any such direction, shall continue to be in force until the completion of the special revision so directed."

Sub-sections 10 to 12 omitted.

9-A Right to vote etc.- Except as otherwise provided by or under this Act, every person whose name is for the time being included in the electoral roll for a territorial constituency of a Gram Panchayat shall be entitled to vote at any election and be eligible for election, nomination or appointment to any office in that gram panchayat or the concerned Nyaya Panchayat.

Proviso omitted.

9. In exercise of the power conferred by sub-section (2) of Section 9 and Section 110 of the Act, the State Government has made the U. P. Panchayat Raj (Registration of Electors) Rules, 1994 (for short "Rules'). The Rules lays down the procedure for preparation and revision of electoral rolls. Rule 9 enables any person whose name is not included or whose name has been wrongly included in the electoral roll of some other territorial constituency of the gram panchayat or whose name is struck off the rolls by reason of any disqualification, to apply to the Assistant Electoral Registration Officer for inclusion of his name in the roll. Rule 10 permits objection to be made against any entry in the electoral roll either at the instance of the person concerned or at the instance of a third person. Rule 16 provides that an Assistant Electoral Registration Officer shall hold a summary enquiry into every application in respect of which notice has been given under Rule 15 and shall record a decision thereon. At the hearing the person to whom such notice was issued, shall be entitled to be present and to be heard. The Assistant Electoral Registration Officer may, in his discretion require any person to whom such notice has been issued to be present and may also require that the evidence tendered by any person shall be given on oath and may administer oath for the purpose. Rule 18 casts a duty on the Assistant Electoral Registration Officer to take remedial action if the name of a dead person or of persons who cease to be, or are not, ordinarily resident in the area of the territorial constituency, have been included in the roll. He is also required to prepare a list of the names and other details of such persons and exhibit a notice on the notice board in his office with a copy of the list along with the notice as to the time and place at which the question of deletion of such names from the roll shall be considered and further after considering. Furthermore, any verbal or written objections that may be preferred, he is required to decide whether all or any of the names be deleted from the rolls. Rule 19 deals with final publication of the roll and sub-rules (1) and (2) are being reproduced below :

"**19. Final publication of roll.**-- (1) The Electoral Registration Officer shall thereafter publish the roll together with the list of amendments under Rules 15, 16. 17 and 18, by making a complete copy thereof available for inspection and displaying a notice in Form 7 at his office.

(2) On such publication the roll together with the list of amendments shall be electoral roll for the territorial constituency.

(3) ..…."

10. Rule 21A provides for appeal and sub-rule (1) thereof lays down that an appeal shall lie from any decision of the Assistant Electoral Registration Officer under Rules 16, 18 or 21 to the District Magistrate.

11. Thus, it is apparent that a detailed and elaborate procedure has been provided for preparing the electoral roll and it has been further provided that no correction alteration or deletion can we made in the roll after the last date of filing nomination.

12. After exhaustively dealing with the provisions of the Act and the Rules pertaining to preparation and revision of electoral rolls mentioned above, a Division Bench of this Court in *Mudi v. State Election Commission and others, AIR 2001 All 21* has opined that the election of a returned candidate cannot be challenged on the ground that the electoral roll was incorrectly prepared. Paragraph 8 and 9 of the said report is being extracted below:

"8. *In view of the aforesaid provision, a challenge to the correctness of electoral roll cannot be permitted to be raised after the publication of the final electoral roll.* If a person feels that name of a dead person or a person who is not eligible to be included in the electoral roll has been included in the electoral roll, his remedy lies in filing an application at the opportune time for correction of the entry. *Similarly, if the name of someone has not been included in the electoral roll though he is eligible for the said purpose, he ought to make an application in that regard within the prescribed period.* The decision of the Assistant Electoral Registration Officer in these matters is subject to an appeal and sub-rule (4) of Rule 21A attaches finality to the order passed in appeal. *The provisions of the Act and the Rules thus provide a complete safeguard against any wrong inclusion or wrong omission of name in the electoral roll. After publication of the final roll, the same is immune from any challenge at a subsequent stage. Once the process of election has begun, they can neither be challenged by means of a writ petition under Article 226 of the Constitution nor in an election petition filed under Section 12C of the U. P. Panchayat Raj Act which gives the procedure for challenging the election of a person as pradhan.*

9. Ours is the biggest democracy and the second most populous country in the world and, consequently, the electoral rolls are also big containing large number of names. The authorities entrusted with the duty of preparation of electoral roll can possibly have no personal knowledge about the correctness of every entry. If the people of the area do not take appropriate steps for deletion of the name of a dead person or the name of a person who is not qualified to be entered in the electoral roll of a panchayat, the same may continue to find place till the time of the election and voting. It is practically impossible to have an absolutely accurate electoral roll. The State machinery has to spend considerable time and energy in holding an election and it also involves huge public expenditure. If the ground of error or mistake in the electoral roll is entertained, every election will be under a peril of being set aside although the authorities have conducted the election in a most fair and impartial manner following the Rules and the candidates have also conducted themselves fairly without committing even the slightest breach of the law. This will lead to great uncertainly and will not be

conducive to the growth of a healthy and vibrant democracy. *Therefore, after the notification for election has been issued, no writ petition should be entertained challenging the correctness of the electoral roll. The election of the returned candidate can also not be challenged on the said ground either by filing a writ petition or by means of an election petition as provided in the statute.* However, if some gross procedural error has been committed in the preparation of the electoral roll, like not publishing the draft electoral roll or not giving opportunity for making an application for either deletion or addition of names, the action of the authorities in such cases will not be immune from challenge under Article 226 of the Constitution provided the same is made promptly and before the notification for holding the election is issued." (emphasis supplied)

13. In view of the settled legal position, the election petition filed by the petitioner challenging the election of respondent no. 7 to the office of Pradhan, on the ground that some persons were illegally included in the electoral roll was not maintainable and has rightly been dismissed by the Prescribed Authority. For the same reason, the revision preferred by the petitioner against the said order has been dismissed by the District Judge at the admission stage. No case for interference with the impugned orders is made out.

14. The writ petition is absolutely misconceived and is accordingly dismissed at the admission stage.

15. Costs made easy.

(2020)1ILR 1577

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2019

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 21408 of 2018

Rama Shankar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ram Kumar Srivastava

Counsel for the Respondents:
C.S.C., Kaushal Mani Tripathi

A. Fair Price shop-license cancelled-on the basis of-statements & affidavits filed by card holders submitted behind the back-such affidavits were not provided-no opportunity to cross examine such card holders-copy of report of area supply inspector also not provided-grounds urged in defence has not been dealt in impugned order-order quashed.

Writ Petition allowed. (E-8)

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

1. The petitioner was a fair price shop licensee. The Sub-Divisional Magistrate, Sadar, Gonda - respondent no.3 herein, by his order dated 11.04.2018, has cancelled the license of the petitioner. The appeal preferred by the petitioner against the said order has been dismissed by the Additional Commissioner (Admin), Devi Patan Mandal, Gonda - respondent no.2, by his order dated 13.07.2018. Both the said orders are under challenge in this writ petition.

2. On the complaint made by one Manoj Kumar regarding the alleged

irregularities being committed by the petitioner in the distribution of the essential commodities, the Area Supply Inspector allegedly made a spot inspection, recorded the statement of 28 card holders / their family members present on the spot and submitted his report to the respondent no. 3 on 06.02.2018. On the basis of the said report, license of the petitioner was suspended by the respondent no. 3. By the same order the petitioner was required to submit his reply to the charges levelled against him within the time mentioned in the said order. A perusal of the suspension order cum show cause notice would show that it only contained the gist of statements alleged to have been made by 28 card holders.

3. On 14.03.2018 the petitioner submitted his reply to the show cause notice and denied the charges levelled against him. Alongwith his explanation, the petitioner submitted the affidavits of 18 card holders to show that the charges leveled against the him were unfounded. After receiving the petitioner's reply, respondent no. 3 accepted the affidavits filed by 14 card holders behind the back of the petitioner. Thereafter, the respondent no.3, by his order dated 11.04.2018, cancelled the fair price shop license of the petitioner holding that the allegations made against the petitioner were proved. The order dated 11.04.2018 was passed without furnishing to the petitioner the copies of the affidavits filed by the witnesses and without affording any opportunity to the petitioner to cross examine them. The appeal preferred by the petitioner against the said order has been dismissed by the respondent no. 2 by his order dated 13.07.2018.

4. Sri Ram Kumar Srivastava, the learned counsel for the petitioner has submitted that the license of the petitioner has been cancelled by the respondent no. 3 without following the procedure laid down in the Government order dated 29.07.2004. The counsel submits that neither the copies of the statements of the card holders alleged to have been recorded by the Area Supply Inspector nor a copy of the report submitted by him was furnished to the petitioner. He has further submitted that the affidavits filed by 14 card holders behind the back of the petitioner were also not made available to the petitioner and he was also not given any opportunity to cross examine them. The counsel submits that the cancellation order having been passed without holding any inquiry and in gross violation of the principles of natural justice cannot be sustained. He has further submitted that the order of respondent no. 3 was challenged by the petitioner before the respondent no. 2, specifically on the aforesaid ground. However, the respondent no. 2 dismissed the petitioner's appeal without considering and recording any finding on the issues raised before him. Per contra the learned Standing Counsel appearing on behalf of the State-respondents has supported the impugned order.

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

6. The State Government has issued a Government Order dated 29.07.2004, laying down the procedure for suspending/ cancelling the fair price shop license/agreement. Paragraph nos. 2, 4, and 5 of the said Government Order being relevant are being quoted below:

"2. उक्त पृष्ठभूमि में मुझे यह कहने का निदेश हुआ है कि ग्रामीण एवं शहरी क्षेत्रों की उचित दर की दुकानों के निलम्बन /निरस्तीकरण के सम्बन्ध में निम्न प्रक्रिया का पालन किया जाए।

(1) उचित दर की दुकान का निलम्बन मात्र किसी व्यक्ति की शिकायत के आधार पर नहीं किया जाय। यदि किसी दुकानदार के विरूद्ध किसी स्रोत से शिकायत प्राप्त होती है तो पहले उसकी प्रारम्भिक जांच करायी जाए। यदि प्रारम्भिक जांच में दुकानदार के विरूद्ध ऐसी गम्भीर अनियमितताएं प्रथम दृष्टया सिद्ध हो रही हों जिनके आधार पर दुकानदार की दुकान निरस्त होने की सम्भावना हो तभी दुकान को निलम्बित किया जाय और *साथ ही साथ दुकानदार को कारण बताओ नोटिस जारी किया जाए कि उसकी दुकान क्यों न निरस्त कर दी जाए। यदि प्रारम्भिक जांच में पाया जाय कि अनियमितता इतनी गम्भीर नहीं है कि दुकान के निरस्तीकरण की सम्भावना हो तो केवल कारण बताओ नोटिस जारी किया जाय। निलम्बन आदेश/कारण बताओं नोटिस एक स्पीकिंग आर्डर होना चाहिए तथा उसमें प्रारम्भिक जांच में पायी गयी उन सभी अनियमितताओं का विवरण होना चाहिए जिनका उत्तर दुकानदार से अपेक्षित हो।*

(2) (क) खाद्य विभाग के अधिकारियों / जिला प्रशासन के अधिकारियों /अन्य प्राधिकृत व्यक्तियों द्वारा उचित दर की दुकान के आकस्मिक निरीक्षण के दौरान यदि पाया जाता है कि दुकानदार द्वारा कोई गम्भीर अनियमितता की गयी है तो भी दुकान को नियुक्ति अधिकारी द्वारा अपने विवेक का प्रयोग करते हुए निलम्बित किया जा सकता है।

(ख) खाद्य विभाग के अधिकारियों / जिला प्रशासन के अधिकारियों / अन्य प्राधिकृत व्यक्तियों द्वारा यदि दुकानदार कोई अनियमित कार्य, वितरण में गड़बड़ी या अनुसूचित वस्तुओं की कालाबाजारी करते हुए पकड़ा जाता तो भी नियुक्ति अधिकारी द्वारा अपने विवेक का प्रयोग करते हुए दुकान को निलम्बित किया जा सकता है।

उक्त परिस्थितियों में दुकान के निलम्बन की स्थिति में भी स्पीकिंग आर्डर से निलम्बन आदेश जारी किया जायेगा जिसमें सभी अनियमितताओं का उल्लेख होगा तथा दुकानदार को कारण बताओ नोटिस जारी किया जायेगा कि क्यों न उसकी दुकान निरस्त कर दी जाय।

4. निलम्बित की गयी दुकानों के विरूद्ध जांच की कार्यवाही अधिकतम एक माह में अनिवार्य रूप से पूरी की जायेगी तथा *जांच में सम्बन्धित दुकानदार को सुनवाई का पूरा मौका दिया जायेगा।* सम्बन्धित दुकानदार का यह दायित्व होगा कि वह जांच में अपना पूरा सहयोग दे ताकि जांच का कार्य जल्दी से जल्दी पूरा किया जा सके तथा नियुक्ति प्राधिकारी द्वारा प्रकरण में गुण–दोष के आधार पर अन्तिम निर्णय लिया जा सके। यदि दुकानदार द्वारा जांच में सहयोग नहीं दिया जा रहा हो और जांच में विलम्ब करने का प्रयास किया जा रहा हो तो दुकानदार को इस आशय का भी नोटिस जारी किया जायेगा और अपना पक्ष रखने का अन्तिम अवसर प्रदान किया जायेगा।

5. *जांच की कार्यवाही अधिकतम एक माह में पूर्ण करके नियुक्ति प्राधिकारी द्वारा प्रकरण में अन्तिम निर्णय लिया जायेगा और गुण दोष के आधार पर एक स्पीकिंग आर्डर जारी किया जायेगा। इस आदेश में यह स्पष्ट उल्लेख होना चाहिए कि सम्बन्धित दुकानदार को सुनवाई का अवसर दिया गया और उसे सुना गया।* यदि दुकानदार ने जांच में सहयोग नहीं किया हो और सुनवाई के अवसर का जानबूझकर उपयोग न किया हो तो अन्तिम आदेश में इस बात का भी पूरा उल्लेख होना चाहिए कि दुकानदार को अवसर प्रदान किया गया तथा अन्तिम नोटिस दिया गया परन्तु उसने जानबूझ कर अवसर का उपयोग नहीं किया और जांच में सहयोग नहीं किया।"

(emphasis supplied)

7. As per clause 4 of the Government Order dated 29.07.2004, before cancelling the fair price shop license, the Competent Authority is obliged to issue a show cause notice containing the charges levelled against the licensee. The Competent Authority is required to pass a speaking order after holding an oral inquiry in accordance with the principles of natural justice. As per the said Government order, in case the license holder is not cooperating in the inquiry, the Competent Authority is obliged to again issue a notice to that effect and afford a last opportunity to the license holder.

8. In *Puran Singh v. State, (2010) 2 UPLBEC 947,* a Full Bench of this Court

has held that paragraph nos. 4 and 5 of the Government order dated 29.07.2004 contemplate a full fledged inquiry before the license/ agreement of a fair price shop is cancelled. The Full Bench has held that as per the Government order dated 29.07.2004 an opportunity of hearing is required before passing an order of cancellation.

9. In *Writ - C No. 3611 of 2014, Sanjay Kumar v. State,* following *Puran Singh (Supra)* a learned Single Judge of this Court has held as follows:

"The procedure for holding an inquiry for cancelling the licence of the fair price shop has been provided in the Government Order dated 29.07.2004 read with U.P. Essential Commodities Distribution Order 2004.

The aforesaid Government Order and Distribution Order came up for consideration before the Full Bench of this Court in case of Puran Singh Vs. State of U.P. and others 2010 (3) ADJ 659 (FB). The Court considering para 4 and 5 of the Government Order dated 29.07.2004 held that it contemplates a full-fledged inquiry pursuant to the show cause notice for cancellation and then a final decision in the matter.

The aforesaid decision was followed by the learned Single Judge in his judgement and order dated 28.11.2014 passed in Writ-C No. 12737 of 2013 and referring to paragraph 35 of the Full Bench decision in Puran Singh's case his Lordship observed that a full-fledged inquiry is necessary before cancelling the agreement and it would require service of the charges, along with material in support of each charge, the information about the place and date of inquiry, the statements of persons on whose complaint inquiry was started or in a case of suo-motu inquiry, the statements of the persons appearing before the Inquiry Officer.

In other words it means that *an independent inquiry before passing an order of cancellation of licence to run a fair price shop is mandatory and a show cause notice simplicitor is not sufficient to conform to the principles of natural justice.*

It is obligatory upon the authorities to hold a full-fledged inquiry against the fair price shop dealer, after serving of the charge sheet with regard to the date and place where the hearing will took place and to give an opportunity of hearing. This is in addition to the show cause notice issued for the purposes of suspension of the licence of the fair price shop."
(emphasis supplied)

10. In *Laloo Singh vs. State, (2015) 6 All LJ 613* this Court has held that the cancellation of an agreement/license of a party is a serious business and cannot be taken lightly. In order to justify the action taken to cancel such an agreement/license, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purposes including the principles of natural justice.

11. This Court in *Rajpal Singh v. State of U.P. and others, 2008 (26) LCD 891* has held that where fair price shop license of a dealer is cancelled by placing reliance on the report of the Supply Inspector and the copy of the report is not furnished to the dealer, such an order is in contravention of principles of natural justice and is liable to be set aside.

14. In the present case, a perusal of the order dated 11.04.2018 would show that the license of the petitioner has been

cancelled only on the basis of the statements and affidavits filed by the card holders and that too without supplying copies of the said statements / affidavits to the petitioner and without affording an opportunity to the petitioner to cross examine them. A copy of the report submitted by the Area Supply Inspector has also not been supplied to the petitioner. Moreover, in his order, the respondent no. 3 has not at all discussed the grounds urged by the petitioner in his reply in support of his defence. Admittedly, the license of the petitioner has been cancelled without affording any opportunity of hearing to the petitioner and without holding any inquiry, whatsoever.

15. In view of the settled legal position, the cancellation of the petitioner's fair price shop agreement / license is ostensibly in contravention of the principles of natural justice and cannot be sustained. The Appellate Authority has also failed to rectify the error committed by the Sub-Divisional Magistrate and as such the order passed by the Appellate Authority is also liable to be set aside alongwith the order of the Competent Authority.

16. For the aforesaid reasons, the writ petition is allowed. The impugned order dated 11.04.2018 passed by the Sub-Divisional Magistrate and the order dated 13.07.2018 passed by the Additional Commissioner (Admin) are hereby quashed.

17. No order as to cost.

(2020)1ILR1581

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 18.12.2019

BEFORE
THE HON'BLE RAJAN ROY, J.

Misc. Single No. 25879 of 2019

Ram Prasad & Ors. ...Petitioners
Versus
A.D.J., Sitapur & Ors. ...Respondents

Counsel for the Petitioners:
Vidya Bhushan Pandey,Illegible, Krishna Kumar

Counsel for the Respondents:

A. Challenging-impugned order-dismissing sec-5 limitation application-filed in an appeal-whether maintainable u/Art 227-to be treated as order disposing application and order passed in appeal-decree to be prepared-resulting in consequential dismissal of appeal-would facilitate filing of Second Appeal u/s.100.

B. Held, In this view of the matter, as, considering the decision of the Supreme Court in Shyam Sunder Sharma (supra), even such orders passed on application under section 5 of the Act 1963, are to be treated as not only disposing the said application but are also to be treated as an order passed in appeal, rejecting it, irrespective of the fact whether or not a consequential order of dismissal is passed in such appeal and a second appeal would lie under section 100 C.P.C. against such an order, a decree of such an order should also be prepared treating it an order passed on the appeal itself, resulting in consequential dismissal of the appeal. This is the ratio of the Full Bench of the Kerala High Court om Thambi's case (supra) wherein the provisions of the C.P.C., Limitation Act and various decisions on this issue have been considered elaborately, which has been approved by the Supreme Court in Shyam Sunder's case (supra). In fact, it

would be in the fitness of things if the Civil Courts while dismissing an application under section 5 of the Act 1963 also pass consequential orders dismissing the appeal itself, as is also mandated under section 3 of the Limitation Act 1963, as, in such a scenario, a decree of such an order would necessarily be prepared in terms of the existing provisions of the C.P.C. and this would facilitate filing of a second appeal or its hearing and decision thereon. It is ordered accordingly. In view of the above this petition under Article 227 of the Constitution of India is dismissed as not maintainable subject, however, to the observations made hereinabove.

Writ Petition dismissed as not maintainable. (E-8)

List of cases cited: -

1. Ratan Singh v. Vijai Singh and others, AIR 2001 SC 279

2. Mamooda Khateen & ors. V. Benian Bibi & ors., AIR 1976 Calcutta 415

3. Nagendra Nath Dey & anr. V. Suresh Chandra Dey & anr., AIR 1932 PC 165

4. Shyam Sunder Sharma v. Pannna Lal Jaiswal & ors., AIR 2005 SC 226

5. Thambi v. Mathew, AIR 1988 Ker. 48

6. Musala Annaji Rao v. Boggarapu Papaiah Setty, AIR 1975 Abdg Ora 73)

7. Gulab Rai v. Mangli Lal, ILR (1884) Allahabad 42

8. Commissioner of Income v. Shahzadi Begum AIR 1952 Madras 232

9. Mela Ram & sons (supra) v. the Commissioner of Income Tax, Punjab, (1956) 29 ITR 607 (SC)

10. Raja Kulkarni v. State of Bombay (AIR 1954 SC 73)

11. Promotho Nath Roy v. W. A. Lee (AIR 1921 Cal 415)

12. Sheodon Singh v. Dariao Kunwar, AIR 1966 SC 1332

13. Rajendra Pal Singh v. Addl. District Judge, Ghaziabad 2016 (2) ADJ 699

14. S. Kalawati v. Durga Prasad & anr., AIR 1975 SC 1272

15. Abdul Mazid v. Jawahar Lal, ILR 1904 (36) Allahabad 350

16. Gulab Chand v. Kudi Lal, AIR 1952 MB

(Delivered by Hon'ble Rajan Roy, J.)

1. By means of this petition under Article 227 of the Constitution of India the petitioner has challenged an order dated 24.4.2019 passed by the Additional District Judge (Court No.4)/Special Judge (E.C. Act), Sitapur, dismissing the application of the petitioner under section 5 of the Limitation Act 1963 (hereinafter referred as 'Act 1963') which was filed alongwith the appeal filed by the petitioners against the judgment and decree passed in O.S. No. 141 of 1999 allowing the suit of the private opposite parties herein. The application under section 5 was registered as Civil Misc. Case No.91 of 2014 and the same has been dismissed by the Appellate Court.

2. A question arose during the course of hearing as to the maintainability of this petition and whether a second appeal under section 100 C.P.C. would not lie against the impugned judgment ? In response, the learned counsel for the petitioner submitted that the order which has been impugned herein does not fall within the definition of decree under section 2(2) of the Code of Civil Procedure Code 1908, as it does not conclusively determine the rights of the parties with regard to all or any of the

matters in controversy in the appeal arising out of the suit, instead it only rejects the application under section 5 of the Limitation Act 1963 which was registered as a separate miscellaneous case. As no decree of such an order is prepared, a second appeal under section 100 C.P.C. will not lie as it lies against appellate decrees.

3. Learned counsel for the petitioner relied upon a decision of the Supreme Court in the case of *Ratan Singh v. Vijai Singh and others, AIR 2001 SC 279* in support of his contention.

4. At first blush the submission of the petitioners' counsel appeared to be quite attractive, especially in view of the law laid down by the Supreme Court in the case of Ratan Singh (supra) wherein, the provision contained in section 2(2), C.P.C., defining a decree, had been considered and it was held that an order dismissing an application under section 5 of the Act 1963 would not be a decree and that the order rejecting the memorandum of appeal consequent to rejection of the application under section 5 of the Act 1963 was merely an incidental order. In the said decision the Supreme Court approved the Full Bench decision of the Calcutta High Court in *Mamooda Khateen & ors. V. Benian Bibi & ors., AIR 1976 Calcutta 415*. The Supreme Court approved the reasoning of the Full Bench that when an appeal is barred by limitation, it cannot be admitted at all until the application under section 5 of the Act 1963 is allowed and until then the appeal, even if filed, will remain in limbo. If the application is dismissed, the appeal becomes otiose. Approving the said view, the Supreme Court disapproved the contrary view taken by other High Courts. The Privy Council decision in *Nagendra Nath Dey & anr. V. Suresh Chandra Dey & anr., AIR 1932 PC 165*, was also considered in Ratan Singh (supra), but it was observed that the said decision does not help in the context of the case before it, as, it related to the scope and interpretation of Article 182 of the old Limitation Act and in this regard it noticed serious departure made by the Parliament in the existing Limitation Act.

5. However, this court finds that in a subsequent decision in the case of *Shyam Sunder Sharma v. Pannna Lal Jaiswal & ors., AIR 2005 SC 226*, a three Judge Bench of the Supreme Court did not approve of the earlier view taken in the case of Ratan Singh (supra) and it held that an order passed on an application under section 5 of the Act 1963 rejecting the same is nevertheless an order passed in appeal. It disapproved the Full Bench decision of the Calcutta High Court in Mamooda Khateen & ors. (supra) and approved another Full Bench decision of the Kerala High Court in *Thambi v. Mathew, AIR 1988 Ker. 48*, wherein it was held that an appeal presented out of time was nevertheless an appeal in the eyes of law for all purposes and an order dismissing the appeal was a decree and that could be the subject of a second appeal.

6. It is fruitful to refer to the decision of the Full Bench of the Kerala High Court in Thambi's case (supra) wherein their Lordships noticed the provision of Order XLI Rule 3-A C.P.C. and then held as under :

"It is clear from sub-rule (1) that there is a proper presentation of the appeal filed out of time if it is

accompanied by an application to condone delay supported by an affidavit setting forth the grounds for the condonation of delay. Sub-rule (2) requires the application to be finally decided by the court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be. A dismissal of the application for condonation of delay results in the dismissal of the appeal which can only be under R. 11. S. 3 of the Limitation Act also requires an appeal filed after the prescribed period of time to be dismissed subject to the provisions contained in Ss. 4 - 24. Sub-rule (3) of R. 3A does not render an appeal properly presented under sub-rule (1), a proposed appeal. Sub-rule (3) in spite of its language would only mean that no stay of the execution of the decree appealed against shall be granted before the court after hearing the appeal under R. 11 decides to admit the same. An appeal presented out of time is nevertheless an appeal in the eye of law for all practical purposes (vide Musala Annaji Rao v. Boggarapu Papaiah Setty, AIR 1975 Abdg Ora 73). The question, whether an appeal properly presented with a petition to condone the delay can be admitted or not, is at the second stage and to reach that stage the application has to be disposed of finally. Sec. 3 of the Limitation Act also makes it obligatory on the part of the court to dismiss an appeal presented out of time subject, of course, to the provisions of Ss. 4 - 24. In a case, where an appeal has been admitted and then dismissed on a preliminary objection raised at the hearing disclosing the fact that the appeal was filed out of time, is it possible to say that the order dismissing the appeal, though on the ground of limitation, is not a decree? The question is whether a dismissal of the appeal after considering an application to condone the delay should be treated differently. An appeal filed out of time is required to be dealt with by the appellate court under S. 3 of the Limitation Act and an order dismissing the appeal is a decree that can be subject of a second appeal as held by the Full Bench in Haji Hassan Rowther's case (AIR 1972 Ker 56). Sub-rule (4) of R. 11 of O. 41, CPC requires an appellate court, not being the High Court, dismissing an appeal under sub-rule (1) to deliver a judgment and a decree is to be drawn up in accordance with the judgment. It is thus clear that the dismissal of an appeal under O.41, Rule 11 postulates the drawing up of a decree which can be the subject of a further appeal under Order 41, Rule 1 read with O. 42, CPC. Sub-rule(4) of R. 11 does not dispense with the need of a decree when the High Court dismisses an appeal under sub-rule (1). The only exception is that it need not deliver a judgment recording its reasons for dismissing the same. It seems to us clear that R. 3A of O. 41 introduced by the CPC. Amendment Act, 1976 does not in any way affect the principle laid down by the Full Bench in Haji Hassan Rowther's case and by Viswanatha Iyer, J. in Kunhiraman's case (1979 KLT 718)."

7. Their Lordships also took note of a Division Bench of the Allahabad High Court rendered as early as in 1884 in Gulab Rai v. Mangli Lal, ILR (1884) Allahabad 42, wherein it was held as under :

"In the Civil Procedure Code there is no separate provision which allows the appellate court to "reject" a memorandum of appeal on the ground of its being barred by limitation. S. 543 is limited to cases in which the memorandum of appeal is not drawn up in the manner

prescribed by the Code, and it is only by applying S. 54(c), mutatis mutandis, (as provided by the last part of S. 582), to appeals that the Code can be understood to make provision for rejection of appeals as barred by limitation. However, S. 4 of the Limitation Act clearly lays down that every "appeal presented after the period of limitation prescribed therefor shall be dismissed." It is, therefore, clear that the order of the District Judge in this case must be taken to be one which falls under the definition of "decree" within the meaning of S. 2 of the Code, as the order, so far as the Judge was concerned, disposed of the appeal."

8. The Full Bench also noticed decision of the Supreme Court in *Mela Ram & sons (supra)* v. the Commissioner of Income Tax, Punjab, (1956) 29 ITR 607 (SC), wherein *inter alia* the Supreme Court affirmed the decision of the Madras High Court in *Commissioner of Income v. Shahzadi Begum AIR 1952 Madras 232*, which had held that if the appeal is dismissed as incompetent or is rejected as it was filed out of time and no sufficient cause was established, it results in an affirmation of the order appealed against.

9. The Supreme Court in *Mela Ram (supra)* also affirmed another decision of the Calcutta High Court reported in AIR1954 Cal. 468, in which it had been held that an appellate order may not, directly and by itself, confirm or reduce or enhance or annul an assessment and may yet dispose of the appeal. If it does so, it is immaterial whether the ground is a finding that the appeal is barred by Limitation or a finding that the case is not fit one for extension of time or both.

10. Referring to the aforesaid cases the Supreme Court in *Mela Ram (supra)* concluded, as observed by the Full Bench, that there is, thus, abundant authority for the position that section 31 should be liberally construed so as to include not only orders passed on a consideration of the merits of the assessment, but also orders which dispose of the appeal on preliminary issues such as limitation and the like.

11. The Full Bench also noticed the decision of the Supreme Court in the case of *Rani Chaudhari v. Lt. Col. Suraj Jit Choudhary, (1982) 2 SCC 596*, which had been followed in *Mela Ram's case (supra)* wherein it had been held as under:

"In the present case, the appeal was dismissed as barred by limitation. That it was an appeal even though barred by time is clear from Mela Ram & Sons v. C.I.T. (AIR 1956 SC 367) where Venkatarama Ayyar J., speaking for the Court, after referring to Nagendra Nath Dey v. Suresh Chandra Dey, (AIR 1932 PC 165), Raja Kulkarni v. State of Bombay (AIR 1954 SC 73) and Promotho Nath Roy v. W. A. Lee (AIR 1921 Cal 415) held that "an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal". There can be no dispute then that in law what the respondent did was to file an appeal and that the order dismissing it as time-barred was one disposing of the appeal."

12. The Full Bench of the Kerala High Court went on to observe that disposal of an appeal filed out of time can only be by way of dismissal as provided for in section 3 of the Limitation Act. An appeal registered under Rule 9 of Order LXI C.P.C. is to be disposed off according to law and a dismissal of the appeal for the reason of delay in its presentation after the

dismissal of an application for condonation of delay is in substance and effect a confirmation of the decree appealed against. This Full Bench decision was affirmed by the Supreme Court in *Shyam Sunder Sharma's case(supra).*

13. With regard to its earlier decision in Ratan Singh's (supra) the Supreme Court in *Shyam Sunder Sharma's case (supra)* held that it was in conflict with the ratio of the decision in the case of Mela Ram (supra) and the decision in *Rani Chaudhary v. Lieutenant Col. Suraj Jeet Chaudhary, 1982 (2) SCC 586,* as also, the Privy Council's decision in Nagendra Nath Dey (supra), which, though referred, was not applied on the ground that it was based on Article 182 of the Old Limitation Act 1908. The Supreme Court was of the view that the decision in *Sheodon Singh v. Dariao Kunwar, AIR 1966 SC 1332* wherein also it was held that dismissal of an appeal from a decree on the ground that the appeal was barred by limitation, was a decision in the appeal and that such dismissal, when it confirms the decision of the Trial Court on the merits, itself amounts to the appeal being heard and finally decided on the merits, whatever may be the ground for dismissal of the appeal, was also not noticed in Ratan Singh's case (supra) and latter was in conflict with the said decision. Thus, the earlier decision in Ratan Singh's case (supra) was impliedly overruled.

14. Now in view of the Three Judge Bench decision of the Supreme Court in *Shyam Sunder Sharma's case (supra)* two things are clear, one, that an order dismissing an application under section 5 of the Limitation Act 1963 for extending limitation for filing the appeal is also an order passed in appeal and the Full Bench of the Calcutta High Court when it held that an order rejecting a time-barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor appealable, did not lay down a correct law. In this view of the matter the irresistible conclusion is that a second appeal would lie against such an order as has been impugned in this writ petition as referred hereinabove.

15. Similar view has also been expressed by two coordinate Benches of this Court in the case of *Smt. Premwati & anr. V. Smt. Munni Devi, (2009) 106 RD 697 and Rajendra Pal Singh v. Addl. District Judge, Ghaziabad 2016 (2) ADJ 699.* In the latter case a specific plea was raised that the order impugned therein merely dismissed the section 5 application but it nowhere stated that the appeal would also stand dismissed, therefore, the argument advanced was that the petition under Article 227 of the Constitution of India would be maintainable against such an order, but, this argument was repelled in view of the authoritative pronouncements discussed in the said judgment, as have also been referred hereinabove.

16. There is another three Judges Bench decision of the Supreme Court in the case of *S. Kalawati v. Durga Prasad & anr., AIR 1975 SC 1272*, wherein, a similar issue as to whether an order passed not on merits of the appeal but otherwise such as on an application for condonation of delay in filing the appeal, non-prosecution or for any other reason, would amount to an order passed in appeal was considered, and it was held that unless the Court had applied its mind to the case and after consideration affirmed it the order

cannot be said to be one of affirmance and after noticing the decision of the Privy Council in *Abdul Mazid v. Jawahar Lal, ILR 1904 (36) Allahabad 350*; decision of the Bombay High Court in *Kursondas Dharamse v. Gangabai, ILR 1907 (32) Bombay 108* and the decision in *Gulab Chand v. Kudi Lal, AIR 1952 MB* the Supreme Court opined that the principle behind majority of decisions is thus to the effect that where an appeal is dismissed on the preliminary ground that it was not competent or for non-prosecution or for any other reason the appeal is not entertained, the decision cannot be said to a "decision, on appeal" nor of affirmance. It is only where the appeal is heard and the judgment delivered thereafter, the judgment can be said to be a judgment of affirmance. However, in view of the later decision by a Three Judges' Bench of the Supreme Court in *Shyam Sunder Sharma (supra)* the legal position at present is as discussed earlier i.e. such an order is an order passed in the appeal, hence appealable under section 100 C.P.C.

17. There are, however, certain practical difficulties in filing a second appeal in such circumstances notice of which needs to be taken by the Court. In the State of U.P. when a time-barred first appeal is filed under the Code of Civil Procedure alongwith an application under section 5 of the Limitation Act 1965 for extension of limitation and condonation of delay, it is the application which is registered as a miscellaneous case, as has happened in this case and is decided first. Only when the delay is condoned the appeal is registered. If the delay is not condoned, the application under section 5 is dismissed and the matter is laid to rest. More often then not no consequential orders are passed on the appeal, dismissing it. As the order rejecting the application under section 5 is not treated as one passed on the appeal, but, is treated as an order passed in the miscellaneous case, no decree is prepared in terms of section 2(2) C.P.C. This creates a practical difficulty in filing a second appeal against such an order under section 100 C.P.C. There was consensus at the Bar that against such an order dismissing the application for condonation of delay under section 5 of the Act 1963 without any consequential order for dismissal of the appeal a decree is not prepared by the Civil Courts in this State under the existing provisions of section 2(2) the Code of Civil Procedure 1908.

18. It is not out of place to refer to Section 3 of the Limitation Act 1963 reads as under :

"Section 3. Bar of limitation.- *(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."*

19. This provision also mandates dismissal of the appeal itself if it is time-barred and application under section 5 for extension of limitation/condonation of delay is rejected.

20. In this view of the matter, as, considering the decision of the Supreme Court in *Shyam Sunder Sharma (supra)*, even such orders passed on application under section 5 of the Act 1963, are to be treated as not only disposing the said application but are also to be treated as an order passed in appeal, rejecting it,

irrespective of the fact whether or not a consequential order of dismissal is passed in such appeal and a second appeal would lie under section 100 C.P.C. against such an order, a decree of such an order should also be prepared treating it an order passed on the appeal itself, resulting in consequential dismissal of the appeal. This is the ratio of the Full Bench of the Kerala High Court om *Thambi's case (supra)* wherein the provisions of the C.P.C., Limitation Act and various decisions on this issue have been considered elaborately, which has been approved by the Supreme Court in *Shyam Sunder's case (supra)*. In fact, it would be in the fitness of things if the Civil Courts while dismissing an application under section 5 of the Act 1963 also pass consequential orders dismissing the appeal itself, as is also mandated under section 3 of the Limitation Act 1963, as, in such a scenario, a decree of such an order would necessarily be prepared in terms of the existing provisions of the C.P.C. and this would facilitate filing of a second appeal or its hearing and decision thereon. It is ordered accordingly.

21. In view of the above this petition under Article 227 of the Constitution of India is **dismissed as not maintainable** subject, however, to the observations made hereinabove.

22. Based on this judgment petitioner can apply for preparation of a decree of the order impugned. In the meantime he can prefer a second appeal relying upon Rule 6-A of Order XX C.P.C. He should annex the original decree of the Trial Court to facilitate valuation etc. of the second appeal.

23. Let a copy of this judgment be circulated amongst District Judges in the State of U.P., who in turn shall circulate the same amongst other Judges of the District so that the practical difficulty being faced in filing second appeal as pointed out by the Members of the Bar, is removed.

24. The Registrar General of this Court shall take necessary steps for circulation of this judgment as aforesaid.

(2020)1ILR 1588

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2019

BEFORE
THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE ALOK MATHUR, J.

Misc. Bench No. 34971 of 2019

M/S Ajmani Leasing & Finance Ltd. ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Shishir Chandra, Vishnu Pratap Singh

Counsel for the Respondents:
A.S.G.

A. Reserve Bank of India Act, 1934 - Challenging order-cessation of permission-granted to the petitioner company-to carry on the business of Non-Banking Financial Institution (NBFI)-on account of-failure in complying-with the directions-issued by RBI-regarding achievement of the specified Net Owned Fund (NOF)-under section 45-IA (6)-matters involving policy decision and economic tests-judicial review-limited-unless decision found contrary to-any statutory provision or Constitution-Court would not interfere-principal of natural justice-duly complied.

B. Held, that in the matter of policy decision and economic tests, the scope of

judicial review is very limited. Unless the decision is shown to be contrary to any statutory provision or the Constitution, the Court would not interfere with an economic decision taken by the State. The Court cannot examine the relative merits of different economic policies and cannot strike down the same merely on the ground that another policy would have been fairer and better. It was further held that it is neither within the domain of the Courts, nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved, nor are the Courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the Courts.

C. After considering the facts of the case as well as the principles enunciated by the Hon'ble Supreme Court, we are of the opinion that principles of natural justice was compiled by the Bank by giving a show cause notice and considering the reply of petitioner before cancelling the registration. The impugned order cannot be set-aside on the ground of the same having been passed in violation of principles of natural justice. Apart from this, the petitioner has failed to indicates as to how he was prejudicial in not being afforded an opportunity of personal hearing. We do not find any merit in the contention of the petitioner in this regard.

Writ Petition dismissed. (E-8)

List of cases cited: -

1. Ashok Kumar Sonkar vs Union of India & Others (2007) 4 SCC 54

2. P.D. Agrawal v. State Bank of India and Others (2006) 8 SCC 776

3. S.L. Kapoor vs. Jagmohan & Ors. [(1980) 4 SCC 379]

4. State Bank of Patiala & Ors. vs. S.K. Sharma [(1996) 3 SCC 364]

5. Rajendra Singh vs. State of M. P. [(1996) 5 SCC 460]

6. State of U.P. vs. Neeraj Awasthi & Ors. JT 2006 (1) SC 19.

7. Mohd. Sartaj vs. State of U. P. (2006) 1 SCALE 265.]"

8. Arcot Textile Mills Ltd vs Reg. Provident Fund Commissioner: (2013) 16 SCC 1

9. Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and Others

10. In Natwar Singh v. Director of Enforcement and Another

11. Kesar Enterprises Limited v. State of Uttar Praesh and Others

12. Swadeshi Cotton Mills v. Union of India[18], Canara Bank v. V.K. Awasthy

13. Sahara India (Firm) v. CIT

14. Villianur Iyarkkai Padukappu Maiyam vs. Union of India reported in (2009) 7 SCC 561

(Delivered by Hon'ble Pankaj Kumar Jaiswal,J. & Hon'ble Alok Mathur,J.)

1. Heard Sri Shishir Chandra, learned counsel for the petitioner and Sri Surya Bhan Pandey, learned Assistant Solicitor General of India, assisted by Sri Varun Pandey, learned counsel for the respondent no.1.

2. The petitioner, which is a non-banking financial company, is aggrieved

by the order dated 30.10.2018 passed by the respondent no.3-Deputy General Manager, Reserve Bank of India, Department of Non-Banking Supervision, Kanpur under Section 45-IA(6) of the Reserve Bank of India Act, 1934 (hereinafter referred to as **"1934 Act"**), whereby permission granted to the petitioner's company for carrying the business of Non-Banking Financial Institution (NBFI) has been ceased. The petitioner has also challenged the appellate order dated 26.08.2019 passed by the respondent no.1-Ministry of Finance, Department of Financial Services, Union of India, under Section 45-IA (7) of 1934 Act, whereby the appeal filed by the petitioner, bearing No.F No. 25/247/2019/BOA-II : in re: *M/s Ajmani Leasing & Finance Ltd. Vs. Reserve Bank of India*, against the order dated 30.10.2018, has been dismissed.

3. Brief facts of the case are that the petitioner's company was incorporated on 12.8.1988 under the Companies Act, 1956 and was granted a Certificate of Registration, bearing No. A-12.00284 dated 10.1.2001 by the Reserve Bank of India (hereinafter referred to as ***"Bank"***) and on reclassification of the Company as an Asset Finance Company, CoR No.A-1200284, dated 21.9.2007 was issued to it, under the provisions of Section 45-IA of 1934 Act to carry on the business of a non-banking financial institution (NBFI) subject to fulfilling the requirements under Chapter III-B of the 1934 Act and complying the directions, regulations including prudential norms issued by the Bank from time to time as also the terms and conditions under which the said Certificate of Registration was issued to it. The said Certificate of Registration was cancelled by the Reserve Bank of India vide order dated 30.10.2018 in terms of Section 45-IA (6) of 1934 Act on account of its failure to comply with the directions of the Reserve Bank of India as regard achievement of the specified Net Owned Fund (NOF).

4. The petitioner's company, thereafter, had challenged the aforesaid order dated 30.10.2018 by filing appeal, which was registered as F No. 25/247/2019/BOA-II : in re: *M/s Ajmani Leasing & Finance Ltd. Vs. Reserve Bank of India*. The appellate authority, vide order dated 26.08.2019, dismissed the appeal on the ground that the writ petitioner/appellant company has failed to achieve a NOF of Rs.200.00 before 1st April, 2017 and has also not given any valid reasons for not achieving the same. Paras 5 and 6 of the order dated 26.08.2019 (supra) are relevant, which reads as under :-

"5. In its reply dated 20th June, 2018 to the Show Cause Notice of RBI, the appellant company had stated that their business in previous years had gone through tough and stressful situation due to inconsistent state government policies towards Vikram and Auto permits in Lucknow. It was a very hard time for the industry and as a result, the Non-Performing Assets increased. The appellant further requested RBI to give time till June, 2019 to meet the requirements of the RBI notification. In his appeal also, the appellant has reiterated his request for time upto June, 2019. In addition, the appellant company has raised the issues of natural justice and not being granted reasonable opportunity of being heard.

6. After going through the records and hearing the arguments put

before me, it is observed that the RBI circular dated 10th November, 2014 read with notification dated 27th March, 2015 had clearly prescribed a NOF of Rs.200.00 lakh as on 31st March, 2017 for NBFCs to commence or carry on the business of NBFI. It was also stated in the circular that NBFCs failing to achieve the prescribed ceiling within the stipulated time period shall not be eligible to hold the CoR as NBFCs and RBI will initiate the process for cancellation of CoR against such NBFCs. The appellant company, in its reply dated 20th June, 2018 to the SCN, had sought time upto June, 2019 which was not granted by the RBI and the CoR was cancelled. As regards the contentions of the appellant invoking principles of natural justice for not being granted reasonable opportunity of being heard before cancellation of CoR, it is observed that RBI has specifically vide letter dated 19th October, 2015 specified the details of its notification dated 27th March, 2015 and advised the appellant to submit plans for increasing the NOF to the prescribed levels in view of its NOF being only Rs.88.89 lakh as on 31st March, 2015. Thus, ample opportunity was provided to the appellant. Its contention that due to inconsistent policy on autos they faced hardships cannot be taken as a reason for not following a statutory requirement of doing business. It is observed that reasonable opportunity of being heard does not necessarily mean an opportunity of personal hearing."

5. Learned counsel for the petitioner has fairly admitted the fact that the notification dated 27.03.2015 specifying Rs.200 Lakhs as NOF for NBFCs to commence or carry on business has not been challenged by the petitioner. However, he submits that while passing the impugned order dated 26.08.2019, the appellate authority erred in not considering the fact that prior to passing the order dated 30.10.2018, no opportunity was granted to the writ petitioner, therefore, the impugned order is liable to be quashed.

6. Learned counsel for the petitioner has assailed the impugned order dated 26.08.2019 on the ground that he was not given an opportunity of hearing and the respondents have acted in a most unreasonable manner without considering the reasons stated by the petitioner in reply to the show cause notice and, therefore, the impugned order is vitiated in the eyes of law and is liable to be set aside.

7. Heard the learned counsels for the parties.

8. The Bank in exercise of the powers under sub- Clause (b) of sub-Section (1) of Section 45-IA of the 1934 Act, and in supersession of Notification No.132/CGM (VSNM)-99 dated 20.04.1999, specified Rs.200 Lakhs as NOF requirement for an NBFC to commence or carry on the business of Non-Banking Financial Institutions. The notification provided that an NBFC holding a Combined Operating Ratio (CoR) issued by the Reserve Bank of India, may continue to carry on the business of a Non-Banking Financial Institution, if such company has NOF of (i) 100 Lakhs of rupees before April 1, 2016; and (ii) 200 Lakhs of rupees before April 1, 2017.

9. The writ petitioner is a NBFC who was granted CoR in terms of Section 45-IA of the 1934 Act. The respondents do not dispute the power of the Reserve Bank of India to fix the monetary limit of NOF

required to be furnished by NBFCs. In fact, this power is traceable to Section 45-IA(a)(b) of the Act. The writ petitioner having not disputed the power of the Reserve Bank of India to fix the NOF, can obviously not challenge the date fixed by the Reserve Bank of India for complying with the said norms.

10. The notification dated 27.03.2015 applies to NBFCs who seek to commence business and also to the existing NBFCs who want to carry on the business. Thus, the writ petitioner was forewarned as early as March, 2015 that, if he wants to carry on business of NBFCs, he has to achieve NOF of 100 lakhs of rupees before April 1, 2016 and 200 Lakhs of rupees before April 1, 2017. Admittedly, the writ petitioner did not achieve the said monetary limit fixed in the notification within the cut of date.

11. What is required to be seen is whether the respondents were justified in cancelling the CoR granted to the writ petitioner for non-compliance of the NOF requirement within the time stipulated. The respondent issued show cause notice dated 07.06.2018. The attention of the writ petitioner was invited to the CoR issued by the Reserve Bank of India underSection 45-IAof the 1934 Act and the respondents were reminded that as per the provisions of Section 45- IA(6) of the 1934 Act, by which the Reserve Bank of India is empowered to cancel the CoR issued to a company on account of any of the reasons referred to in sub-Clauses (i) to (v) of that sub-Section. Further, the respondents were informed that in terms of the Revised Regulatory Framework for NBFCs (RBI/2014-15/520DNBR (PD) CC.No.024/03.10.001/2014-15) read with notification dated 27.03.2015, the Reserve Bank of India had specified Rs.200 lakhs of rupees as the NOF required for NBFCs to commence or carry on the business of non-banking financial institution.

12. It was submitted that as per the records available with the RBI, the writ petitioner was holding CoR on the date of issuance of the aforementioned direction and has failed to achieve the NOF of 200 lakhs of rupees before April 1, 2017, thus, violating the provisions under which the Company was permitted to continue the business of a non-banking financial institution. Thus, the writ petitioner was informed that he has acted in violation of the directions issued by the Reserve Bank of India in exercise of its powers under Chapter III- B of the 1934 Act while conducting its business as a non-banking financial institution. The writ petitioner was called upon to show cause within fifteen days of the receipt of the order as to why the CoR issued to him should not be cancelled under Section 45-IA(6) of the 1934 Act and penal action be not initiated against the writ petitioner for offences punishable under Section 58 of the 1934 Act.

13. The writ petitioner submitted his reply within the time permitted in which, he accepted the fact that he has not complied with the requirement of NOF of 200 lakhs of rupees before April 1, 2017. The writ petitioner stated that his business has been affected due to the inconsistent State Government policies towards Vikram and auto permits in Lucknow, as a result the non-performing assets increased, and the Courts have failed in providing timely justice which may have helped the company recover its outstanding dues. Accordingly, he sought for withdrawal of the show cause notice. The respondents

passed an order dated 30.10.2018 rejecting the reply given by the writ petitioner as not being satisfactory and also having violated the statutory provisions contained in Section 45-M of the 1934 Act, cancelled the CoR in terms of Section 45- IA(6) of the 1934 Act.

14. To consider the submissions of the writ petitioner, we need to refer to Section 45-IA of 1934 Act which is as follows:-

"45-IA. Requirement of registration and net owned fund.-

(1) Notwithstanding anything contained in this Chapter or in any other law for the time being in force, no non-banking financial company shall commence or carry on the business of a non-banking financial institution without-

(a) obtaining a certificate of registration issued under this Chapter; and

(b) having the net owned fund of twenty five lakh rupees or such other amount, not exceeding two hundred lakhs, as the bank may, be notification in the Official Gazette, specify.

(2) Every non-banking financial company shall make an application for registration to the bank in such form as the bank may specify:

Provided that a non-banking financial company in existence on the commencement of the Reserve Bank of India (Amendment) Act, 1997 shall make an application for registration to the bank before the expiry of six months from such commencement and notwithstanding anything contained in sub-section (1) may continue to carry on the business of a non-banking financial institution until a certificate of registration is issued to it or rejection of application for registration is communicated to it.

(3) Notwithstanding anything contained in sub- section (1), a non-banking financial company in existence on the commencement of theReserve Bank of India (Amendment) Act, 1997 and having a net owned fund of less than twenty five lakh rupees may, for the purpose of enabling such company to fulfill the requirement of thenet owned fund, continue to carry on the business of a non-banking financial institution-

(i) for a period of three years from such commencement; or

(ii) for such further period as the bank may, after recording the reasons in writing for so doing, extend, subject to the condition that such company shall, within three months of fulfilling the requirement of the net owned fund, inform the bank about such fulfilment:

Provided that the period allowed to continue business under this sub-section shall in no case exceed six years in the aggregate.

(4) The Bank may, for the purpose of considering the application for registration, require to be satisfied by an inspection of the books of the non-banking financial company or otherwise that the following conditions are fulfilled:-

(a) that the non-banking financial company is or shall be in a position to pay its present or future depositors in full as and when their claims accrue;

(b) that the affairs of the non-banking financial company are not being or are not likely to be conducted in a manner detrimental to the interest of its present or future depositors;

(c) that the general character of the management or the proposed management of the non-banking financial company shall not be prejudicial to the public interest or the interests of its depositors;

(d) that the non-banking financial company has adequate capital structure and earning prospects;

(e) that the public interest shall be served by the grant of certificate of registration to the non-banking financial company to commence or to carry on the business in India;

(f) that the grant of certificate of registration shall not be prejudicial to the operation and consolidation of the financial sector consistent with monetary stability and economic growth considering such other relevant factors which the bank may, by notification in the Official Gazette, specify; and

(g) any other condition, fulfilment of which in the opinion of the bank, shall be necessary to ensure that the commencement of or carrying on of the business in India by a non-banking financial company shall not be prejudicial to the public interest or in the interest of the depositors.

(5) The Bank may, after being satisfied that the conditions specified in sub-section (4) are fulfilled, grant a certificate of registration subject to such conditions which it may consider fit to impose.

(6) The Bank may cancel a certificate of registration granted to a non-banking financial company under this section if such company-

(i) ceases to carry on the business of a non-banking financial institution in India; or

(ii) has failed to comply with any condition subject to which the certificate of registration had been issued to it; or

(iii) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (4); or

(iv) fails-

(a) to comply with any direction issued by the bank under the provisions of this Chapter; or

(b) to maintain accounts in accordance with the requirements of any law or any direction or order issued by the bank under the provisions of this Chapter; or

(c) to submit or offer for inspection its books of accounts and other relevant documents when so demanded by an inspecting authority of the bank; or

(v) has been prohibited from accepting deposit by an order made by the bank under the provisions of this Chapter and such order has been in force for a period of not less than three months:

Provided that before cancelling a certificate of registration on the ground that the non-banking financial company has failed to comply with the provisions of clause (ii) or has failed to fulfil any of the conditions referred to in clause (iii) the bank, unless it is of the opinion that the delay in cancelling the certificate of registration shall be prejudicial to public interest or the interest of the depositors or the non-banking financial company, shall give an opportunity to such company on such terms as the bank may specify for taking necessary steps to comply with such provisions or fulfilment of such condition:

Provided further that before making any order of cancellation of certificate of registration, such company shall be given a reasonable opportunity of being heard"

15. The 1934 Act was enacted to constitute the Reserve Bank of India to regulate the issue of bank notes and keeping of reserves of the view of securing monetary stability in the country and generally operate the currency and credit of the country to its advantage. The Reserve Bank of India being an expert body with regard to operation of the credit system for securing monetary stability in

the country and it is expected to take decisions by taking into consideration all the relevant aspects, laws and the policies of the government, and in this regard there is very little scope of judicial intervention.

16. The notification dated 27/03/15 was issued by the Reserve Bank of India, Department of Non-banking Regulation, Central Office, Mumbai, which provided that a non-banking financial company holding a certificate of registration issued by reserve bank of India and having net owned fund of less than 200 lakh of rupees, may continue to carry on business of non-banking financial institution, if such company achieved net owned fund of:-

(i) 100 lakh of rupees before 01/04/16

(ii) 200 lakh of rupees before 01/04/17.

17. The petitioner's have candidly admitted that he has not fulfilled the NOF requirement before the cut-off dates as prescribed in the aforesaid notification, and in terms of provisions contained in Section 45-IA (6) of the 1934 Act has cancelled the registration on the ground that the petitioner has failed to comply with the directions issued by the bank.

18. The impugned order rejecting the appeal of the petitioner has been mainly assailed on the ground that he was not provided with an opportunity of personal hearing before passing of the impugned order and, therefore, the same is liable to be set aside score alone. The notification dated 27/03/15 itself provided that the petitioner was to achieve the NOF of 100 lakh of rupees before 01/04/16 and 200 lakh of Rupees before 01/04/17 which was admittedly not achieved by him. The petitioner submitted a reply in response to the show cause notice on 20/06/18. The reply submitted by the Company was duly considered by the Reserve Bank of India and the same is not found to be satisfactory and, therefore, by means of the order dated 30/10/18, the certificate of registration dated 21/09/07 was cancelled after recording a finding that the company is not eligible to continue to carry on the business of a non-banking financial institution on account of its failure to comply with the directions of the reserve bank as regard achievement of specified NOF, and it was further recorded that the bank is satisfied that no public interest will be served in allowing the company to continue to undertake the business of the non-banking financial institution.

19. The petitioner preferred an appeal against the aforesaid order to the Central Government assailing the order of cancellation of registration on the ground that the same having been passed in violation of principles of natural Justice, that it vague in as much as it did not specify the provisions which had not been complied by the petitioner, and also that the petitioner had a concrete plan for raising its NOF.

20. The Central Government by means of the impugned order dated 20/10/18 has rejected the appeal after considering the grounds stated by the petitioner in the appeal. Before the appellate authority, the petitioner was granted an opportunity of hearing to present his case. The appellate authority while rejecting the appeal of the petitioner relied upon the notification dated 27/03/15, and held that the petitioner had failed to achieve the prescribed ceiling

within the stipulated time period and, therefore, he is not eligible to hold the certificate of registration as NBFC.

21. With regard to the contention of the petitioner that he was not afforded an opportunity of hearing before cancellation of the registration, it was held that the petitioner was granted reasonable opportunity of being heard before cancellation of the registration and that by means of notification dated 27/03/15, he was advised to submit plans for increasing the NOF to the prescribed level, but the NOF was only 88.89 lakhs as on 31/03/15 and ample opportunity was provided to him to raise the NOF and the ground taken by the petitioner with regard to the inconsistent policy on the autos as well as other hardship would not be a reason for not following the statutory requirement of doing business. It was also held that the reasonable opportunity of being heard does not necessarily mean an opportunity of personal hearing.

22. It is clear that a show was notice was issued to the petitioner before cancellation of the registration and it was indicated in the show cause notice that the petitioner has not achieved the NOF within the stipulated period prescribed in the notification of 2015. The reply submitted by the petitioner was duly considered. It cannot be said that no opportunity of hearing was given to the petitioner.

23. To consider the contention of the petitioner that it was mandatory to provide opportunity of personal hearing, it would be necessary to consider the pronouncements of the Apex Court in this regard.

24. In **Ashok Kumar Sonkar vs Union Of India & Others** : (2007) 4 SCC 54, the Hon'ble Apex Court observed:-

*"In **P.D. Agrawal v. State Bank of India and Others**[(2006) 8 SCC 776], this Court observed :*

*"The Principles of**natur**al**justice**cannot be put in a**straightjacket**formula. It must be seen in circumstantial flexibility. It has separate facets. It has in recent time also undergone a sea change."*

It was further observed :

*"Decision of this Court in S.L. Kapoor vs. Jagmohan & Ors. [(1980) 4 SCC 379], whereupon Mr. Rao placed strong reliance to contend that non-observance of principle of **natur**al **justice** itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of **natur**al **justice**, as noticed hereinbefore, has undergone a sea change. In view of the decision of this Court inState Bank of Patiala & Ors. vs. S.K. Sharma[(1996) 3 SCC 364] and Rajendra Singh vs. State of M.P. [(1996) 5 SCC 460], the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principal doctrine of audi alterem partem, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere technical infringement of the principal. The Court applies the principles ofnaturaljusticehaving regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straightjacket formula. [See Viveka Nand Sethi vs. Chairman, J. & K. Bank Ltd. & Ots. (2005) 5 SCC 337 and State of U.P. vs. Neeraj Awasthi & Ors. JT2006*

(1) SC 19. See also Mohd. Sartaj vs. State of U.P. (2006) 1 SCALE 265.]"

25. In the case of **Arcot Textile Mills Ltd vs Reg. Provident Fund Commissioner :** (2013) 16 SCC 1, it was observed by the Apex Court :-

"25. We may state with profit that principles of natural justice should neither be treated with absolute rigidity nor should they be imprisoned in a straight-jacket. It has been held in Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and Others*[14] that the maxim audi alteram partem cannot be invoked if the import of such maxim would have the effect of paralyzing the administrative process or where the need for promptitude or the urgency so demands. It has been stated therein that the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential. The concept of natural justice sometimes requires flexibility in the application of the rule. What is required to be seen the ultimate weighing on the balance of fairness. The requirements of natural justice depend upon the circumstances of the case.*

26. In Natwar Singh v. Director of Enforcement and Another[15], this Court while discussing about the applicability of the rule had reproduced the following passage:-

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter:" [see R. v. Gaming Board for Great Britain, ex p Benaim and Khaida[16] at QB p. 430 C], observed Lord Denning, M.R.

... Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case."

27. In this context, we may fruitfully refer to the verdict in Kesar Enterprises Limited v. State of Uttar Praesh and Others[17] wherein the Court was considering the applicability of principles of natural justice to Rule 633(7) of the Uttar Pradesh Excise Manual. The said Rule provided that if certificate was not received within the time mentioned in the bond or pass, or if the condition of bond was infringed, the Collector of the exporting district or the Excise Inspector who granted the pass shall take necessary steps to recover from executant or his surety the penalty due under the bond. A two- Judge Bench referred to the decisions in Swadeshi Cotton Mills v. Union of India[18], Canara Bank v. V.K. Awasthy[19] and Sahara India (Firm) v. CIT[20] and came to hold as follows:-

"30. ... we are of the opinion that keeping in view the nature, scope and consequences of direction under sub-rule (7) of Rule 633 of the Excise Manual, the principles of natural justice demand that a show- cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said Rule does not contain any express provision for the affected party being given an opportunity of being heard."

28. Regard being had to the discussions made and the law stated in the field, we are of the considered opinion that natural justice has many facets. Sometimes, the said doctrine applied in a

broad way, sometimes in a limited or narrow manner. Therefore, there has to be a limited enquiry only to the realm of computation which is statutorily provided regard being had to the range of delay. Beyond that nothing is permissible. We are disposed to think so, for when an independent order is passed making a demand, the employer cannot be totally remediless and would have no right even to file an objection pertaining to computation. Hence, we hold that an objection can be filed challenging the computation in a limited spectrum which shall be dealt with in a summary manner by the Competent Authority."

26. Applying the principles enunciated by the Hon'ble Supreme Court with regard to principles of natural Justice, it is clear that Section 45-IA(6)(v) 1934 Act provides for cancellation of certificate of registration after giving a reasonable opportunity of being heard.

27. In the facts of the present case, it has been admitted that the petitioner did not comply with the requirement of the end NOF before the cut-off date of April 1 2017. This is not a case where if opportunity of personal hearing was afforded to the petitioner they could have pleaded before the authority about the reasons for non-compliance of the notification of 2015, and in our considered opinion in the present set of circumstances, no useful purpose would have been served in providing an opportunity of personal hearing to the petitioner, taking into account the fact that he has already admitted that he did not comply with the notification of 2015. The business of the petitioner is subject to obtaining a licence from the reserve bank of India after fulfilling certain conditions prescribed by the Bank from time to time. The petitioner is under a duty to comply with the directions of the reserve bank as provided in section 45IA of 1934 Act, and the statute itself mandates that in case the direction are not complied then the registration is liable to be cancelled, and that there is no escape from the statutory provisions. It is further needless to say that the petitioner does not have a right to carry on the business of non-banking finance company without complying with the directions of the Reserve Bank of India. We further take into account the fact that it has not been argued or submitted by the petitioner that they suffered any prejudice on being denied opportunity of personal hearing, and therefore sufficient opportunity of hearing was provided to them by putting them under notice and considering the reply before proceeding to cancel their registration.

28. Hon'ble Supreme Court in**Villianur Iyarkkai Padukappu Maiyam vs. Union of India**reported in (2009) 7 SCC 561 held that in the matter of policy decision and economic tests, the scope of judicial review is very limited. Unless the decision is shown to be contrary to any statutory provision or the Constitution, the Court would not interfere with an economic decision taken by the State. The Court cannot examine the relative merits of different economic policies and cannot strike down the same merely on the ground that another policy would have been fairer and better. It was further held that it is neither within the domain of the Courts, nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved, nor are the Courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have

been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the Courts.

29. After considering the facts of the case as well as the principles enunciated by the Hon'ble Supreme Court, we are of the opinion that principles of natural justice was complied by the Bank by giving a show cause notice and considering the reply of petitioner before cancelling the registration. The impugned order cannot be set-aside on the ground of the same having been passed in violation of principles of natural justice. Apart from this, the petitioner has failed to indicates as to how he was prejudicial in not being afforded an opportunity of personal hearing. We do not find any merit in the contention of the petitioner in this regard.

30. For the reasons stated herein above, we are of the considered view that there is no infirmity in the appellate order dated 26/08/19 and the order of cancellation of registration dated 30/10/18.

31. The petition being devoid of merits is hereby **dismissed**. No order as to costs.

(2020)1ILR 1599

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Matters Under Article-227 (Crl.)No. 6995 of 2019

Mahesh Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ved Prakash Shukla

Counsel for the Respondents:
C.S.C.

A. Criminal Procedure Code, 1973 - Section 245 - CJM u/s 245 Cr.P.C dropped Section 452 IPC, though offences punishable u/s 323, 504, 506 IPC were prima facie present - In revision Sessions Judge held that by framing charge under Section 452 of IPC, no loss will be caused to the applicants - *Held* - Ingress & trespass was said by the complainant in his own portion of premises where he was residing and on the basis of it, direction was given by the learned Sessions Judge.

Matter Under Article 227 dismissed. (E-5)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Article 227 of the Constitution of India, has been filed by the Applicants, Mahesh Kumar, Suresh Kumar and Rudresh, against State of U.P. and Dinesh Kumar Agrawal, with a prayer for setting aside impugned order, dated 18.4.2016, passed by the Additional Sessions Judge, Sant Kabir Nagar, in Criminal Revision, filed against the order of Chief Judicial Magistrate, Sant Kabir Nagar, dated 15.3.2016, passed in Complaint Case No. 2190 of 2010, Dinesh Kumar Agrawal vs. Mahesh Kumar and others.

2. Learned counsel for applicants argued that the Chief Judicial Magistrate, Sant Kabir Nagar, in Complaint Case No.

2190 of 2010, while deciding Application, moved, under Section 245 of Cr.P.C., held that offence, punishable under Section 452 of Indian Penal Code (IPC), was not made out, at the stage of evidence, recorded, under Section 244 of Cr.P.C., though offences, punishable, under Sections 323, 504, 506 of IPC were prima facie present. Hence, offence, under Section 452 of IPC was dropped. Against this order of Chief Judicial Magistrate, Sant Kabir Nagar, Criminal Revision was preferred by complaint, Dinesh Kmar Agrawal, wherein, learned Sessions Judge, Sant Kabir Nagar, admitted revision, relying upon version of Opposite party no.2, and came to conclusion that by framing charge under Section 452 of IPC, no loss will be caused to the applicants. Thus, directed for framing of charge by Chief Judicial Magistrate. Against this order, passed in revision, this Application, for invoking jurisdiction of superintendence of the High Court, over subordinate courts, regarding misuse of process of law, has been moved, under Article 227 of the Constitution of India.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. Heard learned counsel for both sides and gone through the impugned order as well as materials placed on record.

5. From very perusal of impugned order, dated 18.4.2016 of Sessions Judge, Sant Kabir Nagar, it is apparent that statement of complainant, PW-1, recorded under Section 244 of Cr.P.C., on 3.3.2016, was entered in it, wherein, complainant has admitted that complainant, Dinesh Kumar Agrawal and present applicants, Mahesh Kumar, Suresh Kumar and Rudresh are real brothers. All of them were residing in a single premises, side by side, after partition amongst themselves, though no separate house number was yet allotted and on the basis of this statement, offence of criminal trespass, punishable, under Section 452 of Cr.P.C. was held to be not made out by learned Chief Judicial Magistrate, Sant Kabir Nagar, but his finding has not been changed by learned Sessions Judge, rather a direction for decision at the time of judicial decision making, regarding offence, punishable under Section 452 of IPC, was given.

6. No doubt, complainant and three accused persons were residing in one and common premises, but it was specifically said that there had been a mutual partition in that premises, but no separate house number was allotted, but ingress and trespass was said by the complainant in his own portion of premises where he was residing and on the basis of it, direction was given by the learned Sessions Judge. Hence, there remains nothing illegal or irregular in the order of the learned Sessions Judge. More so, accused persons are having opportunity to make cross-examination of witnesses of prosecution on this point and it is a question of fact to be seen by the Trial court on the basis of evidence led before it. Hence, there remains nothing for any indulgence to be granted by this Court, in exercises of power of superintendence, over subordinate court, vested in the High Court, by way of Article 227 of the Constitution of India.

7. Accordingly, this proceeding, being devoid of merits, stands dismissed, but with a direction to the Chief Judicial Magistrate, Sant Kabir Nagar that, while recording his finding, he will not be

influenced, either by the findings of learned Sessions Judge or observations made by this Court, hereinabove, in this order. Judicial decision making shall be taken on the basis of evidence led before the Magistrate.

(2020)1ILR 1601

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Matters Under Article-227 No. 8621 of 2019

Siraj Ahmad @ Sirajuddin & Ors. ...Petitioners
Versus
Sanjeev Kumar & Ors. ...Respondents

Counsel for the Petitioners:
Sri Bashir Ahmad Khan

Counsel for the Respondents:
Sri Rakesh Kumar Pandey, Sri Sushil Kumar Pandey, Sri Ravi Agrawal

A. Waqf Act, 1995, Section 85 – Bar of jurisdiction of Civil Courts in respect of matter relating to waqf, waqf property - Civil Procedure Code, Section 9, Order 7 Rule 11 - suit property shown in the revenue records as a "kabristan" (graveyard) - No material to show that suit property was a waqf property by way of its inclusion in the list of auqaf, published in the Official Gazette or registered as waqf before - Revenue records do not confer title - S. 85 will not be applicable - Jurisdiction of Civil Court, not barred. (Para 22 & 23)

Matter Under Article 227 dismissed. (E-5)

List of cases cited: -

1. Most Rev. P.M.A. Metropolitan & Ors. Vs. Moran Mar Marthoma & Anr 1995 Supp (4) SCC 286

2. Dhulabhai Vs. State of M.P. AIR 1969 SC 78

3.Secretary of State Vs. Mask & CompanyAIR 1940 PC 105

4. FirmSeth Radha Kishan (Deceased) represented by Hari Kishan Vs. the Administrator, Municipal Committee, Ludhiana AIR 1963 SC 1547

5. Smt. Ganga Bai Vs. Vijay Kumar & Ors(1974) 2 SCC 393

6.Dhannalal Vs.Kalawatibai&Ors(2002) 6 SCC 1 6

7. Guru Amarjit Singh Vs. Rattan Chand & Ors (1993) 4 SCC 349

8.Jattu Ram Vs. HakamSingh (1993) 4 SCC 403

9. Union of India & Ors. Vs. Vasavi Cooperative Housing Society Limited & Ors v

10.Sayed EkramSaha & Ors. Vs. Debendra Kum ar Pati & Ors AIR 2018 Ori 47

11.Shalini Shyam Shetty & Anr.Vs. Rajendra Sh ankar Patil (2010) 8 SCC 329

12.RadheyShyam & Anr. Vs. Chhabi Nath & Ors (2015) 5 SCC 423

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

1. Heard Sri Bashir Ahmad Khan, learned counsel for the petitioners and Sri Ravi Agrawal alongwith Sri Rakesh Kumar Pandey, learned counsel for the respondents.

2. The present petition has been filed seeking a prayer to set aside the order dated 24.11.2018 passed by the Civil Judge (Junior Division)-I, Hapur in Original Suit No.199 of 2017 (Sanjeev Kumar & Ors. Vs. Siraj Ahmad & Ors.) whereby the application (Paper No.90Ga)

filed by the petitioners under Order VII Rule 11 of the Code of Civil Procedure, 19081 has been rejected.

3. The petitioners also seek to assail the order dated 23.07.2019 passed by the District Judge, Hapur in Civil Revision No.75 of 2018 (Siraj Ahmad & Ors. Vs. Sanjeev Kumar & Ors.) in terms of which the order rejecting the application under Order VII Rule 11 CPC has been affirmed.

4. The only ground which has been sought to be canvased on behalf of the petitioners to support their claim for rejection of plaint under Order VII Rule 11 CPC is by placing reliance upon Section 85 of the Waqf Act, 19952 to contend that the property in question being a waqf property the jurisdiction of the civil court would be barred.

5. *Per contra*, learned counsel for the respondents has supported the orders passed by the courts b0…….elow by submitting that no material was placed on record by the petitioners to support their claim that the property in question is a waqf property. It has further been submitted that there was no material to show that the property was included in the list of auqaf published under the Act, 1995 and the claim of the petitioners which was based merely on certain revenue entries could not be accepted.

6. In order to examine the rival contentions the scope of the provisions under Order VII Rule 11 CPC is required to be considered and it has also to be seen as to whether, in the facts of the case the jurisdiction of the civil court would be barred in view of the provisions contained under Section 85 of the Act, 1995.

7. Section 9 CPC enables any person, as a matter of right, to file a suit of a civil nature excepting those, the cognizance whereof is either expressly or impliedly barred.

8. The two conditions which are required to be fulfilled for a civil court to have jurisdiction are; (a) the suit must be of a civil nature; and (b) the cognizance of such a suit should not have been expressly or impliedly barred.

9. The expression "civil nature" and the scope of jurisdiction of a civil court under Section 9 CPC was considered in the case of **Most Rev. P.M.A. Metropolitan & Ors. Vs. Moran Mar Marthoma & Anr.**3, and it was held as follows:-

"28. ...The expansive nature of the section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the section by use of the word 'shall' and the expression, "all suits of a civil nature" unless "expressly or impliedly barred".

29. Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of right. The word 'shall' makes it mandatory. No court can refuse to entertain a suit if it is of description mentioned in the section. That is amplified by use of expression 'all suits of civil nature'. The word 'civil' according to dictionary means "relating to the citizen as an individual; civil rights". In Black's Legal Dictionary it is defined as "relating to provide rights and remedies sought by civil actions as contrasted with criminal proceedings". In law it is understood as an antonym of criminal. Historically the two broad classifications were civil and criminal. Revenue, tax and company etc. were added to it later. But they too pertain to the larger family of 'civil'. There is thus no doubt about the width of the word 'civil'. Its width has been stretched further by using the word 'nature' along with it. That is even those suits are cognizable which are not only civil but are even of civil nature. In Article 133 of the Constitution an appeal lies to this Court against any judgment, decree or order in a "civil proceeding". This expression came up for construction in S.A.L. Narayan Row v. Ishwarlal Bhagwandas (AIR 1965 SC 1818). The Constitution Bench held "a proceedings for relief against infringement of civil right of a person is a civil proceedings". In Arbind Kumar Singh v. Nand Kishore Prasad (AIR 1968 SC 1227) it was held "to extend to all proceedings which directly affect civil rights". The dictionary meaning of the word 'proceedings' is "the institution of a legal action, any step taken in a legal action". In Black's Law Dictionary it is explained as:

"In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like."

The word 'nature' has been defined as "the fundamental qualities of a person or thing; identity or essential character; sort; kind; character". It is thus wider in content. The word 'civil nature' is wider than the word "civil proceeding". The section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature."

10. A litigant having grievance of a civil nature thus has a right to institute a suit in a civil court unless its cognizance is either expressly or impliedly barred. In **Dhulabhai Vs. State of M.P.**4 it was held that the exclusion of the jurisdiction of civil court is not to be readily inferred and such exclusion must be clear.

11. Reference may also be had to the judgment in the case of **Secretary of State Vs. Mask & Company**5 which is the leading decision on the point that exclusion of jurisdiction of civil courts is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied. The observations made in the judgment are as follows:-

"...It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where

the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure…"

12. The aforementioned legal position was reiterated in Firm **Seth Radha Kishan (Deceased) represented by Hari Kishan Vs. the Administrator, Municipal Committee, Ludhiana**6 wherein it was stated that at the mere conferment of special jurisdiction on a tribunal in respect of any matter does not itself exclude the jurisdiction of civil courts. The observations made in the judgment are as follows:-

"7. Under S. 9 of the Code of Civil Procedure the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil Courts. The statute may specifically provide for ousting the jurisdiction of civil Courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the said remedy could be had. Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions."

13. The inherent right in every person to bring a suit of civil nature unless the same is barred by statute was emphasised in the case of **Smt. Ganga Bai Vs. Vijay Kumar & Ors.**7, in the following words:-

"15. ...There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit…"

14. A similar view was taken in the case of **Dhannalal Vs. Kalawatibai & Ors.**8 wherein it was stated that plaintiff is *dominus litis* and it is for him to choose the forum unless there be a rule of law excluding access to the said forum. The observations made in the judgment are as follows:-

"23. Plaintiff is dominus litis, that is, master of, or having dominion over, the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of the plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law."

15. In the case at hand the plea which has been sought to be raised on behalf of

the petitioners for rejection of plaint under Order VII Rule 11 CPC is based on the contention that the suit property having been shown in the revenue records as a *"kabristan"* (graveyard) as a consequence the same would be a waqf property and in view of the bar under Section 85 of the Act, 1995 the jurisdiction of the civil court would be barred.

16. In order to appreciate the aforementioned contention the provision contained under Section 85 may be adverted to. For ease of reference Section 85 is being reproduced below:-

"**85. Bar of jurisdiction of civil courts.**--No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any wakf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal."

17. The expression "waqf" has been defined under Section 3(r) of the Act, 1995, and the same is extracted below:-

"**3. Definitions.**--In this Act, unless the context otherwise requires,-- x x x x x

(r) "waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes--

(i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;

(iii) "grants", including mashrut-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law, and "waqif" means any person making such dedication;"

18. Section 5 of the Act, 1995 provides for publication of list of auqaf in the Official Gazette, which reads as follows:-

"**5. Publication of list of auqaf.**--(1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and forward it back to the Government within a period of six months for publication in the Official Gazette a list of Sunni auqaf or Shia auqaf in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed.

(3) The revenue authorities shall--

(i) include the list of auqaf referred to in sub-section (2), while updating the land records; and

(ii) take into consideration the list of auqaf referred to in sub-section (2), while deciding mutation in the land records.

(4) The State Government shall maintain a record of the lists published under sub-section (2) from time to time."

19. In terms of Section 36 of the Act, 1995 every waqf whether created before or after commencement of the Waqf Act, 1995 is required to be registered at the office of the Waqf Board9, and in terms of sub-section (8) thereof every application for registration of waqf is required to be made within three months from the date of; (a) commencement of the Act, 1995, (b) the creation of the waqf, (c) the establishment of the Board, as the case may be. The relevant provisions in this regard are being extracted below:-

"**36. Registration.**--(1) Every waqf, whether created before or after the commencement of this Act, shall be registered at the office of the Board.

x x x x x

(8) In the case of auqaf created before the commencement of this Act, every application for registration shall be made, within three months from such commencement and in the case of auqaf created after such commencement, within three months from the date of the creation of the waqf:

Provided that where there is no Board at the time of creation of a waqf, such application will be made within three months from the date of establishment of the Board.

Comments: Registration of every waqf at the office of the Board is a sine qua non to its valid creation. Every application for registration of waqf shall be made within three months from the date of (a) the commencement of this Act, (b) the creation of the waqf, (c) the establishment of the Board, as the case may be."

20. A plain reading of the provisions under Section 36 lead to the inference that registration of every waqf at the office of the Board is a *sine qua non* to its valid creation.

21. The Act, 1995 provides for publication of the list of auqaf under Section 5 after receipt of a report of survey under sub-section (3) of Section 4 and it is also enjoined upon the Revenue Authorities to include the list of auqaf published in the Official Gazette, while updating the land records.

22. The courts below have recorded that the petitioners have not been able to place any material on record that the property in question, which according to them was entered in revenue records, as *"kabristan"*, was a waqf property, as per the requirement under the Act, 1995, by way of its inclusion in the list of auqaf which is required to be published in the Official Gazette or by way of its registration as a waqf before the Board.

23. As regards the reliance sought to be placed on certain revenue entries wherein the property is stated to be entered as *"kabristan"* this Court may take into consideration that it is settled law that the revenue records do not confer title and even if the entries in the record of rights may be held to carry value that by itself would not confer any title upon the person claiming on the basis of the same.

24. The Supreme Court in **Guru Amarjit Singh Vs. Rattan Chand & Ors.**10 held that entry in revenue records are not proof of title, and it was stated as follows:-

"2. ...It is settled law that entries in the Jamabandi are not proof of title.

They are only statements for revenue purpose. It is for the parties to establish the relationship or title to the property unless there is unequivocal admission…"

25. A similar position was reiterated in **Jattu Ram Vs. Hakam Singh**11, and it was held as follows:-

"3. ...The sole entry on which the appellate court placed implicit reliance is by the Patwari in Jamabandi. It is settled law that the Jamabandi entries are only for fiscal purpose and they create no title…"

26. In **Union of India & Ors. Vs. Vasavi Cooperative Housing Society Limited & Ors.**12 the same legal position has again been stated in the following terms:-

"21. This Court in several judgments has held that the revenue records do not confer title. In Corpn. of the City of Bangalore v. M. Papaiah (1989) 3 SCC 612 this Court held that: (SCC p. 615, para 5)

"5. ...It is firmly established that the revenue records are not documents of title, and the question of interpretation of a document not being a document of title is not a question of law."

In Guru Amarjit Singh v. Rattan Chand (1993) 4 SCC 349 this Court has held that: (SCC p. 352, para 2)

"2. ...that entries in the Jamabandi are not proof of title."

In State of H.P. v. Keshav Ram (1996) 11 SCC 257 this Court held that: (SCC p. 259, para 5)

"5. ...an entry in the revenue papers by no stretch of imagination can form the basis for declaration of title in favour of the plaintiffs."

27. This Court may also take notice of the fact that the Act, 1995 has been enacted to provide for the better administration of auqaf for the matters connected therewith or incidental thereto, and as per Section 85, the bar of jurisdiction of the civil courts is in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under the Act, 1995 to be determined by a Tribunal, therefore, it is only those matters which are required by or under the Act, 1995 to be determined by a Tribunal that the bar under Section 85 would apply. It is also seen from the scheme of the Act, 1995 that the jurisdiction of the civil courts is not completely ousted.

28. A similar plea with regard to the ouster of jurisdiction of civil courts in view of the provision contained under Section 85 of the Act, 1995 was considered in the case of **Sayed Ekram Saha & Ors. Vs. Debendra Kumar Pati & Ors.**13 and the said contention was repelled after taking notice of the fact that no material was placed on record to establish that the property involved in the suit was enlisted property in the list of auqaf prepared under the Act, 1995. The relevant observations made in the judgment are as follows:-

"6. A whole reading of the aforesaid provisions makes it clear that first of all the property must be a auqaf property finds place in the list prepared following section 5 of the Act based on the preliminary survey following the provisions contained in Section 4 of the Act and in the event any dispute regarding the status of such property under the list, the Tribunal constituted under the Act has been given power to decide such matters.

So far as provision under Section 81(5) is concerned, it also leaves no doubt that the Tribunals have the same power like the Civil Court under the Code of Civil Procedure while trying a suit or executing a decree or order. Taking into consideration the claim of Sri Nayak, learned counsel that Civil Court has all powers to decide the dispute even involving waqf property has no force. Power given under Section 83 (5) of the Act is limited to the extent following the powers of Civil Court following the provisions of the Code of Civil Procedure relating to trial of a suit or executing a decree or order and nothing beyond that. Looking to the claim of Sri Nayak, learned counsel for the petitioner, this Court finds even though the petitioners claimed in the court below that the property being waqf property, a civil suit is barred under Section 85 of the Act, but for no material to establish that the property involved in the suit is enlisted property involving the list of Waqf or auqafs as prepared under Sections 4 and 5 of the Act, a civil suit at this stage is not barred…"

29. The jurisdiction of civil court is plenary in nature and unless the same is ousted expressly or by necessary implication, it will have jurisdiction to try all types of suits. The ouster of jurisdiction, it is well settled, cannot be inferred readily and onus lies on the person asserting the ouster and vesting of jurisdiction in some other court, tribunal or authority. Section 9 CPC enables any person, as of right, to file a suit of civil nature excepting those, the cognizance whereof is expressly or by necessary implication barred.

30. Order VII Rule 11(d) CPC is one of such provisions which provides for rejection of plaint, if it is barred by any law. The provision therein being in the nature of an exception the same must be strictly construed and the embargo thereunder to the maintainability of the suit must be apparent from the averments in the plaint.

31. The courts below having recorded findings to the effect that no material was placed on record by the petitioner to show that the suit property is a waqf or a waqf property or relates to any other matter which is required to be determined by a Tribunal constituted under the Act, 1995, the bar under Section 85 whereunder the jurisdiction of civil courts is ousted, has rightly been held to be not attracted and in view of the same the application of the petitioners for rejection of the plaint has been turned down. The orders passed by the courts below therefore cannot be faulted with.

32. This Court may also take notice of the fact that the power of superintendence conferred under Article 227, is to be exercised most sparingly and within the parameters which have been summarized in the case of **Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil**14, and also in the case of **Radhey Shyam & Anr. Vs. Chhabi Nath & Ors.**15.

33. Counsel for the petitioners has not been able to point out any material error or illegality in the orders passed by the court below so as to warrant interference in exercise of power under Article 227 of the Constitution of India.

34. The petition thus fails and is accordingly dismissed.

(2020)1ILR 1609

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Matters Under Article-227 No. 8624 of 2019
(Civil)

M/s J.A. Construction ...Petitioner
Versus
Sardar Kuldeep Singh & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Jain, Sri Abu Bakht, Sri Nitin Jain

Counsel for the Respondents:
Sri Shailendra

A. Civil Procedure Code, 1908 - Order 6 Rule 17 proviso - Amendment of Written statement at the belated stage of appeal - Rejected - Burden on the person, who seeks amendment, after commencement of the trial to show that in spite of "due diligence" such an amendment could not have been sought earlier.

Defendant sought amendment in his WS - at the stage of appeal - Trial court held filing of amendment application at the belated stage of appeal was with a view to delay the proceedings & accordingly rejected - ***Held*** - Petitioner failed to discharge the burden that inspite of due diligence , amendments could not be sought during the pendency of the proceedings at the stage of trial - Amendments sought at the stage of appeal were not bona fide and the same were only with a view to delay the proceedings. (Para 17)

Matter Under Article 227 dismissed. (E-5)
List of cases cited: -

1.Chander Kanta Bansal VsRajinderSingh Anand (2008) 5 SCC 117

2.J. Samuel VsGattu Mahesh & Ors(2012) 2 SCC 300

3.Revajeetu Builders and Developers Vs Narayanaswami and Sons & Ors (2009) 10 SCC 84

4.M.RevannaVsAnjanamma & Ors(2019) 4 SCC 332

5. Vijay Hathising Shah & Anr. Vs Gitaben Parshottamdas Mukhi & Ors(2019) 5 SCC 360

6. Madhaw Asharam Charitable Trust Hanuman Mandir & Anr. Vs Shri Shamshul Khuda Khan 2019 (12) ADJ 41

7.Hari Narayan VsShanti Devi2019 (2) ARC 715

8. Shalini Shyam Shetty & Anr.Vs Rajendra Shankar Patil (2010) 8 SCC 329

9. Radhey Shyam & Anr. Vs. Chhabi Nath & Ors (2015) 5 SCC 423

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

1. Heard Sri Abu Bakht, learned counsel for the petitioner and Sri Shailendra, learned counsel appearing for respondent nos.1 and 2.

2. The present petition has been filed against the order dated 01.05.2018 passed by the Additional District Judge, Court No.8, Kanpur Nagar in Civil Appeal No.139 of 2016 rejecting the amendment application whereby certain amendments had been sought by the petitioner-defendant in his written statement. The petitioner also seeks to assail the order dated 17.09.2019 whereby another amendment application (Application No.132Ga) again seeking certain amendments in the written statement filed by the petitioner-defendant has also been rejected.

3. Contention of the learned counsel for the petitioner is that the amendments in

question were necessitated due to the fact that certain legal points came to the knowledge of the counsel of the petitioner-defendant subsequently and since the said points had not been mentioned in the written statement they were necessary and to be raised at the stage of appeal.

4. *Per contra*, learned counsel for the respondent-plaintiffs submits that the original suit which had been filed in the year 2008 had been decreed vide judgment dated 29.05.2015 and thereafter the petitioner-defendant had preferred an appeal in the year 2016 and as such the amendments which are being sought in the written statement at the stage of appeal are only with a view to linger the proceedings and the amendment applications have rightly been rejected.

5. The order dated 01.05.2018 whereby the first amendment application of the petitioner has been rejected takes note of the fact that the amendments which were sought were basically with a view to raise a plea with regard to insufficiency of court fee and that the trial court while deciding the suit had framed a specific issue as to whether the suit was undervalued and there was deficiency of court fee and the said issue had been decided by an order dated 14.10.2010 answering the same in the negative and accordingly it was not necessary for the petitioner to seek an amendment in his written statement raising the issue at the stage of appeal. The court below has however held that the legal submissions on the issue of valuation of the suit and the court fee can be raised by the petitioner at the stage of hearing of the appeal.

6. The order dated 17.09.2019 whereby the second amendment application moved by the petitioner has been rejected takes notice of the fact that an earlier amendment application filed by the petitioner on 28.03.2017 wherein similar amendments had been sought had already been rejected by an order dated 01.05.2018. The court below has also taken note of the fact that the suit had been decreed on 25.05.2015 and during the pendency of the suit no such amendment had been sought by the petitioner-defendant and the filing of the amendment application at the belated stage of appeal was clearly with a view to delay the proceedings and accordingly the same was rejected and the matter was posted for hearing.

7. The rival contentions which fall for consideration relate to the scope of the powers of the Court to allow amendment of pleadings under Order VI Rule 17 of the Civil Procedure Code, 19081.

8. The purpose and object of rules relating to pleadings being to decide the real controversy between the parties and not to punish them for their negligence, the provisions relating to the amendment of pleadings are usually to be liberally construed with a view to promoting the ends of justice and not for defeating them, and consequently the courts generally allow all amendments that may be necessary for determining the real question in controversy between the parties.

9. The proviso to Rule 17 under Order VI, as inserted by the Code of Civil Procedure (Amendment) Act, 20022, however, restricts and curtails the power of the court to allow amendment of pleadings by enacting that no application for amendment is to be allowed after the trial has commenced unless the court

comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

10. The proviso to Rule 17, as per the Amendment Act, 2002, has introduced the "due diligence" test, which requires that the court must be satisfied that in spite of "due diligence" the party could not discover the ground pleaded in the amendment. The term "due diligence" has been specifically used so as to provide a test for determining whether to exercise the discretion in situations where amendment is being sought after commencement of the trial.

11. The object of introducing the proviso to Rule 17 was considered in the case of **Chander Kanta Bansal Vs. Rajinder Singh Anand**3, and it was held as follows:-

"11. ...The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment.

12. With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy leading to protest all over the country. Thereafter, the Rule was restored in its original form by amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to some extent. The new proviso lays down that no application for amendment shall be allowed after the commencement of trial, unless the court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise.

13. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason

for adding proviso is to curtail delay and expedite hearing of cases.

x x x x x

15. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.

16. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

17. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial.…"

12. The provisions contained under Order VI Rule 17 proviso as introduced in the year 2002 again came up for consideration in the case of **J. Samuel Vs. Gattu Mahesh & Ors.**4 wherein the principles relating to allowing amendments under Order VI Rule 17 were reiterated and the object of the proviso and the meaning and significance of "due diligence" of the parties seeking amendment was also stated. The observations made in the judgment in this regard as follows:-

"18. The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:

"...no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief.

An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

x x x x x

23. ...The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. (Vide Aniglase Yohannan v. Ramlatha (2005) 7 SCC 534, Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N. (2006) 12 SCC 1, Chander Kanta Bansal v. Rajinder Singh Anand (2008) 5 SCC 117, Rajkumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd. (2008) 14 SCC 364, Vidyabai v. Padmalatha (2009) 2 SCC 409 : (2009) 1 SCC (Civ) 563 and Man Kaur v. Hartar Singh Sangha (2010) 10 SCC 512 : (2010) 4 SCC (Civ) 239)."

13. Reference may also be had to the judgment in the case of **Revajeetu Builders and Developers Vs. Narayanaswami and Sons & Ors.**5 wherein some of the important factors which may be kept in mind while dealing with an application filed under Order VI Rule 17 have been enumerated in the following terms:-

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

14. In a recent judgment in the case of **M. Revanna Vs. Anjanamma & Ors.**6, it has been held that after commencement of trial amendment of pleadings is not permissible except under conditions stated in the proviso and the burden is on the person seeking the amendment after commencement of trial to show "due diligence" on his part as contemplated under the proviso. The relevant observations in the judgment are as follows:-

"7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."

15. A similar view was taken in the case of **Vijay Hathising Shah & Anr. Vs. Gitaben Parshottamdas Mukhi & Ors.**7 wherein the order passed by the High Court setting aside the order of the Trial Court rejecting the amendment application was held to be unsustainable and the order of the Trial Court was restored. The observations made in the judgment are as follows:-

"9. In our view, the trial court was right in rejecting the application. This we say for more than one reason. First, it was wholly belated; second, Respondent 1-plaintiff filed the application for amendment of the plaint when the trial in the suit was almost over and the case was fixed for final arguments; and third, the suit could still be decided even without there being any necessity to seek any amendment in the plaint. In our view, amendment in the plaint was not really required for determination of the issues in the suit."

16. The aforementioned legal position has been reiterated in recent judgments of this Court in **Madhaw Asharam Charitable Trust Hanuman Mandir & Anr. Vs. Shri Shamshul Khuda Khan8 and Hari Narayan Vs. Shanti Devi**9.

17. In the case at hand the court below upon due consideration of the facts of the case has come to the conclusion that the amendments which were being sought to come at the stage of appeal were not *bona fide* and the same were only with a view to delay the proceedings.

18. No material has been placed on record on behalf of the petitioner to discharge the burden that in spite of due diligence the amendments which are being sought could not have been sought during the pendency of the proceedings at the stage of trial.

19. This Court may also take notice of the fact that the power of superintendence conferred under Article 227, is to be exercised most sparingly and within the parameters which have been summarized in the case of **Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil**10, and also in the case of **Radhey Shyam & Anr. Vs. Chhabi Nath & Ors.**11.

20. Counsel for the petitioner has not been able to point out any material error or illegality in the orders passed by the court below so as to warrant interference in exercise of power under Article 227 of the Constitution of India.

21. The petition lacks merit and is accordingly dismissed.

(2020)1ILR 1615

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.01.2020

BEFORE
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Application U/S 482/378/407 No. 3242 of 2009

Ravindra Kumar Yadav ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
S.K. Upadhyay

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Procedure Code, 1973 – Section 190 (1) (a) Cr.P.C.- Cognizance – The Court has to make Prima Facie satisfaction on the allegations made in the Complaint-

The correctness of the allegations made in the Complaint and in the statements of the witnesses u/s 200/202 Cr.Pc can only be adjudged on the basis of evidence led during the trial. At the stage of taking cognizance the Magistrate has to see only that a prima facie case is made out on the basis of the Complaint. (Para 10)

B. Criminal Procedure Code, 1973 – Section 190 (1) (a) Cr.P.C- Defence of the accused- Involvement of the person and not of his innocence or any version in defence of the accused is not to be seen.

At the stage of cognizance, court is concerned with the involvement of the person and not of his innocence, therefore any version in defence of the accused is not to be seen and the same has to be adjudicated by the magistrate during the course of the trial. (Para 12)

C.Criminal Procedure Code, 1973 - Section 482 – Scope-The High Court is not to appreciate and analyse factual aspect of case because the same is a question of evidence before the trial Court.

What is necessary is to see whether an error is committed by the Magistrate while taking cognizance of the offence on the basis of facts alleged and materials placed before it and the Court cannot look into or appreciate evidence under Section 482 Cr.P.C. (Para 10, 13)

Exercising the extraordinary power of the Court conferred under Section 482 Cr.P.C., the applicant directed to appear before the Court concerned within three weeks from the date certified copy is issued, alongwith his counsel and the learned Court of Magistrate concerned is directed to record his appearance through counsel, without taking him into custody subject to his producing proper bail bonds and sureties to the satisfaction of the Court concerned, on the same day of the appearance. (Para 19)

Criminal Application disposed of.(E-3)

Case law/ Judgements relied upon:-

1. Mohd. Allauddin Khan Vs. St. of Bih.& ors, AIR 2019 SC 1910

2. Arnesh Kumar Vs. St. of Bih.& Anr., (2014) 8 SCC 273

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. In the revised call of the list, learned counsel Sri S.K. Upadhyay, Advocate appears on behalf of the applicant to press his case. Learned A.G.A. for the State is also present.

3. In the nut shell, the case, as emerging from the materials available on record, seems to have arisen from a matrimonial dispute which is long drawn. The parties to the marriage respectively, the applicant-Ravindra Kumar Yadav and the opposite party no.2-Anita Yadav entered into their marital life by virtue of marriage on 23.04.2000. Thereafter, they fell into dispute and differences in their marital life which resulted into going out of the wife from her matrimonial home. Consequent thereupon, a suit for restitution of conjugal rights was filed by the applicant-husband which was decreed on 28.09.2005 in his favour.

4. Learned counsel for the applicant vehemently press this fact for the reason to show the justification of the complaint filed by the opposite party no.2-wife on 22.04.2006 which is subsequent to decree of restitution of conjugal rights.

5. Learned counsel for the applicant further states that instead of obeying the decree of Conjugal Rights, she (opposite party no.2) remained busy in continuing the dispute on this way or that way and therefore, filed a complaint against the applicant on 27.06.2006 with an allegation that a motor bike was given, by the parents of the complainant in dowry which was fraudulently and deceitfully converted into the name of applicant. As such, she charged him for committing offences under Section 420, 467, 468 and 506 of I.P.C.

6. Learned counsel further argues that in the above context, the statements under Section 200 and 202 Cr.P.C. were recorded and the Court took cognizance of offences under Section 420, 467, 468 and 506 of I.P.C. and issued summons vide order dated 20.01.2007.

7. The order sheet reveals that effort of personal service upon opposite party no.2, of notice of the case was repeatedly made but all went in vain. However, from the materials available on record, it becomes clear that the opposite party no.2-the wife is residing in Lucknow separately and also, neither the registered post A.D. nor the processes issued by the Court could be served upon her.

8. Learned A.G.A. for the State is present. The legal issue involved necessary for disposal of application under Section 482 Cr.P.C. is to be addressed by him. Therefore, heard the case to decide it finally on merit.

9. The moot question involved in the case is that whether the Court was justified in taking the cognizance of offence under Section 420, 467, 468 and 506 of I.P.C. and the another question that whether the defence, as argued by the learned counsel for the applicant may be taken into consideration for quashing the summoning order at this stage by the High Court in application under Section 482 Cr.P.C.

10. So far as, the power of taking cognizance of the Court is concerned,

undoubtedly, the Court has to make prima facie satisfaction as to the allegations made in the complaint and the supporting evidences. The record shows that the complainant has pleaded the factum of marriage with the applicant and presentation of motor bike as gift in the marriage with him. While hearing the revision, it is not disputed on the part of applicant also. So far as the allegations as to changing ownership fraudulently in deceitful manner is concerned, if originally the bike is not in the name of the applicant and if allegation is made that mutation of the name of the applicant is made in place of his wife without her knowledge and consent in the papers namely registration of the vehicle though is to be adjudged on the basis of evidences on establishing it true or false in the course of trial, but that is sufficient for satisfaction of magistrate for taking cognizance of offence to call the accused-applicant for trial. Before holding any allegation as true or discarding the same holding false, what is necessary is to see whether an error is committed by the Magistrate while taking cognizance of the offence on the basis of facts alleged and materials placed before it. It is not necessary to look into or appreciate evidences whether it is contradictory, inconsistent, false or true etc. Hon'ble the Supreme Court in appeal against the order of High Court held in ***AIR 2019 SC 1910 (Mohd. Allauddin Khan Vs. State of Bihar and others)*** that the High Court had no jurisdiction to appreciate the evidences of the proceedings under Section 482 Cr.P.C. because where there are contradictions or the inconsistencies in the statements of the witnesses, is essentially an issue relating to appreciation of evidences and the same can be gone into by the Judicial Magistrate during trial, when the entire evidence is adduced by the parties. Para 17 of the judgment of Hon'ble the Supreme Court quoted hereunder:

"17. In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings Under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case."

11. All facts of complaint stated before the Court of magistrate supported with applicant statement on oath by the complainant and her witness alongwith the documents relating to the name over the documents relating to bike showing the name of complainant and afterwards the conversion into the name of applicant, is prima facie fulfilling elements of offences charged over the accused-applicant namely under Sections 420, 467 and 468 of the I.P.C., as they are defined in the I.P.C.

12. It is argued by the applicant that all these allegations have arisen out of matrimonial dispute. After the marriage transfer of the name was consented. But this is a defence, it may or may not be consented is to be adjudged by the magistrate, if pursuant to the summon, the applicant who is accused, appears before it and put his said defence alongwith evidences. The Court has to weigh the evidences of both the parties in the light of pending matrimonial dispute, keeping into consideration that the complaint is filed after a decree of restitution of Conjugal Rights. It would be too early to record any finding in this regard by this Court.

13. As such, at this stage, the Court sitting under Section 482 Cr.P.C. is not capable to weigh the evidences put forth or proposed by the applicant under Section 482 Cr.P.C.

14. In view of the above, the application under Section 482 Cr.P.C. **does not deserve to be allowed for quashing of the summoning order and further proceeding.**

15. In criminal law, the accused faces the risk of losing personal liberty. Hon'ble the Supreme Court in an erudite judgment in ***Arnesh Kumar Vs. State of Bihar and Anr., (2014) 8 SCC 273*** expressed a serious concern about the manner in which arrests were being made in matrimonial disputes under Section 498-A of the Indian Penal Code. Directions were given in all states to instruct their police not to mechanically resort the power of arrest under Section 41 of the Cr.P.C. and imply the provision of notice under Section 41-A of the Cr.P.C.

16. In present case, the accused-applicant was summoned after taking cognizance of the offences by the magistrate vide order dated 20.01.2007 fixing a date for his appearance on 08.03.2007. The court passing the summoning order was Special Additional Chief Judicial Magistrate, CBI (Ayodhya Prakaran Lucknow) whereas, the case according to the accused, pertains to district Barabanki and thereafter, the proceeding was transferred to Fourth Additional Civil Judge, Junior Division, Room No.36. In the light of the aforesaid facts, the applicant takes the plea of having been mislead thereby. He specifically stated in affidavit para 24 that the order of Summoning has not been served upon the petitioner and as and when it has come into knowledge of the petitioner, he managed the fund and get the copy of the court and the delay in approaching this Hon'ble is neither deliberate nor intentional.

17. The issuance of process by the magistrate after taking cognizance of the offences against the accused is only with a view to procure and ensure the attendance of the accused in trial. In a case, where after a prolonged litigation the parties are in bitter relation between them and the accused-applicant is feared of the coercive processes like arrest and detention into custody, if willing to appear before the Court so as to get the proceeding pending against him, his appearance should be facilitated in the interest of justice.

18. In the present case, the materials on record are sufficient to reveal that the parties by reason of matrimonial dispute arisen just after their marriage in the year 2000, fell into bitter relations with each other. However, a decree of restitution of Conjugal Rights is passed in favour of the applicant, even then instead of getting into the matrimonial life, again the parties are litigating several cases, the present case is one of them.

19. Exercising the extraordinary power of the Court conferred under Section 482 Cr.P.C., this Court directs the applicant to appear before the Court concerned within three weeks from the date certified copy is issued, alongwith his counsel and the learned Court of Magistrate concerned is directed to record his appearance through counsel, without taking him into custody subject to his producing proper bail bonds and sureties to the satisfaction of the Court concerned, on the same day of the appearance.

20. In doing so, the learned court is directed not to enforce the coercive process/orders, if any, passed by it for the purpose of taking him into custody or to make his arrest. The purpose, as discussed here in above is only to decide the case between the parties and not to harass by physical arrest.

21. Learned A.G.A. would have no objection in passing such direction to the Court concerned as the interest of the State is also in getting dispose of huge pendency in the criminal courts.

22. It is further made clear that if the parties are willing and consented to get their dispute settled amicably by way of compromise then the same may be taken by the Court into consideration for the purpose of disposal of the case as soon as possible.

23. With the aforesaid observations, the application under Section 482 Cr.P.C. is **disposed of.**

(2020)1ILR 1619

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.01.2020

BEFORE
THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482/378/407 No. 4259 of 2009

Mahanth Kalyan Das & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ravi Singh, Manoj Kumar Mishra

Counsel for the Opposite Parties:
Govt. Advocate, Ajai Kumar Verma, Hemant Kumar Mishra, Mohammad Ehtesham Khan, Rajesh Kumar Awasthi

A. Jurisdiction - extraordinary jurisdiction under Article 226 of the Constitution or inherent jurisdiction under Section 482 of the Cr.P.C. for quashing the criminal proceedings can be exercised if the proceedings were instituted with mala fide intention or with ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

The revenue record remains in the custody of the revenue officials. It cannot be believed that some manipulation has been done without the involvement of the revenue officials. No revenue official has been made an accused. It is not possible to manipulate the revenue record without the involvement of the revenue official. It is the duty of the Court to ensure that the criminal prosecution is not used as an instrument of harassment or for seeking private vendetta. (Para 22)

Application U/s 482/378/407 allowed. (E-10)

List of cases cited: -

1. State of Haryana and ors Vs. Bhajan Lal and ors 1992 Supp (1) SCC 335 *(followed)*

2. Inder Mohan Goswami and anr Vs. State of Uttaranchal and ors (2007) 12 SCC 1

3. Indian Oil Corpn. Vs. NEPC India Ltd. And ors (2006) 6 SC 736

4. Anand Kumar Mohatta and anr Vs. State (Govt. of NCT, Delhi), Department of Home and anr Criminal Appeal No. 1395 of 2018

5. State of Karnataka Vs. L. Muniswamy and ors 1977 (2) SCC 699

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

1. The present petition under Section 482 Cr.P.C. has been filed for quashing the

proceedings including the summoning order dated 6.6.2009 and the order dated 30.9.2009 issuing bailable warrant against the petitioners passed in Complaint Case No.3482 of 2009, pending in the court of Additional Chief Judicial Magistrate IInd, Faizabad (Now Ayodhya).

2. The case of the petitioners is that Gata Nos.799, 1011, 1013, 1014 and 1015 are recorded in the name of Udasin Sangat Datavya Evam Lok Sansthan, Ranopali, Ayodhya of which Damodar Das, Disciple (Chela) Mahadeo Das was the Mahanth and Sarvrahkar. After the death of Damodar Das, petitioner no.1, Mahant Kalyan Das, became the Mahanth and sarvrakar as per inheritance and succession on the basis of registered Will duly executed by Mahanth Damodar Das. Name of the petitioner no.1 was recorded as Mahanth and Sarvrakar vide mutation order passed under Section 33/39 of the U.P. Land Revenue Act and name of Damodar Das was deleted. A report dated 1.1.2004 was sent by the Sub-Divisional Magistrate, Sadar, Faizabad to the Additional District Magistrate (Administration), Faizabad stating therein that on the basis of the report of the Tehsildar, Sadar, Faizabad dated 1.1.2004, mutation of name of Mahanth Damodar Das in khatauni as Sarvrakar was wholly legal and correct. It was further said that in view of the report of the Tehsildar and perusal of the copies of the khataunis, the order passed by the Sub-Divisional Magistrate on 20.11.2001 was correct. It was further said that it was not required to initiate fresh proceedings under the Uttar Pradesh Ceiling of Land Holdings Act. The Sub-Divisional Magistrate forwarded his comments along with the report of the Tehsildar dated 1.1.2004 to the Additional District Magistrate (Administration), Faizabad.

3. Ram Bahadur Singh, respondent no.2/complainant filed a case under Section 33/39 of the Uttar Pradesh Land Revenue Act, 1901 on 27.2.2006 for correction of the revenue records in respect of the above gata numbers before the Sub-Divisional Magistrate, Sadar, Faizabad. It was alleged that in the khatauni of fasli years 1375-1377 against Gata Nos.278, 279 and 389 in place of his father Rajkaran Singh, S/o Ramdhari Singh, name of Bhartendra Vikram S/o K.K. Nair and Smt. Shakuntala Nair, W/o K.K. Nair had been wrongly recorded. Similarly, in Gata No.889, in place of applicant's father, name of Sripal S/o Nanku, R/o Village Ranopali had been wrongly recorded. It was also stated that during the course of the consolidation proceedings when it came to the knowledge of the father of the applicant that name of the aforesaid two persons had been wrongly recorded against Gata Nos.278, 279 and 389, he filed Case No.1035, under Section 9A(2) of the U.P. Consolidation of Holdings Act. The aforesaid case was decided by the Consolidation Officer vide order dated 2.7.1977 against his father. Against the order dated 2.7.1977 passed by the Consolidation Officer, father of respondent no.2 filed an appeal before the Settlement Officer Consolidation under Section 11(1) of the Consolidation of Holdings Act. The aforesaid appeal was decided vide order dated 6.9.1977 in favour of the father of respondent no.2. Settlement Officer, Consolidation directed that names of Bhartendra Vikram, Shakuntala Nair and Sripal be expunged and in their place name of the father of the respondent no.2, Rajkaran Singh S/o Rambali Singh be mutated. It was stated that due to consolidation proceedings, the aforesaid gata numbers got changed and

for fasli years 1398-1403 the aforesaid gata numbers were changed to 799, 1011, 1013, 1014 and 1015, which were part of Khata No.394 in the name of father of respondent no.2, Rajkaran Singh.

4. Father of respondent no.2 died on 27.3.1992 and, according to the succession, respondent no.2's name was mutated against the aforesaid gata numbers in place of his father vide order dated 19.11.1992 for fasli years 1398 to 1403.

5. It was alleged that after fasli year 1403, new khatauni was prepared without there being any order by any competent authority. The area Lekhpal and Kanoongo by mistake recorded the Gata Nos.799, 1011, 1013, 1014 and 1015 being part of plot no.662 in favour of the petitioners. It was further said that respondent no.2 could come to know only in the month of November, 2005 and after obtaining the necessary documents, he filed the aforesaid complaint. Thus, in sum and substance, the allegation in the aforesaid application was that by mistake of Lekhpal and Kanoongo, the aforesaid land of Gata Nos.799, 1011, 1013, 1014 and 1015 of plot no.662 got recorded in the name of the petitioners.

6. Petitioner no.1 filed objection on 5.9.2006 to the said application filed by respondent no.2. He claimed that the land in question belonging to the Sangat Ashram. It was specifically stated that no case was ever contested/filed by the father of respondent no.2 against Martand Vikram Nair and Smt. Shakuntala Nair. The case set up by the father of respondent no.2 was based on forged and fabricated documents and, the papers, which were filed, were nothing but forged documents and the same were prepared by manufacturing the revenue record. It was further stated that the aforesaid land in question was of the Sangat Ashram, Ranopali and, the case set up by the father of respondent no.2 was liable to be rejected being based on forged and fabricated document. It was further said that Mahanth Damodar Das filed an application under Section 9 of the U.P. Consolidation of Holdings Act against Shakuntala Nair and Martand Vikram Nair claiming that in place of Shakuntala Nair and Martand Vikram Nair, name of Ashram and his name as Sarvrakar should again be recorded. The case was finally decided in Appeal No.1860-1251 under Section 11(1) of the U.P. Consolidation of Holdings Act (Udasin Sangat Ashram, Ranopali Vs. K.K. Nair and others) on 6.9.1977. The Settlement Officer, Consolidation directed that in the basic year of the Village Ranopali against the names of Martand Vikram Nair and Smt. Shakuntala Nair in khatauni nos.278 and 279, name of Sangat Ashram, Ranopali should be recorded as khatedar. It was further said that the documents i.e. khatauni for fasli years 1386-1391 for khata Nos.356, 357 and 706 filed along with the application are completely false and fabricated. Khatauni for the fasli years 1392-1397 and 1398-1403 were also prepared committing forgery and manipulation. Thus, the case of the petitioner no.1 from the very beginning had been that the application filed by the father of respondent no.2 was based on forged and fabricated revenue record, which got prepared by manipulation and it was prayed that the said application be rejected. It was further stated in the petition that petitioner no.3 on coming to know the forgery and manipulation committed in the revenue record by

respondent no.2 and his brothers, moved an application before the Inspector, Police Station Kotwali City, Faizabad and the Senior Superintendent of Police, Faizabad, but when the FIR was not registered, he moved an application under Section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Faizabad. In compliance of the order passed by the Chief Judicial Magistrate, Faizabad in the aforesaid application under Section 156 (3) Cr.P.C., an FIR vide Case Crime No.311 of 2008, under Sections 419, 420, 467, 468 and 471 IPC against respondent no.2 and his brothers, Virendra Bahadur Singh and Kewal Bahadur Singh, S/o Late Rajkaran Singh was lodged at the Police Station Kotwali City, District Faizabad on 21.1.2008. Respondent no.2 and his brothers preferred Writ Petition No.1144 (MB) of 2008 for quashing of the aforesaid FIR before this Court. However, vide order dated 7.2.2008, the aforesaid writ petition was dismissed by this Court. The police submitted the charge sheet in the aforesaid case against respondent no.2 and his two brothers under Sections 419, 420, 467, 468 and 471 IPC in the Court of Chief Judicial Magistrate, Faizabad.

7. Respondent no.2, who is working as Peon in the Nazarat of the Civil Court, Faizabad moved an application under Section 156(3) Cr.P.C. on 15.7.2008 after charge sheet was submitted and the cognizance was taken in Case Crime No.311 of 2008 for registration of the FIR against the petitioners. It was stated that against the order dated 2.7.1977 passed by the Consolidation Officer, Makbara, Faizabad in Case No.1035, under Section 9A(2) of the U.P. Consolidation of Holdings Act, father of respondent no.2 filed an appeal before the Settlement Officer, Consolidation being Appeal No.1262, under Section 11(1) of the U.P. Consolidation of Holdings Act, which was decided on 6.9.1977 in favour of the father of respondent no.2 and a direction was issued that against Khata Nos.278, 279 and 389 of Village Ranopali, in place of Bhartendra Vikram, Shakuntala Nair and Sripal S/o Nanku, name of father of respondent no.2 should be recorded as sirdar. It was said that in pursuance of the aforesaid order passed by the Settlement Officer, Consolidation, in khatauni of fasli year 1386-1391, name of father of respondent no.2 got recorded in Gata Nos.799, 1011, 1013, 1014 and 1015, which are part of Khata No.394 from fasli year 1386-1391, 1392-1397 and 1397-1403. After the death of father of respondent no.2 on 27.3.1992, vide order dated 19.11.1992 name of respondent no.2 and his two brothers got recorded against those gata numbers in fasli years 1398-1403, which became kahata No.394.

8. In paragraph 8 of the aforesaid complaint, it was stated that after the fasli year 1403, without there being any order from the competent officer, by mistake of Area Lekhpal and Kanoongo, the aforesaid land of Gata Nos.799, 1011, 1013, 1014 and 1015 got recorded in the name of Sangat Ashram, Ranopali, Ayodhya and was shown as part of Plot No.662. It was also stated that when this fact came to the knowledge of late Mahanth Damodar Das, who was the Mahanth and Sarvrakar of the Ashram, he accepted the aforesaid mistake and Case No.68, under Section 33/39 of the U.P. Land Revenue Act was filed in the court of Sub-Divisional Magistrate, Sadar, Faizabad for correcting the revenue entries/record. Tehsildar in his report, had specifically stated that the land in Gata Nos.799, 1011, 1013, 1014 and 1015 was of the father of respondent no.2, Late

Rajkaran Singh and because of mistake of Area Lekhpal and Kanoongo, it was wrongly recorded as part of Plot No.662 belonging to the Sangat Ashram, Ranopali. It was alleged that unfortunately the revenue record could not get corrected and, therefore, respondent no.2 filed Case No.5/22/135, under Section 33/39 of the U.P. Land Revenue Act in the court of Sub-Divisional Magistrate, Sadar, Faizabad for correction of the revenue record in respect of Gata Nos.799, 1011, 1013, 1014 and 1015 and prayed that in place of the name of Sangat Ashram, Ranopali, Ayodhya, his name and names of his two brothers should be mutated. It was also alleged that as soon as the petitioners came to know about the case filed by respondent no.2 under Section 33/39 of the U.P. Land Revenue Act, they got removed the revenue record of fasli year 1387 (page no.64) where the land of Gata Nos.799, 1011, 1013, 1014 and 1015 was ordered to be recorded in the name of father of respondent no.2, late Rajkaran Singh and got inserted a forged order for recording the name of the Sangat Ashram, Ranopali against the aforesaid gata numbers. When this fraudulent and forged act came to the knowledge of respondent no.2 during the course of inspection of revenue record for the purposes of case filed by him on 27.2.2006 in the court of Sub-Divisional Magistrate, Sadar, Faizabad in 5/22/135, under Section 33/39 of the U.P. Land Revenue Act, then respondent no.2 gave a complaint in the police station for registration of the FIR. However, the FIR was not registered. Thereafter, he moved an application on 18.6.2008 before the Senior Superintendent of Police. However, no action was taken on the aforesaid application. Therefore, on 15.7.2008 the present application under Section 156(3) Cr.P.C. was moved for a direction to register an FIR and investigate the offence. The Chief Judicial Magistrate, Faizabad passed an order on 2.9.2008 treating the application under Section 156(3) Cr.P.C. filed by respondent no.2 as a complaint case.

9. From perusal of the complaint, it is evident that respondent no.2 did not disclose the case pending against him in pursuance of the FIR registered at Case Crime No.311 of 2008, Police Station Kotwali City, District Faizabad. The statement of the complainant/respondent no.2 under Section 200 Cr.P.C. reiterated the allegation that revenue record in respect of Gata Nos.799, 1011, 1013, 1014 and 1015 of fasli year 1387 (Page no.64) was removed fraudulently and the forged order was mentioned for recording those gata numbers in the name of Sangat Ashram, Ranopali. Statement of Kewal Bahaur Singh, brother of respondent no.2 recorded under Section 202 Cr.P.C. was also made almost the same allegation. Manoj Kumar in his statement recorded under Section 202 Cr.P.C. also stated that he had been seeing the possession of respondent no.2 and his brothers on the land in question. The petitioners have no concern about the said land. The petitioners want to grab the land by manipulating the record. The Judicial Magistrate-II, Faizabad vide order dated 6.6.2009 had summoned the petitioners under Sections 420, 467, 468 IPC in the aforesaid complaint case. Thereafter, on 30.9.2009 passed an order issuing bailable warrants against the petitioners.

10. An additional supplementary affidavit dated 1.11.2018 has also been filed on behalf of the petitioners. Along with the aforesaid affidavit, a copy of the

order dated 28.7.2011 passed by the Additional Officer (First), Faizabad in Case No.7/9/12/4/5/22/135, under Section 33/39 of the U.P. Land Revenue Act (Now under Section 32 of the Revenue Code, 2006) filed by respondent no.2 for correction of the revenue entry in respect of Gata Nos.799, 1011, 1013, 1014 and 1015 has been placed on record as Annexure No.SA-1. The Additional Officer (First) by a detailed order dated 28.7.2011, has dismissed the aforesaid application filed by respondent no.2. Against the aforesaid order, revision preferred by respondent no.2, has also been dismissed by the Additional Commissioner (Administration), Faizabad Division, Faizabad vide order dated 25.6.2013. The said order has been placed on record as Annexure SA-2 to the supplementary affidavit.

11. Learned Additional Officer (First), Faizabad in his order dated 28.7.2011 has rejected the contention of respondent no.2 and his two brothers that page no.64 of fasli year 1387 was removed and by manipulation in pursuance of the forged order dated 6.9.1977, name of Sangat Ashram, Ranopali was recorded. Learned Additional Officer (First) has specifically held that respondent no.2 and his brothers could not file any khatauni before the fasli year 1375-1377, which could establish that the land in question was their ancestral property. Respondent no.2 had also not filed any khasra in respect of fasli year 1359 nor he has filed any receipt depositing in the land revenue in respect of the aforesaid land. Learned Additional Commissioner has affirmed the findings of the learned presiding officer. These two orders have been challenged by respondent no.2 and his brothers in Writ Petition No.7360 (MS) of 2013 before this Court. This Court on 19.11.2013 passed the following order in the aforesaid writ petition :-

"The main dispute is as to whether any order in favour of petitioner was passed by S.O.C. on 06.9.1977 or not. Annexure 3 to the writ petition is copy of the said order. It is mentioned in the said order that it is in respect of three appeals, i.e., Appeal No.1260, 1261 and 1262. Number of the appeal alleged to have been filed by petitioner's father Raj Karan Singh was 1262. Learned counsel for the contesting respondent has also shown photostat copy of certified copy of judgment of the same officer of the same date but it contains only number of two appeals, i.e. 1260 and 1261.

Learned Standing Counsel Shri Anil Kumar Yadav is directed to immediately verify from the record room of Faizabad as to whether files of appeal no. 1260, 1261 and 1262, if filed, are available or not. If files are available they must be shown to the Court. Learned counsel for the petitioner is also directed to file copy of the order dated 02.7.1977, alleged to have been passed by the C.O. against Raj Karan, father of the petitioner against which Appeal no. 1262 was allegedly filed.

Put up as fresh on 21.11.2013.

Office is directed to supply a copy of this order free of cost to Shri Anil Kumar Yadav, learned Standing Counsel."

12. The petitioners/respondent no.2 and his brothers, have been seeking adjournments in the aforesaid case, which is evident from the order-sheet dated 31.10.2013, 6.11.2013, 8.11.2013, 11.11.2013, 14.11.2013, 21.11.2013, 22.11.2013, 25.11.2013, 2.12.2013, 9.11.2016 and 6.12.2017. No order has

been passed in favour of the petitioners till date in the aforesaid writ petition.

13. Respondent no.2 has filed counter affidavit, in which it has been stated that the petitioners are involved in several criminal cases of similar nature and various proceedings are pending against them. The contents of complaint filed before the Magistrate have been reiterated and, it has been stated that the petitioners had manipulated the revenue record and fraudulently and by manipulation, name of the Ashram as well as petitioners had got recorded in the revenue record in place of respondent no.2 and his brothers.

14. The question whether the order dated 6.9.1977 was passed in respect of three appeals i.e. Appeal No.1260, 1261 and 1262, the last appeal being allegedly filed by the father of respondent no.2 or it was only in respect of Appeal Nos.1260 and 1261, has been adjudicated by the two competent authorities and, the contention of respondent no.2 has not been accepted. The writ petition is pending before this Court and, the final adjudication is still to be done by this Court. Respondent no.2 has not got any interim order from this Court in the pending writ petition.

15. Sri Ravi Singh, learned counsel for the petitioners has submitted that the impugned proceedings are nothing but counter blast to the FIR lodged by petitioner no.3, in which charge sheet has been submitted and, respondent no.2 and his brothers are facing prosecution. He has further submitted that their petition challenging the proceedings in pursuance of the FIR registered at Case Crime No.311 of 2008 has been dismissed by this Court. He has also submitted that the dispute is of civil nature and, the impugned proceedings have been initiated against the petitioners with mala fide intention. Respondent no.2 and his brothers have not been successful in the other proceedings. Filing of the complaint before the learned Magistrate is a counter blast measure. They have tried to give colour to the civil dispute as a criminal offence. He has also submitted that respondent no.2 had filed an application under Section 156(3) Cr.P.C. without disclosing the true and correct facts. He has not disclosed the lodging of the FIR and the proceedings against him and his brothers in the complaint. He, therefore, submits that the impugned proceedings are nothing but an abuse of process of the Court, which have been filed with ulterior motive to falsely implicate the petitioners and, therefore, they are liable to be set aside.

16. On the other hand, Sri Hemant Kumar Mishra, learned counsel for respondent no.2 has submitted that the complaint discloses the commission of the offence by the petitioners. The complaint is neither frivolous nor fictitious. The allegations set out in the complaint clearly constitute the offence for which cognizance has been taken by the learned Magistrate and, therefore, this Court should not be quashed the proceedings. He has further submitted that defence of the petitioners should not be considered while adjudicating the present petition under Section 482 Cr.P.C.

17. I have considered the submissions advanced by the parties carefully and perused the record.

18. In sum and substance, the allegation by respondent no.2 in the

complaint is that the petitioners have manipulated the revenue record in respect of fasli year 1387. They have removed page no.64 in which the order for recording/mutating the name of father of respondent no.2 was recorded and they have manipulated that page by inserting another page and mentioning the order for recording the name of the Ashram and the petitioners. Two competent officers have not found any substance in these allegations and the case filed by respondent no.2 and his brothers under Section 33/39 of the U.P. Land Revenue Act has been dismissed. Respondent no.2 has not got any relief from this Court. He is seeking adjournment in the case, which is evident from the order-sheet.

19. It is also important to mention here that the first FIR was registered on the complaint of petitioner no.3. After investigation, charge sheet has been filed. Trial against respondent no.2 and his two brothers is in progress before the competent court. From the narration of facts, it appears that the impugned proceedings have been initiated as a counter blast measure by respondent no.2.

20. Supreme Court in several judgements including the leading judgement in the case of ***State of Haryana and others Vs. Bhajan Lal and others***, 1992 Supp (1) SCC 335, wherein as illustration the Supreme Court in paragraph 102 has explained the circumstances on which the High Court should exercise its jurisdiction under Section 482 Cr.P.C. or Article 226 of the Constitution of India for quashing the criminal proceedings. Paragraph 102 of the aforesaid judgement is extracted herein-below:-

*"**102.** In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a

Magistrate as contemplated under Section 155(2) of the Code.

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

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

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

21. In the present case, it appears that the impugned proceedings have been instituted with mala fide intention with ulterior motive and the case is covered under category (7) of paragraph 102 of the aforesaid judgement.

22. The revenue record remains in the custody of the revenue officials. It cannot be believed that some manipulation has been done without involvement of the revenue officials. No revenue official has been made an accused. It is not possible to manipulate the revenue record without the involvement of the revenue official. It is the duty of the Court to ensure that the criminal prosecution is not used as an instrument of harassment or for seeking private vendetta.

23. The Supreme Court in the case of ***Inder Mohan Goswami and another Vs. State of Uttaranchal and others***, (2007) 12 SCC 1 while dealing with the power of the High Court under Section 482 Cr.P.C. in paragraph 46 of the judgement held as under :-

*"**46.** The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 CrPC though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."*

24. Supreme Court in the case of ***Indian Oil Corpn. Vs. NEPC India Ltd. and others***, (2006) 6 SCC 736 has also lays down the parameters for quashing of criminal complaint/proceedings. Paragraphs 12 and 13 of the aforesaid judgement are extracted herein below:-

*"**12.** The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few--Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234] , State of Haryana v.*

Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059] , Central Bureau of Investigation v. Duncans Agro Industries Ltd. [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045] , State of Bihar v. Rajendra Agrawalla [(1996) 8 SCC 164 : 1996 SCC (Cri) 628] , Rajesh Bajaj v. State NCT of Delhi [(1999) 3 SCC 259 : 1999 SCC (Cri) 401] , Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [(2000) 3 SCC 269 : 2000 SCC (Cri) 615] , Hridaya Ranjan Prasad Verma v. State of Bihar [(2000) 4 SCC 168 : 2000 SCC (Cri) 786] , M. Krishnan v. Vijay Singh [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque [(2005) 1 SCC 122 : 2005 SCC (Cri) 283] . The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

***13.** While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an*

impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] this Court observed: (SCC p. 643, para 8)

"It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

25. It is also well settled that the dispute which is essentially of a civil nature and has given a cloak of criminal offence, the High Court should quash the criminal proceedings to prevent the abuse of process of the Court. In the present case, except for a photocopy of the order dated 9.6.1977 passed by the Settlement Officer Consolidation, wherein three appeals i.e. 1260, 1261 and 1262 have been decided, there is no other evidence which would demonstrate that the petitioners had committed any offence. As mentioned above, the contention raised by respondent no.2 and his brothers regarding the manipulation in the revenue record by the petitioners has not found favour before the two competent revenue authorities.

26. In view of the aforesaid fact, this Court is required to consider whether in the facts and circumstances of the case, it would be justified to allow the impugned proceedings to continue against the petitioners or to quash them.

27. The Supreme Court in ***Criminal Appeal No.1395 of 2018, Anand Kumar Mohatta and another Vs. State (Govt, of NCT of Delhi), Department of Home and another,***, decided on 15.11.2018, has held that the High Court should quash the proceedings if it comes to the conclusion that allowing the proceedings to continue, would be an abuse of the process of the Court or that the ends of justice require that the proceedings are required to be quashed.

28. Supreme Court in the case of ***State of Karnataka V.L. Muniswamy and others***, 1977 (2) SCC 699 in paragraph 7 of the judgement held as under under:-

"7. ..... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of

justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

29. In view of the aforesaid, this Court finds that the continuation of the impugned proceedings would be an abuse of the process of the Court. The proceedings have been initiated with ulterior motive to achieve for extraneous purposes as a counter blast to the FIR registered at Case Crime No.311 of 2008 against respondent no.2 and his brothers.

30. Thus, the petition is ***allowed*** and the summoning order dated 6.6.2009 and the order dated 30.9.2009 issuing bailable warrant against the petitioners passed in Complaint Case No.3482 of 2009, pending in the court of Additional Chief Judicial Magistrate IInd, Faizabad (Now Ayodhya) and the entire proceedings of the aforesaid complaint case are hereby quashed.

(2020)1ILR 1631

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.10.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Application U/S 482 Cr.P.C. No. 4741 of 2015

Smt. Mahadevi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rakesh Kumar Singh, Sri K.K. Roy

Counsel for the Opposite Parties:
A.G.A., Sri Hemendra Pratap Singh

A. Inherent Jurisdiction - Section 482 - Cr.P.C. - at the stage of charge sheet factual query and assessment of defence evidence is beyond purview of scrutiny under Section 482 Cr.P.C. - allegation being factual in nature can be decided only through evidence before Trial Court.

The Court observed that whether the accused has intention to cheat opposite party no. 2 from the very beginning or not is subject matter of evidence because if they had taken Rs. 1 Lac under the agreement to sell without having any intention to fulfill the said agreement, both the offences of criminal breach of trust as well as cheating would be constituted. It would appear that the accused never had any intention to honor the agreement and kept the money extended to them which would be nothing but criminal misappropriation of the said amount. Whether the said amount was paid to the deceased by opposite party no. 2 or not is again a subject matter of evidence. Hence, it cannot be said that no prima-facie case under Section 420 and 406 IPC would be made out. (Para 16)

B. Simultaneous/parallel proceedings - if a civil suit is maintainable for specific performance of contract - simultaneously, criminal proceedings can also lie, if criminal breach or cheating has been committed.

Application u/s 482 rejected. (E-10)

List of cases cited: -

1. Md. Allauddin Khan Vs. The State of Bihar & ors Criminal Appeal No. 675 of 2019

2. V. Ravi Kumar Vs. State 2018 SCC Online SC 2811 *(followed)*

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Rakesh Kumar Singh, learned counsel for the applicants, Sri Hemendra Pratap Singh, learned counsel for opposite party no. 2, Sri G.P. Singh, learned A.G.A. and perused the record.

2. This application under Section 482 Cr.P.C has been moved with a prayer to quash the impugned charge-sheet dated 12.11.2014 arising out of Case Crime No. 261 of 2014 under sections 420 and 406 IPC Police station Hathras Gate, District Hathras registered as Case No.73 of 2015 (State vs. Smt. Mahadevi and others) pending in the Court of A.C.J.M., Hathras and to direct that no coercive action may be taken against the applicants in pursuance of the charge-sheet dated 12.11.2004.

3. The main argument of the learned counsel for the applicant is that the FIR was lodged 11 years after the date of occurrence and in the grounds taken by him in affidavit filed in support of the application it has been mentioned that the opposite party no. 2 had filed an original suit no. 200 of 2004 (Prem Singh and another vs. Smt. Mahadevi and 4 others) in which he had also moved an application under Order 39 Rule 2(A) CPC seeking punishment for committing contempt of court but when he did not succeed there, he lodged this FIR. This is nothing but purely civil dispute between the parties. There is no independent witness of the occurrence and the statements of the witnesses are stereo typed. The facts mentioned in the FIR and the complaint cannot be taken as gospel truth, this is nothing but malicious prosecution and entire proceeding needs to be quashed.

4. Learned counsel for the opposite party no.. 2 though had appeared but has not filed any counter affidavit and his main argument has been that no averment was made by the applicant that the agreement to sell was a fraudulent document.

5. In order to appreciate the arguments of the respective parties, it is essential to give here the facts of the case in brief, which are as follows:

6. As per FIR, the opposite party no. 2 Ranveer Singh, one Indal Singh son of Deepa resident of Khera Baramai, P.S. Mursan had executed an agreement to sell on 03.02.2003 of his land in favour of opposite party no. 2 Ranveer Singh, Prem Singh and Preetam Singh after having received Rs.one lac and thereafter Indal Singh died. In the said agreement to sell the wife of Indal Singh Smt. Maha Devi accused-applicant no. 1 was a witness but Maha Devi and her sons namely, Har Prasad, Mahendra, Satya Prakash, Kailashi had executed a sale deed on 19.10.2013 playing fraud upon opposite party no. 2 and his co-sharers in favour of Nem Singh, accused-applicant no. 6, Prem Singh accused-applicant no.7, Raj Kumar accused-applicant no. 8 in collusion with Omwati accused-applicant no.10, Sushma Chaudhary and Omveer Rana fraudulently, in which witnesses were namely Rameshwar, Jagdish Prasad Sharma, Subodh Kumar, Pritam Singh, Ajit Singh and Chandravir who were also involved in this conspiracy despite the fact that there was a status quo order passed by the court below on 25.5.2006 in respect of the said property.

7. After investigating the case, the Investigating Officer has submitted charge-sheet, which is annexed Annexure-1 to the affidavit. Out of the total 17

persons named in the FIR, only against 10 persons charge sheet has been submitted while proceedings were dropped against seven persons by the Investigating Officer.

8. It is revealed from the perusal of the record that on 03.02.2003 one Indal had entered into an agreement to sell with Prem Singh, Preetam Singh and Ranveer Singh (opposite party no..2) under certain conditions which were to be fulfilled within a certain period of time, failing which agreement to sell was to have no force and its copy has been annexed as Annexure-3 to the affidavit. The said conditions incorporated in the agreement to sell were flouted and hence the same became non est. In the meantime, Indal Singh i.e. father of the applicant nos. 2 to 5 and husband of applicant no. 1 died, thereafter on 8.10.2013 the wife of Indal accused-applicant no. 1 and her sons executed a registered sale deed in favour of the applicant nos. 6, 7 and 8 by which certain portion of their property was sold by Mahadevi and her sons i.e. accused applicants nos. 1 to 5. After the conditions of the agreement to sell were flouted and the said property was not transferred through registered sale deed in favour of Prem Singh and Ranveer Singh then they filed civil suit being Civil Suit No. 200 of 2004 (Prem Singh and another vs. Smt. Mahadevi and 4 others) before the Civil Judge (S.D.), copy of the plaint is annexed as Annexure-5, with a prayer to issue a direction to the opposite parties to execute sale deed after having taken remaining consideration amount and an alternative prayer was also made that if the sale deed is not possible to be executed then an amount of Rs.66,667/- be directed to be paid to the opposite party no. 2.

9. The opposite parties in the suit, accused in the present case had filed their objection on 14.12.2004 in which it was mentioned that the deceased Indal Singh was not competent to sell the disputed property as he was suffering from mental ailment for which he was being treated since 2011. This fact was known to the opposite party no. 2. Therefore, the opposite party no. 2 taking advantage of the mental illness of the deceased Indal Singh had got prepared a forged agreement to sell, benefit of which cannot be taken by opposite party no. 2. There was no question of payment of any consideration amount to the deceased Indal Singh. The allegation that an amount of Rs.10.00 lace was paid from the side of the opposite party no. 2 to the applicants was concocted. There was no obligation on the part of the applicant nos. 1 to 5 to be bound by the agreement to sell allegedly executed by Indal as it was void document. The notice which was served upon the applicant nos. 1 to 5 from the side of opposite party no. 2 post death of Indal Singh was appropriately replied by the applicants. It was very apparent that from the side of the opposite party no. 2 an attempt was being made to grab the property of the deceased Indal Singh. The applicant nos. 1 to 5 did not have any knowledge of such agreement to sell. It is further mentioned that on 25.5.2006 the trial court passed an order of the status quo in regard to that property which is annexed as Annexure-7 to the affidavit. On 25.11.2013 the opposite party no.. 2 moved an application no. 144 of 2013 in the said suit under order 39 rule 2A seeking punishment to be awarded to the applicant nos. 1 to 5 for committing contempt of court for executing registered sale deed on 21.10.2013 and 26.10.2013, copy of which is annexed as Annexure-8 to the affidavit. When he failed to get a relief in the said application before civil court, this false FIR has been lodged against the applicants after 11 years. Matter is purely of civil nature. The

charge-sheet indicates that the Investigating Officer has recorded statements of three witnesses namely Ranveer Singh opposite party no. 2, Dhiraj Singh and Nihal Singh and rest of the four witnesses are formal witnesses and on the basis of their statements a prima-facie case is made out, charge-sheet has been submitted under section 420 and 406 IPC against the 10 accused-applicants named above.

10. This court has to see as to whether offences under section 406 and 420 IPC are made out or not in the light of the averments made in the FIR because if it is found that on the basis of averments made in the FIR, the offences under the abovementioned sections would not be constituted then only charge-sheet could be quashed.

11. Time and again it has been highlighted by Supreme Court that at the stage of charge sheet factual query and assessment of defence evidence is beyond purview of scrutiny under Section 482 Cr.P.C. The allegations being factual in nature can be decided only subject to evidence. In view of settled legal proposition, no findings can be recorded about veracity of allegations at this juncture in absence of evidence. Apex Court has highlighted that jurisdiction under Section 482 Cr.P.C. be sparingly/rarely invoked with complete circumspection and caution. Very recently in **Criminal Appeal No.675 of 2019 (Arising out of S.L.P. (Crl.) No.1151 of 2018) (Md. Allauddin Khan Vs. The State of Bihar & Ors.)** decided on 15th April, 2019, Supreme Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under:

"15. The High Court should have seen that when a specific grievance of the applicant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, ***then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not.*** *In other words, in* ***order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint.*** *In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the ***High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482*** *of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.")* ***because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties.*** *That stage is yet to come in this case."*

(Emphasis added)

12. It is clear that from the side of the applicant, copies of the statement of witnesses have not been annexed but as per averments made in the FIR it is being scrutinized whether the offence under the abovementioned sections is found to be made or not.

13. For offence under section 406 IPC, following ingredients are required to be satisfied.

i) Entrusting any persons with property or with any dominion over property;

ii) The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person to so to do in violation.

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

14. And as for as offence under section 420 IPC is concerned following are the necessary ingredients.

(i) There must be deception i.e. the accused must have deceived someone;

(ii) That by the said deception, the accused must induce a person,

(a) to deliver any property; or

(b) to make, alter or destroy the whole or part of the valuable security or any thing which is signed or sealed and which is capable of being converted into a valuable property.

(iii) That the accused did so dishonestly.

15. In the present case the plea taken by the opposite party no. 2 is that applicant nos. 1 to 5, who are wife and children of deceased Indal Singh, who is alleged to have executed an agreement to sell of his property in favour of Ranveer Singh, (opposite party no.2), Prem Singh and Pritam Singh for an amount of Rs.3,97,000/- and out of the said amount Rs.one lac was taken as advance on 03.02.2003 i.e. on the date of registered agreement while rest of the amount was to be paid at the time of execution of sale deed within one year. In the said agreement, wife of Indal i.e. accused-applicant no. 1 (Smt. Maha Devi) was witness. Later on Indal was served notice to execute sale deed but to no avail. Subsequently, Indal died, a notice thereafter was served upon his legal heirs i.e accused-supplicant nos. 1 to 5 to execute sale deed but they did not execute the same in favour of opposite party no. 2. Then O.S. No. 200 of 2004 was filed by opposite party no. 2 for specific performance of contract. While the said O.S. was pending, the applicant nos. 1 to 5 executed a registered sale deed of the said land in favour of accused-applicant nos. 6 to 8 on 19.10.2013 in which accused nos. 9 to 10 were also colluding. It is apparent that in the said civil suit no.200 of 2004 the accused nos. 1 to 5 had set up plea that Indal was not in a fit mental state to execute the agreement to sell nor did he take any consideration amount from the side of opposite party no. 2 and that therefore they had liberty to execute the sale deed in favour of opposite party nos. 6 to 8 and that no cheating or criminal breach of trust was committed by them.. On the other hand, the case of opposite party no. 2 is that an amount of Rs.one lac has been received by deceased Indal who was husband of applicant no. 1 and father of applicant nos. 2 to 5, therefore, being legal heirs of Indal, they were duty bound to execute the sale deed in favour of opposite party no. 2 in pursuance of terms and conditions of the agreement to sell dated 07.02.2003. Since till 2013 they did not execute the sale deed in favour of opposite party no. 2, instead executed the sale deed in favour of applicant nos. 6 to 8

who, in collusion with co-accused purchased the said land, therefore all the accused-applicants have committed offence under section 420 and 406 IPC because applicant nos. 1 to 5 never intended to sell the said land and had, with ill intention to usurp the advanced sum of Rs. One lac, taken the said amount.

16. I find that whether accused had intention to cheat opposite party no.2 from the very beginning or not is subject matter of evidence because if they had taken Rs. One lac under the agreement to sell without having any intention to fulfill the said agreement, both the offences of criminal breach of trust as well as cheating would be constituted. It would appear that the accused never had any intention to honour the agreement and kept the money extended to them (i.e. the deceased who was the husband of applicant no.1 and father of applicant nos. 2 to 5) which would be nothing but criminal misappropriation of the said amount. Whether the said amount was paid to deceased by opposite party no. 2 or not is again a subject matter of evidence. Hence, in my opinion, at this stage, it cannot be said that no prima-facie case under section 420 and 406 IPC would be made out.

17. In a catena of judgments of Apex Court, it has been held that even if a civil suit is maintainable for specific performance of contract that would not mean that a criminal proceedings would not lie if a criminal breach of trust or cheating has been committed. In civil proceedings the remedy of getting the contract executed would be granted but in criminal proceedings the punishment would be awarded for having committed offence under section 406 and 420 IPC.

18. I would like to rely on **V. Ravi Kumar vs. State 2018 SCC Online SC 2811**, paragraphs nos. 29, 33, 37 are as under.

"29. *There can be no doubt that a mere breach of contract is not in itself a criminal offence, and gives rise to the civil liability of damages. However, as held by this Court in Mridaya Ranjan Prasad Verma. v. State of Bihar8, the distinction between mere breach of contract and cheating, which is a criminal offence, is a fine one. While breach of contract cannot give rise to criminal prosecution for cheating, fraudulent or dishonest intention is the basis of the offence of cheating. In this case, in the FIR, there were allegations of fraudulent and dishonest intention including allegations of fabrication of documents, the correctness or otherwise whereof can be determined only during trial when evidence is adduced."*

33. *In* ***Vesa Holdings (P) Ltd.v.State of Kerala,*** *this Court observed:*

"12. The settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception."

13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not."

"37. *In this case, it cannot be said that there were no allegations whichprima facie constitute ingredients of offences under Sections 420, 409 and 34 of the Indian Penal Code in complaint. There*

were clear allegations of fraud and cheating which prima facie constitute offences under Section 420 of the Indian Penal Code. The correctness of the allegations can be adjudged only at the trial when evidence is adduced. At this stage, it was not for the High Court to enter into factual arena and decide whether the allegations were correct or whether the same were a counter-blast to any proceedings initiated by the respondents."

19. In view of above, I am of the view that it would be inappropriate to interfere in the present matter under inherent jurisdiction of the Constitution. Accordingly, application deserves to be dismissed and is dismissed.

(2020)1ILR 1636

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2019

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 8355 of 2009

Mohd. Yusuf Khan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri R.B. Singh, Sri Syed Ahmad Faizan, Sri Syed Farman Ahmad Naqvi

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

A. First Information Report - after registration of the FIR and commencement of investigation, a second FIR relating to the same incident was lodged - the test of sameness is to be applied to ascertain whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction - in case the answer is in affirmative, the second FIR is liable to be quashed.

Both the first information reports have been lodged against the same accused i.e., applicant by the two officers of the same department. Though the complainant/informant of both the aforesaid FIRs is different person, both the complainant/informant have lodged their respective FIRs in their official capacity on behalf of the same department and not in their personal capacity. (Para 29)

After reading the aforesaid facts and after applying the principle of sameness, it is explicitly clear that the second FIR is cryptic and does not stand the test laid down by the Apex Court. (Para 31)

Application u/s 482 allowed. (E-10)

List of cases cited: -

1. In Kari Choudhary Vs. Most. Sita Devi & ors AIR 2002 SC 441

2. T.T. Antony Vs. State of Kerala and ors (2001) 6 SCC 181

3. Pandurang Chandrakant Mhatre and ors Vs. State of Maharastra (2009) 10 SCC 773

4. Babubhau Vs. State of Gujarat and ors (2010) 12 SCC 254 *(followed)*

5. Amitbhai Anil Chandra Shah Vs. Central Bureau of Investigation & anr (2013) 6 SCC 348

6. Surender Kaushik & ors Vs. State of U.P. & ors (2013) 5 SCC 148 *(distinguished)*

7. Ramesh Baburao Devaskar Vs. State of Maharashtra (citation not given)

8. Vikram Vs. State of Maharashtra (citation not given)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Perusal of the order-sheet records that despite several orders, notices issued to opposite party no.2 has not been returned back after service nor any body has appeared on his behalf till date.

2. Learned counsel for the applicant states that since the impugned first information report had been lodged in the official capacity by the first informant/opposite party no.2 and probably, he must have retired from service, notice issued to opposite party no.2 has returned back at all times.

3. This application under Section 482 Cr.P.C. has been filed to quash the charge-sheet dated 20th August, 2008 in Case No. 7710 of 2008 arising out of Case Crime No. 457 of 2008, under Sections 420, 468, 467 and 471 I.P.C., Police Station-Quarsi, District-Aligarh.

4. Heard Mr. Syed Farman Ahmad Naqvi, learned counsel for the applicant and Mr. Amit Singh Chauhan and Mr. Prashant Kumar, learned Additional Government Advocates for the State as well as perused the entire materials available on record.

5. Brief facts, as born out from the record, are that a first information report has been lodged on 27th May/June, 2008 by Pramod Kumar in the capacity of Deputy Commandant, 45th Vahini P.A.C. Aligarh for the alleged incident dated 23rd April, 1988 against the applicant with the allegation that on 23rd April, 1988, the applicant, namely, Md. Yusuf Khan, S/o Late Mohd. Sultan Khan, R/o village Chhetarpur, Police Station-Sakaldeehan, District-Chandauli, having been appointed as cook in the P.A.C. Department, was posted at Aligarh. At the time of appointment, the applicant had disclosed his forged date of birth as "01th November, 1969" while concealing his correct date of birth i.e. "3rd January, 1965" as also he had disclosed his qualification as Class IX passed while concealing that he was declared fail in the High School Examination. The aforesaid facts had also been verified from the transfer certificate issued by the Principal, Janta Higher Secondary School, Boobash Dheena. At the time of appointment he had also filed an affidavit, wherein he had undertaken that all the facts in the form of information furnished by him and documents submitted by him were true and genuine, whereas after verification it was found that all were forged. For the aforesaid forgery committed by the applicant, the informant had also conducted a preliminary enquiry and after enquiry, on the basis of statements and records it was found that after misleading the department, he had obtained appointment on the basis of forged and fabricated documents and filed a false affidavit, while concealing his correct date of birth and qualification. Seeing the grievous offence, as committed by the applicant, the informant has lodged the first information report against the applicant, which was registered as Case Crime No. 457 of 2008, under Sections 420, 468, 467 and 471 I.P.C., Police Station-Quarsi, District-Aligarh. After conducting statutory investigation of the aforesaid case crime number, under Chapter XII Cr.P.C., the Police has submitted charge sheet against the applicant on 20th August, 2008 against which, present application, under Section 482 Cr.P.C. has been filed.

6. On the present matter being placed before this Court, on 10th April, 2009, a

Coordinate Bench of this Court passed following order:

"Heard learned counsel for the applicant and learned A.G.A.

The present application under Section 482 Cr.P.C. has been filed for quashing the charge sheet dated 20.08.2008 of Case Crime No. 457 of 2008, Case No. 7710 of 2008, under Sections 420, 468, 467, 471 I.P.C., Police Station Quarsi, District Aligarh.

It is contended by learned counsel for the applicant that at the time of appointment of the applicant under Dying in Harness Rules, the applicant submitted all his educational certificates to the opposite party no.2 and thereafter, the opposite party no.2 on 01.09.2006 lodged an F.I.R. in Case Crime No. 620 of 2006, under Sections 420, 464, 466, 467, 468, 471 I.P.C., against which the applicant filed a Criminal Misc. Writ Petition before the Division Bench of this Court and this Court had granted interim order on 04.10.2006 and thereafter, final report has been submitted in the aforesaid case on 04.12.2006. It is next contended by learned counsel for the applicant that thereafter, the applicant proceed on medical leave and when the applicant sent a letter for joining, the opposite party no.2 again lodged an F.I.R. in case Crime No. 457 of 2008, under Sections 420, 467, 468, 471 I.P.C. on 27th June, 2008 with the same allegation as was made in the earlier F.I.R. dated 01.09.2006. It is last contended by learned counsel for the applicant that lodging of second F.I.R. and submission of charge-sheet is bad in law and cannot be sustained.

Issue notice to opposite party no.2 returnable within a period of four weeks. Steps be taken within a week.

Learned A.G.A. prays for and is granted four weeks' time to file counter affidavit. Opposite party no.2 may also file counter affidavit within the same period.

As prayed by learned counsel for the applicant one week thereafter, is granted for filing rejoinder affidavit.

List immediately, after expiry of the aforesaid period before appropriate Bench.

Till the next date of listing, no coercive action shall be taken against the applicant in the aforesaid case."

7. Mr. Syed Farman Ahmad Naqvi, learned counsel for the applicant has informed the Court that for the same offence, as alleged to have been committed by the applicant, departmental proceedings were also initiated against the applicant and after enquiry, the applicant has been terminated from service. Against the termination order, the applicant has approached this Court by means of a writ petition, which is still pending before this Court.

8. Learned counsel for the applicant further informed the Court that for the same offence, as alleged to have been committed by the applicant, a first information report had been lodged on 1st September, 2006 by Ramyash Singh, in the official capacity as Assistant Commandant, 45th Vahini, P.A.C. Aligarh under Sections 420, 464, 466, 467, 468 and 471 I.P.C., Police Station Quarsi, District-Aligarh, which has been registered as Case Crime No. A 91 of 2006. After conducting statutory investigation, under Chapter XII Cr.P.C., the Police has submitted final report on 4th December, 2006. Learned counsel for the applicant further informed that after submission of the Police report in the aforesaid case, the

applicant proceeded on medical leave and when the applicant sent a letter for joining, along with medical report, mentioning his fitness, the opposite party no.2 (informant in the present case) has lodged the first information report which has been registered as Case Crime No. 457 of 2008, under Sections 420, 468, 467 and 471 I.P.C., Police Station-Quarsi, District-Aligarh, in which charge-sheet has been submitted on 20th August, 2008 against which the present application, under Section 482 Cr.P.C., has been filed.

9. It is submitted by Mr. Naqvi, learned counsel for the applicant that the second first information report dated 27th May/June, 2008 for the same cause of action/offences/incident could not have been lodged and entertained as law prohibits lodging of the second first information report in respect of the same offence. To bolster the contention that the second FIR could not have been entertained, the learned counsel for the applicant has commended this Court to the following decisions of the Apex Court:

(1) **In Kari Choudhary Versus Most. Sita Devi & Others;** *AIR 2002 SC 441;*

(2) **T.T. Antony v. State of Kerala and others** reported in *(2001) 6 SCC 181;*

(3) **Pandurang Chandrakant Mhatre and others v. State of Maharashtra** reported in (2009) 10 SCC 773;

(4) **Babubhai v. State of Gujarat and others** reported in *(2010) 12 SCC 254*; and

(5) **Amitbhai Anil Chandra Shah Vs. Central Bureau of Investigation & Another,** reported in *(2013) 6 SCC 348.*

10. Mr. Naqvi, learned counsel for the applicant, therefore, submits that in view of the settled law as laid down in various judgments by the Apex Court, the impugned charge-sheet dated 20th August, 2008 submitted in pursuance of the second first information report lodged on 23rd April, 2008 against the applicant for the same offence, cannot be legally sustained and is liable to be quashed.

11. Mr. Amit Singh Chauhan and Mr. Prashant Kumar, learned A.G.As. for the State, per contra, has vehemently opposed the submissions as urged by the learned counsel for the applicant, by submitting that there is no absolute prohibition in law for lodging of a second FIR and, more so, when allegations are made from different spectrum or, for that matter, when different versions are putforth by different persons and there are different accused persons. In support of their plea, they have placed reliance upon the judgment of the Apex Court in the case of **Surender Kaushik & Others Versus State of Uttar Pradesh & Others** reported in (2013) 5 SCC 148.

12. This Court has considered the submissions as urged by the learned counsel for the applicant and the learned A.G.A. for the State as well as gone through the entire materials brought on record.

13. Before coming to the merits of the submissions made by the learned counsel for the parties, it would be relevant to refer Chapter XII of the Code, which deals with information to the police and their powers to investigate. As provided under Section 154 of the Code of Criminal Procedure (hereinafter referred as the "Code/Cr.P.C."), every information

relating to commission of a cognizable offence, either given orally or in writing is required to be entered in a book, to be kept by the officer-in-charge of the concerned police station. The said FIR, as mandated by law, should pertain to a cognizable case. Section 2(c) of the Code defines "cognizable offence" which also deals with cognizable cases.

14. For ready reference, Sections 2 (c), 154 and 156 (3) Cr.P.C., which are relevant for deciding the present application, read as follows:-

"cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

15. If the primary requirement is satisfied, an FIR is to be registered and the criminal law is set in motion and the officer-in-charge of the police station takes up the investigation. The question that has emerged for consideration in this case is whether after registration of the FIR and commencement of the investigation, a second FIR relating to the same incident on the basis of a direction issued by the learned Magistrate under Section 156(3) of the Code can be registered.

16. For apposite appreciation of the issue raised, it is necessary to refer to certain authorities which would throw significant light under what circumstances entertainment of second FIR is prohibited.

17. In **Kari Chaudhary (Supra)**, the Apex Court has observed that of course it is settled law that there cannot be two first information reports against the same accused in respect of same case, but when there are rival versions in respect of same episode, they would normally take the shape of two different first information reports and investigation can be carried on under both of them by the same investigating agency.

18. For ready reference, paragraph nos. 11 and 12 of the judgment of the Apex Court in the case of **Kari Choudhary (Supra)** read as follows:

"11. Learned counsel adopted an alternative contention that once the proceeding initiated under FIR No. 135 ended in a final report the police had no authority to register a second FIR and number it as FIR 208. ***Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency.*** *Even that apart, the report submitted by the court styling it as FIR No. 208 of 1998 need be considered as an information submitted to the court reading the new discovery made by the police during investigation the persons not named in FIR No. 135 are the real culprits. The quash the said proceeding merely on the ground that final report had been laid in FIR No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed it.*

12. Even otherwise the investigating agency is not precluded from further investigation in respect of an offence in spite of forwarding a report under Sub-section (2) of Section 173 on a previous occasion. This is clear from Section 173(8) of the Code." (emphasis added)

19. In **T.T. Antony (supra)**, it was canvassed on behalf of the accused that the registration of fresh information in respect of the very same incident as an FIR under Section 154 of the Code was not valid and, therefore, all steps taken pursuant thereto including investigation were illegal and liable to be quashed. The Bench, analyzing the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of the Code, came to hold that only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 of the Code and, therefore, there can be no second FIR and consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. It was further observed that on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the

course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code.

20. It would be worthwhile to reproduce paragraph nos. 20, 28 and 35, in the case of **T.T. Antony (Supra)**, the Apex Cour, which read as follows:

""20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155,156, 157, 162, 169, 170 and 173 Cr.P.C only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. ***Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences.*** *On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 Cr.P.C.*

28.....In our view, in sending information in regard to the same incident, duly enclosing a copy of the report of the commission of inquiry, to the Inspector General of Police for appropriate action, the Additional Chief Secretary adopted the right course of action. Perhaps the endorsement of the Inspector General of Police for registration of a case misled the subordinate police officers and the said letter with regard to the incident of November 25, 1994 at Kuthuparamba was registered again under Section 154 of Cr.P.C. which would be the second FIR and, in our opinion, on the facts of this case, was irregular and a fresh investigation by the investigating agency was unwarranted and illegal. On that date the investigations in the earlier cases (Crime Nos.353 and 354 of 1994) were pending. The correct course of action should have been to take note of the findings and the contents of the report, streamline the investigation to ascertain the true and correct facts, collect the evidence in support thereof, form an opinion under Sections 169 and 170 Cr.P.C., as the case may be, and forward the report/reports under Section 173(2) or Section 173(8) Cr.P.C. to the concerned Magistrate. ***The course adopted in this case, namely, the registration of the information as the second FIR in regard to the same incident and making a fresh investigation is not permissible under the scheme of the provisions of the Cr.P.C. as pointed out above, therefore, the investigation undertaken and the report thereof cannot but be invalid. We have, therefore, no option except to quash the same leaving it open to the investigating agency to seek permission in Crime No.353/94 or 354/94 of the Magistrate to make further investigation, forward further report or reports and thus proceed in accordance with law.***

*35. For the aforementioned reasons, the registration of t****he second FIR under Section 154 of Cr.P.C. on the basis of the letter of the Director General of Police as Crime No.268/97 of Kuthuparamba Police Station is not valid and consequently the investigation made pursuant thereto is of no legal***

consequence, they are accordingly quashed. We hasten to add that this does not preclude the investigating agency from seeking leave of the Court in Crime No.353/94 and Crime No.354/94 for making further investigations and filing a further report or reports under Section 173(8) of Cr.P.C. before the competent Magistrate in the said cases. *In this view of the matter, we are not inclined to interfere with the judgment of the High Court under challenge insofar as it relates to quashing of Crime No. 268/97 of Kuthuparamba Police Station against the ASP (R.A.Chandrasekhar); in all other aspects the impugned judgment of the High Court shall stand set aside." (Emphasis added)*

21. In **Pandurang Chandrakant Mhatre (supra)**, the Apex Court referred to cases of T.T. Antony (supra), Ramesh Baburao Devaskar v. State of Maharashtra, and Vikram v. State of Maharashtra and opined that the earliest information in regard to the commission of a cognizable offence is to be treated as the first information report and it sets the criminal law in motion and the investigation commences on that basis. Although the first information report is not expected to be an encyclopaedia of events, yet an information to the police in order to be first information report under Section 154(1) of the Code, must contain some essential and relevant details of the incident. A cryptic information about the commission of a cognizable offence irrespective of the nature and details of such information may not be treated as first information report. After so stating, the Bench posed the question whether the information regarding the incident therein entered into general diary given by PW-5 is the first information report within the meaning of Section 154 of the Code and, if so, it would be hit by Section 162 of the Code. It is worth noting that analyzing the facts, the Court opined that information given to the police to rush to the place of the incident to control the situation need not necessarily amount to an FIR.

22. In **Babubhai (supra)**, the Apex Court, after surveying the earlier decisions, expressed the view that the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, the second FIR is liable to be quashed. However, in case the contrary is proved, where the version in the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible. In case the accused in the first FIR comes forward with a different version or counterclaim in respect of the same incident, investigation on both the FIRs has to be conducted.

23. In paragraph nos. 14, 17, 20 & 21, in the case of **Babubhai (Supra)**, the Apex Court has observed as follows:

"14. In Upkar Singh Vs. Ved Prakash & Ors. (2004) 13 SCC 292, this Court considered the judgment in T.T. Antony (supra) and explained that the judgment in the said case does not exclude the registration of a complaint in the nature of counter claim from the purview of the court. What had been laid down by this Court in the aforesaid case is that ***any further complaint by the same complainant against the same accused,***

subsequent to the registration of a case, is prohibited under the Cr.P.C. because an investigation in this regard would have already started and further the complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence, will be prohibited under section 162 Cr.P.C. However, this rule will not apply to a counter claim by the accused in the first complaint or on his behalf alleging a different version of the said incident. Thus, in case, there are rival versions in respect of the same episode, the Investigating Agency would take the same on two different FIRs and investigation can be carried under both of them by the same investigating agency and thus, filing an FIR pertaining to a counter claim in respect of the same incident having a different version of events, is permissible.

17. In Rameshchandra Nandlal Parikh Vs. State of Gujarat & Anr. (2006) 1 SCC 732, this Court reconsidered the earlier judgment including T.T. Antony (supra) and held that in case the FIRs are not in respect of the same cognizable offence or the same occurrence giving rise to one or more cognizable offences nor are they alleged to have been committed in the course of the same transaction or the same occurrence as the one alleged in the First FIR, there is no prohibition in accepting the second FIR.

20. Thus, in view of the above, the law on the subject emerges to the effect that an FIR under Section 154 Cr.P.C. is a very important document. It is the first information of a cognizable offence recorded by the Officer In-Charge of the Police Station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion underSection 169 or 170 Cr.P.C., as the case may be, and forwarding of a police report under Section 173Cr.P.C. Thus, it is quite possible that more than one piece of information be given to the Police Officer In- charge of the Police Station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the Diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the First Information Report will be statements falling under Section 162 Cr.P.C.

21. In such a case the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is affirmative, the second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counter claim, investigation on both the FIRs has to be conducted." (Emphasis added)

24. In **Amitbhai Anilchandra Shah (Supra)**, the Apex Court has clearly observed that there can be no second FIR, hence there can be no fresh investigation on receipt of every subsequent information in respect of same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences,

therefore, second FIR can be held to be invalid and quashed, as per the scheme of Code of Criminal Procedure and fundamental rights of an accused provided under Articles 14, 20 and 21 of the Constitution of India.

25. In paragraph-37, 38 and 60 in the case of **Amitbhai Anilchandra Shah (Supra)**, the the Apex Court has observed as follows:

"37. This Court has consistently laid down the law on the issue interpreting the Code, that a second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In T.T. Anthony (supra), this Court has categorically held that registration of second FIR (which is not a cross case) is violative of Article 21 of the Constitution. The following conclusion in paragraph Nos. 19, 20 and 27 of that judgment are relevant which read as under:

"19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.

27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case it was, however, observed that it would be appropriate to conduct further investigation with the permission of the

court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution."

The above referred declaration of law by this Court has never been diluted in any subsequent judicial pronouncements even while carving out exceptions.

38. Mr. Rawal, learned ASG, by referring T.T. Anthony (supra) submitted that the said principles are not applicable and relevant to the facts and circumstances of this case as the said judgment laid down the ratio that there cannot be two FIRs relating to the same offence or occurrence. Learned ASG further pointed out that in the present case, there are two distinct incidents/occurrences, inasmuch as one being the conspiracy relating to the murder of Sohrabuddin with the help of Tulsiram Prajapati and the other being the conspiracy to murder Tulsiram Prajapati - a potential witness to the earlier conspiracy to murder Sohrabuddin. We are unable to accept the claim of the learned ASG. As a matter of fact, the aforesaid proposition of law making registration of fresh FIR impermissible and violative of Article 21 of the Constitution is reiterated, re-affirmed in the following subsequent decisions of this Court:

1. Upkar Singh vs. Ved Prakash (2004) 13 SCC 292

2. Babubhai vs. State of Gujarat & Ors. (2010) 12 SCC 254

3. Chirra Shivraj vs. State of A.P. AIR 2011 SC 604

4. C. Muniappan vs. State of Tamil Nadu (2010) 9 SCC 567.

In C. ***Muniappan (supra), this Court explained "consequence test", i.e., if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR then offences covered by both the FIRs are the same and, accordingly, the second FIR will be impermissible in law. In other words, the offences covered in both the FIRs shall have to be treated as a part of the first FIR.***

60. In view of the above discussion and conclusion, the second FIR dated 29.04.2011 being RC No. 3(S)/2011/Mumbai filed by the CBI is contrary to the directions issued in judgment and order dated 08.04.2011 by this Court in Writ Petition (Criminal) No. 115 of 2009 and accordingly the same is quashed. As a consequence, the charge sheet filed on 04.09.2012, in pursuance of the second FIR, be treated as a supplementary charge sheet in the first FIR. It is made clear that we have not gone into the merits of the claim of both the parties and it is for the trial Court to

decide the same in accordance with law. Consequently, Writ Petition (Criminal) No. 149 of 2012 is allowed. Since the said relief is applicable to all the persons arrayed as accused in the second FIR, no further direction is required in Writ Petition (Criminal) No. 5 of 2013."

(Emphasis added)

26. In **Surender Kaushik (Supra)** referred by the learned Additional Government Advocates for the State, the Apex Court has observed that the lodging of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. The rival versions in respect of same incident do not take different shapes and in that even, lodging of two first information reports is permissible. Thus counter-first information report in respect of same or connected incident is permissible.

27. For ready reference, paragraph nos. 24 and 25 in the case of **Surender Kasuhik (Supra)** is quoted herein-under:

"24. From the aforesaid decisions, it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-Judge Bench in Upkar Singh (supra), the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible.

25. In the case at hand, the appellants lodged the FIR No. 274 of 2012 against four accused persons alleging that they had prepared fake and fraudulent documents. The second FIR came to be registered on the basis of the direction issued by the learned Additional Chief Judicial Magistrate in exercise of power under Section 156(3) of the Code at the instance of another person alleging, inter alia, that he was neither present in the meetings nor had he signed any of the resolutions of the meetings and the accused persons, five in number, including the appellant No. 1 herein, had fabricated documents and filed the same before the competent authority. FIR No. 442 of 2012 (which gave rise to Crime No. 491 of 2012) was registered because of an order passed by the learned Magistrate. Be it noted, the complaint was filed by another member of the Governing Body of the Society and the allegation was that the accused persons, twelve in number, had entered into a conspiracy and prepared forged documents relating to the meetings held on different dates. There was allegation of fabrication of the signatures of the members and filing of forged documents before the Registrar of Societies with the common intention to grab the property/funds of the Society. If the involvement of the number of accused persons and the nature of the allegations are scrutinized, it becomes crystal clear

that every FIR has a different spectrum. The allegations made are distinct and separate. It may be regarded as a counter complaint and cannot be stated that an effort has been made to improve the allegations that find place in the first FIR. It is well-nigh impossible to say that the principle of sameness gets attracted. We are inclined to think so, for if the said principle is made applicable to the case at hand and the investigation is scuttled by quashing the FIRs, the complainants in the other two FIRs would be deprived of justice. The appellants have lodged the FIR making the allegations against certain persons, but that does not debar the other aggrieved persons to move the court for direction of registration of an FIR as there have been other accused persons including the complainant in the first FIR involved in the forgery and fabrication of documents and getting benefits from the statutory authority. In the ultimate eventuate, how the trial would commence and be concluded is up to the concerned court. The appellants or any of the other complainants or the accused persons may move the appropriate court for a trial in one court. That is another aspect altogether. But to say that it is a second FIR relating to the same cause of action and the same incident and there is sameness of occurrence and an attempt has been made to improvise the case is not correct. Hence, we conclude and hold that the submission that the FIR lodged by the fourth respondent is a second FIR and is, therefore, liable to be quashed, does not merit acceptance."

28. The instant case is required to be examined in the light of the aforesaid settled legal propositions for which it is necessary for this Court to examine the facts and circumstances giving rise to both the first information reports and the test of sameness is to be applied to find out whether both the first information reports relate to the same incident in respect of the same occurrence or are in regard to the incidents, which are two or more parts of the same transaction. If the answer is affirmative, the second first information report is liable to be quashed. However, in case, the contrary is proved, where the version in the second first information report is different and they are in respect of the two different incidents/crimes, the second first information report is permissible. In case in respect of the same incident the accused in the first information comes forward with a different version or counter claim, investigation on both the FIRs has to be conducted.

29. If both the first information report reports dated 1st September, 2006 and 27th May/June, 2008 lodged against the present applicant are read together, it becomes clear that the incident was of 23rd April, 1988, when the applicant was appointed as cook in 45th Vahini P.A.C. Aligarh under Dying-in-Harness Rules and it was alleged in both the first information reports that the applicant had obtained appointment on the basis of forged and fabricated documents and affidavit while concealing his correct date of birth and qualification and for the aforesaid same offence punishable under Sections 420, 468, 467 and 471, both the first information reports have been lodged against the same accused i.e. applicant by the two officers of same department i.e. 45th Vahini P.A.C., Aligarh. Though the complainant/informant of both the aforesaid first information reports is different person, both the complainant/informant have lodged their

respective first information report in their official capacity on behalf of the same department i.e. 45th Vahini P.A.C., Aligarh and not in their personal capacity.

30. After reading of the aforesaid facts and after applying the principle of sameness, this Court finds that both the first information reports relate to the same incident in respect of the same occurrence, therefore, the submissions made by the learned counsel for the applicant has substance. The second first information report dated 28th May/June, 2008 is liable to be quashed. The judgment relied upon by the learned Additional Government Advocates for the State in the case of **Surender Kaushik (Supra)** is not applicable in the facts of the present as in the instant case, there is no rival versions or any improvisation in respect of the same incident in both the first information reports.

31. In the light of the judgements of the Apex Court, referred to above, it is explicitly clear that the second first information report is cryptic and does not stand the test laid down by the Apex Court.

32. Accordingly, the present criminal misc. application succeeds and is **allowed.** The second first information report dated 28th May/June, 2008 and the impugned charge-sheet dated 20th August, 2008 in Case No. 7710 of 2008 arising out of Case Crime No. 457 of 2008, under Sections 420, 468, 467 and 471 I.P.C., Police Station-Quarsi, District-Aligarh, **are quashed** leaving it open for opposite party no.2 to file protest petition, if not already filed, in Case Crime No. 457 of 2008, under Sections 420, 468, 467 and 471 I.P.C., Police Station-Quarsi, District-Aligarh. In case the final report submitted by the Police in the said case has already been accepted by the court concerned, opposite party no.2 may file a fresh application for re-investigation of the matter in pursuance of the earlier first information report lodged by him against the applicant.

(2020)1ILR 1649

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 Cr.P.C. No. 11175 of 2004

Ravinder Talwar ...Applicant
Versus
State of U.P. & Anr. ...Oposite Parties

Counsel for the Applicant:
Sri G.S. Chaturvedi, Sri Samit Gopal

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

A. Requirements of Section 340 Cr.P.C - two conditions are required to be fulfilled - first, false affidavit in a proceedings before Court - second, in the opinion of the Court it should be expedient in the interest of justice to make an inquiry against such a person in relation to offence committed - in order to form an opinion, the Court is empowered to conduct preliminary enquiry - after the opinion is formed, the Court makes a complaint to the Magistrate of First Class concerned.

Absence of preliminary enquiry to reach such a finding would not vitiate the finding reached by the Court regarding the opinion. (Para 16)

There is no magic in recording the words that "Court find it expedient in the interest of justice

that inquiry should be made" but from the order of court, it should appear that Court formed such opinion. (Para 23)

The Court, under Section 340 Cr.P.C., is not to decide guilt or innocence of party against whom proceedings are to be taken before Magistrate. At this stage, Court only considers whether it is expedient in the interest of justice that an enquiry should be made for any offence affecting administration of justice. (Para 17)

B. Section 195 Cr.P.C. - procedure given under Section 340 Cr.P.C. is required to be observed in order to proceed against the offences given under Section 195 (1)(b)(i).

The offences under Section 195(1)(b)(i) Cr.P.C. is a serious offence and relates to public confidence in the system of justice, therefore, Section 195(1)(b) should be adopted cautiously and only when the Court is satisfied that prosecution of person concerned is in the interest of justice. Court must be satisfied about the deliberate falsehood as a matter of substance and that there is a reasonable foundation for the charge. There may be cases where a false affidavit may have been filed or offence under Section 195 (1)(b) might appear to have been committed, yet proceedings ought to be initiated only when the Court is satisfied that it is expedient in the interest of justice that an inquiry should be made or a complaint should be directed to be filed. (Para 13)

C. Natural Justice - no opportunity of hearing is required to be given against whom the complaint is filed.

The Scheme of the Statute would clearly show that there is no statutory requirement to afford an opportunity of hearing to persons against whom Court may file complaint before Magistrate for initiating prosecution for committing an offence under Section 195(1)(b) of Cr.P.C. (Para 17)

Application u/s 482 rejected. (E-10)

List of cases cited: -

1. B.K. Gupta Vs. Damodar H. Bajaj and ors 2001 (9) SCC 742

2. Syed Asadullah Kazmi Vs. Additional Magistrate 1988 (3) Crimes 330 (All)

3. Pritish Vs. State of Maharashtra 2002 (1) SCC 253

4. M.S. Sheriff and anr Vs. State of Madras abd ors AIR 1954 sc 397

5. Prem Sagar Manocha Vs. State (NCT of Delhi) 2016 (4) SCC 571

6. Sidhartha Vashisth @ Manu Sharma Vs. State (NCT of Delhi) 2010 (6) SCC 1

7. Sh. Narendra kumar Srivastava Vs. State of Bihar and ors 2019 AIR (SC) 2675 *(followed)*

8. Santokh Singh Vs. Izhar Hussain and anr. (1973) 2 SCC 406 *(followed)*

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

1. Heard Sri G.S. Chaturvedi, learned Senior Counsel assisted by Sri Samit Gopal, learned counsel for applicant and learned AGA for State of U.P.

2. This application under Section 482 Code of Criminal Procedure, 1973 *(hereinafter referred to as "Cr.P.C.")* has been filed by applicant- Ravinder Talwar with a prayer that proceedings of Criminal Complaint Case No. 3505 of 2000, High Court of Judicature at Allahabad through its Registrar General Vs. Ravinder Talwar and another, under Sections 193, 196, 205, 209, 466, 468 IPC, Police Station Cantt., District Allahabad, pending in the Court of Chief Judicial Magistrate, Allahabad, be quashed. A further prayer has been made to quash order dated 24.06.2000 passed by Chief Judicial Magistrate, Allahabad *(hereinafter referred to as "C.J.M.")* in the above criminal complaint case.

3. Facts in brief, giving rise to the present application, are that a Writ Petition

No. 282 of 1989 was filed in the name of Kashi Ram son of Sri Kabool Ram Sharma through Power of Attorney Holder Ravinder Talwar seeking a declaration that U.P. Excise (Amendment) Act, 1998 *(hereinafter referred to as "Amendment Act, 1998")* is ultravires. Further a mandamus was also prayed for refund of entire wholesale vending fee of foreign liquor under licence F.L.II. An affidavit in support of writ petition was sworn by one Sri Suresh Kumar Goel son of Sri Banarh Das, resident of 8/427, Kamoh Katera, Saharanpur being *Pairokar* of agent deputed by Principal.

4. Contesting writ petition, Excise Authorities filed reply wherein a copy of affidavit sworn by Kashi Ram himself was appended stating that he has not authorized anyone to file writ petition in the High Court.

5. Taking cognizance of this fact and observing that above affidavit shows that Power of Attorney Holder as well as deponent of affidavit, both, have played fraud with Court and presentation of writ petition amounts to filing of a false affidavit, a Division Bench consisting of Hon'ble Ravi S. Dhavan, J. (as His Lordships then was) and Hon'ble B. Dikshit, J., vide order dated 22.07.1999 directed Registrar General of this Court to file a complaint against both the above persons, namely, Ravinder Talwar i.e. applicant and Suresh Kumar Goel. Both these persons were directed to answer charge before C.J.M. and findings and result of proceedings were directed to return to High Court for conclusion of proceedings and further action under Procedure of High Court for Uttar Pradesh (Act No. 13 of 1869). Writ Petition, however, was dismissed by above judgement.

6. Pursuant to above direction, a complaint got registered as Complaint Case No. 3505 of 2000 by Registrar General vide complaint dated 24.06.2000, under Sections 193, 196, 205, 209, 466, 468 IPC. C.J.M. vide order dated 24.06.2000 summoned accused persons under aforesaid Sections. The above proceedings have been challenged in the present application.

7. It is contended that complaint in question is purported to have been filed under Section 195 Cr.P.C. which is not attracted; procedure and requirement of Section 340 Cr.P.C. is also not satisfied, inasmuch as, there is no finding recorded by Division Bench in its judgement dated 22.07.1999 that "it is expedient in the interest of justice to make an inquiry"; Court has not applied its mind regarding condition whether it was expedient in the interest of justice to make an inquiry into false affidavit given by accused applicant and in absence of such observation, Section 340 Cr.P.C. is not attracted. In support of his contention, learned counsel for applicant has placed reliance on a Supreme Court's decision in **B.K. Gupta Vs. Damodar H. Bajaj and Others 2001 (9) SCC 742.**

8. A short question up for consideration is "whether complaint has been made in compliance of requirement of Section 340 read with 195 Cr.P.C. or not".

9. Section 340 Cr.P.C., reads as under:-

"340. (1) When, upon an application made to it in this behalf or otherwise ***any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any***

offence referred to in clause (b) of sub-section (1) of section 195, *which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-*

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section," Court" has the same meaning as in section 195."

(Emphasis added)

10. A perusal of Section 340 Cr.P.C. shows that first of all, it is applicable in respect of such cases which are covered by Section 195(1)(b) Cr.P.C. and thus, I reproduce above section also:-

"195(1) No Court shall take cognizance -

(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, ***Sections 193 to 196 (both inclusive),*** *199, 200,* ***205 to 211*** *(both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or*

(ii) of any offence described in Section 463, or punishable under Section 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub- clause (ii),

except on the complaint in writing of that Court, or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate" (Emphasis added)

11. Section 195(1)(b)(i) Cr.P.C. covers offenses under Sections 193 to 196, 199, 200, 205 to 211 and 228 IPC and, therefore, it cannot be doubted that procedure under Section 340 Cr.P.C. has to be observed. It is not the case of applicant that complaint has not been filed by competent authority. The only argument is that requirements of Section 340 Cr.P.C. are not satisfied.

12. The object of Section 340 Cr.P.C. is to provide a safeguard against frivolous

and vexatious prosecution. For taking action under Section 340 Cr.P.C. it is no doubt true that Court has to form an opinion that it is expedient in the interest of justice that an inquiry should be made for an offence referred to in Section 195(1)(b) Cr.P.C. which appears to have been committed or in relation to a proceeding in that Court.

13. This Court in **Syed Asadullah Kazmi Vs. Additional Magistrate 1988 (3) Crimes 330 (All)** has observed that Sections 340 and 195 Cr.P.C. are closely connected and in order to have a harmonious consideration, they should be read together. An offence under Section 195(1)(b)(i) Cr.P.C. is a serious offence and relates to public confidence in the system of justice, therefore, Section 195(1)(b) should be adopted very cautiously and only when Court is satisfied that prosecution of person concerned is in the interest of justice. Section 340 Cr.P.C. commenced with words "It is expedient in the interest of justice that an inquiry should be made" and this is a guiding factor constituting a foundation for proceeding of this nature. In other words, it is only in glaring cases of deliberate falsehood where Court should direct that an inquiry should be made or complaint should be filed but this discretion has to be exercised judicially in the light of all relevant circumstances, and not with a view to satisfy personal feelings or vindictiveness. Court must be satisfied about the deliberate falsehood as a matter of substance and that there is a reasonable foundation for the charge. There may be cases where a false affidavit may have been filed or offence under Section 195(1)(b) might appear to have been committed, yet proceedings ought to be initiated only when Court is satisfied that it is expedient in the interest of justice that an inquiry should be made or a complaint should be directed to be filed.

14. It is not necessary to burden this judgement with number of authorities on the subject but suffice it to refer a few very straight on the point.

15. In **B.K. Gupta (supra)**, learned Single Judge of Bombay High Court while deciding writ petition found that a false statement on oath was made and litigant also adduced evidence known to be false and fabricated. Exercising power under Section 340 Cr.P.C., learned Single Judge issued notice to accused to show-cause for having committed offence referred to under Section 195(1)(b) Cr.P.C.. Thereupon concerned person appeared through counsel and learned Single Judge found that incumbent had intentionally made false statement on oath and adduced evidence known to be false and fabricated, therefore, direction was issued for filing complaint before Magistrate against said person. This order was challenged before Supreme Court and it was argued that learned Single judge has not applied its mind whether it was expedient in the interest of justice that a complaint be filed against such person. Supreme Court said that there are two conditions on fulfillment whereof, a complaint can be filed against a person who has given a false affidavit or evidence in a proceeding before Court. First, such person has given a false affidavit in a proceeding before Court and secondly, in the opinion of Court, it is expedient in the interest of justice to make an inquiry against such a person in relation to an offence committed by him. Court allowed appeal after recording its finding that from record, it could not find application of mind by learned Single

Judge on the aspect that it was expedient in the interest of justice to make an inquiry.

16. Section 340 Cr.P.C. then came up for consideration before a three Judges' Bench in **Pritish Vs. State of Maharashtra 2002 (1) SCC 253**. Therein State Government for construction of a canal under Arunwati Project in 1985 sought to acquire 3.9 acres of land. Land Acquisition Officer awarded compensation of Rs. 24,000/- for entire land. Owner being dissatisfied with award went for reference under Section 18 of Land Acquisition Act, 1894 *(hereinafter referred to as "L.A. Act, 1894") whereon* Reference Court on the basis of evidence adduced by parties increased compensation to Rs. 10,30,000/-, besides other benefits like solatium etc., vide award dated 23.04.1993. Appellant Pritish was one of the beneficiary of this award which was made on the basis of evidence adduced by parties including Pritish. Land owners still felt dissatisfied with such enhancement and moved further in appeal to High Court but it was dismissed. In 1995, some persons of locality brought to the notice of Reference Court that land owners had wrangled a whopping enhancement after playing chicanery on the Court by producing forged copies of sale deeds for supporting their claim for enhancement. The documents marked as Exts. 31, 32 and 35 were fabricated copies of sale deeds. Reference Court made inquiry and found such documents forged. It called upon relevant record from Sub-Registrar and found that documents presented before it were forged. Court thus found that appellant Pritish and one Rajkumar Anandrao Gulhane have committed offence affecting administration of justice by making forged documents. Court passed an order for filing complaint in writing against above two persons before Magistrate concerned. The person who complaint about this forgery felt that action should have been taken against some others also, hence, preferred an appeal before District Judge who passed an order on 12.08.1996 directing that complaint should be filed against five more persons besides appellant Pritish and Rajkumar Anandrao Ghulane whereagainst Reference Court has passed order. Those five persons went to High Court and got proceedings against them quashed. Pritish came to High Court filing an appeal under Section 341 and said that Reference Court has passed order in violation of principles of natural justice and made inquiry without giving any opportunity to him. Learned Single Judge repelled contention and observed that under Section 340 Cr.P.C., no opportunity is required to be given to person against whom complaint is to be filed and such person has no right to be heard. Same issue was raised before Supreme Court. Referring to Section 340, Court observed that basic requirement to apply Section 340 is formation of an opinion by Court that it is expedient in the interest of justice that an inquiry should be made for an offence which appears to have been committed. In order to form such opinion, Court is empowered to hold a preliminary inquiry. Even without holding such preliminary inquiry, Court can form such opinion when it appears to Court that such offence is made out in relation to a proceeding in that Court. When Court forms such an opinion, it is not mandatory that Court should make a complaint. Section 340 confers power to do so but it does not mean that Court should give a complaint but once Court decides to do so, then Court should make a finding to the

effect that on the fact situation it is expedient in the interest of justice that offence should further be probed into. If Court finds it necessary to conduct a preliminary inquiry to reach such a finding, it is always open to Court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by Court regarding its opinion. Further, preliminary inquiry contemplated is not for finding whether a particular person is guilty or not. The purpose of preliminary inquiry, if Court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed or not. Court also examined inquiry as defined in Section 2(g) of Cr.P.C. and said that observation made by Court that it is expedient to hold inquiry means an inquiry to be conducted by Magistrate. Once Court forms an opinion, whether it is after conducting preliminary inquiry or not, it is expedient in the interest of justice that an inquiry should be made into an offence, said Court has to make a complaint in writing to Magistrate of First Class concerned as such offences are all falling within the purview of warrant case as defined under Section 2(x) Cr.P.C., Magistrate concerned has to follow the procedure prescribed in Chapter XIX of Cr.P.C.. Section 343 Cr.P.C. specifies that Magistrate to whom complaint is made under Section 340 or 341 Cr.P.C. shall proceed to deal with the case as if it were instituted on a police report. That being so, Magistrate on receiving complaint, shall proceed under Section 238 to 243 of Cr.P.C. Thus, the legal right of person against whom complaint is made to be heard, arises only when Magistrate calls accused to appear before him and not earlier thereto.

17. The scheme of Statute would clearly show that there is no statutory requirement to afford an opportunity of hearing to persons against whom Court may file complaint before Magistrate for initiating prosecution for committing an offence under Section 195(1)(b) of Cr.P.C.. Having said so, it was further observed by Supreme Court that Section 340 Cr.P.C. is not to decide guilt or innocence of party against whom proceedings are to be taken before Magistrate. At that stage, Court only consider whether it is expedient in the interest of justice that an inquiry should be made for any offence affecting administration of justice.

18. In **M.S. Sheriff and Another vs. State of Madras and Others AIR 1954 SC 397**, a Constitution Bench said that no expression on the guilt or innocence of persons should be made by Court while passing an order under Section 340 of Cr.P.C.. An exercise at that stage is not for finding whether any offence was committed or who committed the same. The scope is confined to see whether Court could then decide on the materials available that the matter requires inquiry by a criminal Court and that it is expedient in the interest of justice to have it inquired into. This decision of Constitution Bench has also been followed by a three Judges' Bench in **Pritish (supra)** observing that Court when decide to make a complaint under Section 340 is not to record finding of guilt or innocence of person against whom complaint is to be made before Magistrate.

19. Above authorities explain as to what is required to be done and what is the scope of consideration by Court whether

an offence enumerated under Section 195(1)(b) has been committed.

20. In **Prem Sagar Manocha Vs. State (NCT of Delhi) 2016 (4) SCC 571,** in connection with FIR No. 287 of 1999 registered as P.S. Mehrauli (Jessica Lal Murder Case), Police sought an expert opinion from State Forensic Science Laboratory, Rajasthan by letter dated 19.01.2000 on the following three questions:

"1. Please examine and opine the bore of the two empty cartridges present in the sealed parcel.

2. Please opine whether these two empty cartridges have been fired from a pistol or a revolver.

3. Whether both the empty cartridges have been fired from the same firearm or otherwise."

21. Appellant Prem Sagar Manocha was working as Deputy Director of said Laboratory. He forwarded a report dated 04.02.2000 with following result of examination:

"(i) The caliber of two cartridge cases (C/1 and C/2) is .22.

(ii) These two cartridge cases (C/1 and C/2) appear to have been fired from pistol.

(iii) No definite opinion could be given on two .22 cartridge cases (C/1 and C/2) in order to link firearm unless the suspected firearm is available for examination."

22. During trial before Sessions Court, New Delhi, 101 witnesses were examined for prosecution and appellant Prem Sagar Manocha was witnessed PW-95. Trial Court acquitted all ten persons. In Appeal, Delhi High Court convicted all of them vide judgement dated 20.12.2006. Conviction was also upheld by Supreme Court vide judgment in **Sidhartha Vashisht @ Manu Sharma vs. State (NCT of Delhi) 2010 (6) SCC 1.** Anguished by conduct of some witnesses turning hostile, High Court in appeal against acquittal, conducted suo motu proceedings against 32 witnesses including appellant Prem Sagar Manocha. In respect of appellant, High Court was of the opinion that he had reflected a shift in the stand from written opinion and that is how, helped accused, which is an offence under Section 193 IPC. Court, therefore, directed for registration of a case under Section 340 Cr.P.C. vide order dated 22.05.2013 whereagainst Sri Manocha filed an appeal before Supreme Court. Supreme Court relied on an earlier judgement in **Pritish (supra)** and said that Section 340 Cr.P.C. can be successfully invoked even without a preliminary inquiry since the whole purpose of inquiry is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. Thereafter, in para-13 of judgement quoted relevant part of High Court's order and said that said order shows that High Court did form an opinion after inquiry.

23. There is no magic in recording the words that "Court find it expedient in the interest of justice that inquiry should be made" but from order of Court, it should appear that Court has formed such opinion. Court also referred to an earlier Section 479-A of Code of Criminal Procedure, 1898 *(hereinafter referred to as "Cr.P.C., 1898")* which became Section 340 Cr.P.C. and pointed out distinction that under old statute, it was mandatory to record a finding after preliminary inquiry

regarding the commission of offence but the word "shall' as it was in Section 479-A of Cr.P.C., 1898 is substituted by word "may' in Section 340 Cr.P.C. as a result thereof it is no more mandatory that Court should record a finding. What is now required is only recording the finding of preliminary inquiry which is meant only to form an opinion of Court, and that too, opinion on an offence which appears to have been committed, as to whether the same should be duly inquired into.

24. I find a very recent judgement in **Sh. Narendra Kumar Srivastava Vs. State of Bihar and Others 2019 AIR (SC) 2675**, dealing with this aspect. It is held therein that requirement of formation of opinion of Court that it is expedient in the interest of justice that an inquiry should be made, is with an objective that prosecution should be ordered if it is in the larger interest of administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Court referred to an earlier decision in **Santokh Singh vs. Izhar Hussain and Another (1973) 2 SCC 406** and observed that too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely that Court should direct prosecution.

25. Now, I proceed to examine the order of this Court whether satisfy the requirement of law as discussed above.

26. An extraordinary constitutional remedy under Article 226 was invoked by filing a writ petition under Article 226 before this Court in the name of Kashi Ram, (petitioner) but he himself did not file writ petition. Instead, it was filed through Ravinder Talwar who claims to be a Holder of Power of Attorney of Kashi Ram. Writ petition involves an important question of vires of Amendment Act, 1998 and also seeks a mandamus that entire vend fee deposited by petitioner should be refunded. State Government and Excise Department while contesting writ petition filed an affidavit of Kashi Ram son of Kabool Ram Sharma stating that he has not authorized anyone to file writ petition. Meaning thereby, a writ petition involving serious issue of constitutional validity of a Statute was filed by an unauthorized person, making false claim that he was holding Power of Attorney of Kashi Ram and authorized to file writ petition. Court prima facie found that it is a case of fraud played upon Court and it may have resulted in interfering with legislation at the instance of a person who had no authority to bring an action in writ Court. Observation of Court that this kind of fraud cannot be allowed to encourage, so as to bring any unwarranted writ petition before this Court, shows that administration of justice in larger public interest required action in such matter and also inquiry need be conducted against person concerned who has played fraud with Court. Court has observed that in a fraudulent manner and by filing an unauthorized writ petition with a false affidavit, an attempt was made to utilize prerogative jurisdiction of Court and to seek extraordinary remedy by claiming that legislative enactment is ultravires and also to seek refund from Excise Department and this is a serious matter.

27. In my view, impugned order of Court if read as a whole, it cannot be said that Court has not recorded its opinion that it is expedient in the interest of justice that an inquiry should be made, inasmuch as,

entire order of Court shows that Court found that action in question amounts to playing fraud with Court and unauthorized and unwarranted invocation of prerogative writ jurisdiction that too involving such a serious matter cannot be encouraged which shows that Court was clearly of the opinion that larger public interest required inquiry in the matter. For considering the compliance of requirement of Section 340 Cr.P.C. one has to look into substance of the order and should not expect a technical literal compliance by using the word stated in the Statute. If order shows substantive compliance and requirement of statute, such order does not require any interference.

28. Hence, I do not find any substance in the argument advanced on behalf of applicant.

29. No other point has been argued.

30. Application lacks merits and is accordingly dismissed.

31. Interim order, if any, stands vacated.

(2020)1ILR 1658

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2019

BEFORE
THE HON'BLE VIVEK KUMAR SINGH, J.

Application U/S 482 Cr.P.C. No. 11645 of 2007

Sartaj ...Applicant
Versus
State of U.P. ...Oposite Party

Counsel for the Applicant:
Sri Anil Mullick

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

A. Double Jeopardy - applicant was acquitted of charges levied under Section 384/506 IPC read with Section 7 of Criminal Law Amendment Act - during the pendency of the abovementioned trial proceedings, an FIR was lodged under Section 2/3 of the U.P. Gangster Anti-Social Activities (Prevention) Act, 1986 - applicant cannot be tried for the same offence again - proceedings under the Gangster Act are not independent proceedings - trial under the Gangster Act is illegal and unjustified.

Application u/s 482 allowed. (E-10)

List of cases cited: -

1. Pritam Singh and anr Vs. State of Punjab AIR 1956 Supreme Court 415

2. N.R. Gosh Vs. The State of West Bengal AIR 196 Supreme Court (SC) 239

3. Manipur Adminstration, Manipur Vs. Thokchon Veere Singh AIR 1965 (SC) 87

4. Lalta and ors Vs. State of U.P. AIR 1970 (SC) 1381

5. Municipal Corporation of Delhi Vs. Shiv Singh 1971 (1) SCC 422

6. Bhagat Ram Vs. State of Rajasthan (1972) 2 SCC 466

7. Masood Khan Vs. State of U.P. (1974) 3 SCC 469

8. V.K. Agarwal, Assistant Collector of Customs Vs. Vasant Raj Bhagwan Ji Bhatia and ors (1988) 3 SCC 467

9. Kolla Vira Raghav Rao Vs. Gorantia Vlalalalalal Rao, (2011) 2 SCC 703

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

1. Heard Sri Anil Mullick learned counsel for the applicant and Sri Abhinav

Prasad, learned A.G.A. on behalf of the state.

2. This 482 Cr.P.C. application has been preferred for quashing the charge sheet No.119 dated 13.8.2001, under Section 2/3 The U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Meerut, pending in the Court of learned Special Judge Gangster Act, Meerut.

3. The facts of the case are that a first information report was lodged against the applicant as case crime No.166 of 2000, under Sections 2/3 of the U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Meerut and only on the basis of a single case i.e. case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut, after investigation the Investigating Officer has submitted charge sheet against four persons including the applicant. The trial of the said case commenced and after the trial the applicant was acquitted by the judgment and order dated 27.4.2001 passed in Criminal Case No.871 of 2000.

4. During the pendency of the aforesaid trial a first information report was lodged against the accused, including the applicant on 13.8.2000 under Section 2/3 of the U.P. Gangster Anti-Social Activities (Prevention) Act 1986 (hereinafter referred to as "Gangster Act") only. The sole basis of lodging of the first information report against the applicant was the implication in case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut, he was acquitted on 27.4.2001. Before acquittal chargesheet dated 15.12.2007 was filed against the applicant.

5. Counter affidavit has been filed on behalf of the state stating that the applicant is an accused in the eye of law who has involved himself in anti-social activities. During investigation of the case evidence also came to light that the applicant formed a gang which is involved in extortion of money from innocent people and therefore he was implicated in the case under Gangster Act. Even after acquittal in case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut, he cannot be discharged from the proceedings under the Gangster Act and he does not deserve any relief from this Court.

6. Learned counsel for the applicant submits that the very basis of initiation of F.I.R. under Gangster Act was the statements recorded under Section 161 Cr.P.C. of case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Meerut. Learned counsel submitted that said basis for initiation of F.I.R. under Gangster Act has been disbelieved by the trial Court as the applicant has been acquitted in the aforesaid crime, which acquittal order has not been challenged as yet. It is further contended that once very basis of initiation of Gangster's Act proceedings diminished, the entire trial procedure and rigmarole of proceedings of criminal trial under that Act will be nothing but only wastage of time of Court. The learned counsel for the applicant has relied upon the judgment of the Apex Court in the case of ***Pritam Singh and another vs. State of Punjab, AIR, 1956 Supreme Court 415*** in support

of his contention that once the revisionist was acquitted by the competent court for the case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, his trial under the provisions of Gangster Act would not be justified since the basis of implication in the case under the Gangsters Act was the case registered against the applicant in case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act. His contention is that his trial under the Gangster's Act would require trial regarding the same offence which was not found to have been proved by the trial court in the earlier case. He has relied upon the following observations of the Apex Court in the above mentioned case:-

"The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.

The maxim 'res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial".

7. In support of his contention learned counsel has further placed reliance on the judgment of the Apex Court in the case of ***N.R. Ghosh vs. the State of West Bengal, AIR 1960 Supreme Court (SC) 239*** and has relied upon in paragraph 22 of the same reads as under:-

"The principle stated in the section is that when a person has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of it, he shall not while the conviction or acquittal remains in force, be tried again for the same offence. In order, therefore, that the appellant may have the benefit of the section he must have been tried by a court of competent jurisdiction. Furthermore, such acquittal must be in force."

8. Reference to the Apex Court judgment in the case of ***Manipur Administration, Manipur vs. Thokchon Veere Singh, AIR 1965 (SC) 87*** has also been made wherein paragraph 6 are as follows:-

*Before referring to the decision of this Court in **Pritam Singh v. State of Punjab(1)** it would be convenient to refer to and put aside one point for clearing the ground. Section 403, Criminal Procedure Code embodies in statutory form the accepted English rule of autre fois acquit. This section is as follows:-*

"403 (1) A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any offence for which a different charge from the one made against him might have been made under s. 236, or for which he might have been convicted under section 237. (2) A person acquitted or convicted of any offence may be afterwards tried for

any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1). (3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(1) A.T.R. 1956 S.C. 415.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation-The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section." Section 26 of the General Clauses Act which is referred to in s. 403 enacts:

"26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

We might also, in this connection, refer to Art. 20(2) of the Constitution since it makes provision for a bar against a second prosecution in an analogous case. That provision reads:

"20(2). No person shall be prosecuted and punished for the same offence more than once." As has been pointed out by this Court in ***State of Bombay v. S. L. Apte(1)****, both in the case of Art. 20(2) of the Constitution as well as s. 26 of the General Clauses Act to operate as a bar the second prosecution and the consequential punishment thereunder, must be for "same offence" i.e., an offence whose ingredients are the same. It has been pointed out in the same decision that the V Amendment of the American Constitution which provides that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb, proceeds on the same principle.*

9. Reliace on Apex Court judgment in the case of ***Lalta and others vs. State of U.P., AIR 1970 (SC) 1381*** has been made, wherein case of ***Pritam Singh's (supra) and Manipur Administration's case (supra)*** have been accepted as binding authorities on the issue. Reference to ***Municipal Corporation of Delhi vs. Shiv Singh 1971 (1) SCC 422*** has been made where Section 26 of the general clauses Act 1897 were considered regarding the question of double jeopardy in relation to prosecution of an accused for single offence under two enactments and it was held that Section 26 of the general clauses Act prevents accused from double penalty. This judgment has been relied by the counsel to advance the proposition that the prosecution of the revisionist under the general provisions of Indian Penal Code and then under the provisions of Special Act i.e., Gangster Act on the basis of implication in the case under Section I.P.C., wherein he has been acquitted should not be permitted.

10. Counsel for the applicant has referred to the judgment, ***Bhagat Ram vs. State of Rajasthan (1972) 2 SCC 466***, wherein the Apex Court held that even if an order of acquittal is passed by Division Bench of the Court, it is not open for the third Judge of the same Court in a subsequent stage of the same proceedings to convict the person unless the judgment of the Division Bench is set aside by the Supreme Court. In view of the principle embodied in Section 403 I.P.C.

11. The counsel has relied upon the judgment, ***Masood Khan vs. State of U.P. (1974) 3 SCC 469***, wherein the issue decided was that for getting the benefit of the principle of issue of estoppel both the proceedings should be criminal proceedings and where one proceeding is civil and the other is criminal, the benefit of this principle will not be extended to the accused. Reference to ***V.K. Agrawal, Assistant Collector of Customs vs. Vasant Raj Bhagwan Ji Bhatia and others, (1988) 3 SCC 467*** has also been made.

12. Learned counsel for the applicant has argued that in the present case the prosecution of the applicant is being made under the Gangsters Act. After acquittal under the provisions of I.P.C. If two constructions are possible one leading to anamoly, absurdity and unconstitutionality should be avoided.

13. Learned counsel for the applicant has relied upon the judgment in the case of ***Kolla Vira Raghav Rao vs. Gorantla Vlalalalalal Rao, (2011) 2 SCC 703***. In this case the Apex Court disapproved the prosecution of the accused under Section 420 I.P.C. After he was convicted under Section 138 N.I. Act, holding that the subsequent prosecution is barred by article 20(2) and Section 300(1) Cr.P.C. once the facts are the same.

14. After considering the authorities cited by the counsel for the applicant it is clear that the applicant was implicated in the Gangsters Act only on account of involvement in the case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act. The proceedings under the Gangsters Act are not independent proceedings. The implication of the applicant in the offence under the Gangsters Act was only because of the one case registered against him as case crime no.166 of 2000, under Section 384/506 I.P.C. read with Section 7 Criminal Law Amendment Act, as clear from the gang chart annexed with the affidavit in support of this 482 Cr.P.C. application. The definition of gang is given in Section 2(b) which is as follows:-

Section 2:-

(b)"Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in antisocial activities, namely:

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U. P. Excise Act, 1910 (U. P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic

Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

*(v) offences punishable under the Suppression of *[Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956)], or*

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or (viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or (x) inciting others to resort to violence to disturb communal harmony, or (xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course.

15. A perusal of the aforesaid sections shows that the applicant was implicated in an offence under chapter 16, I.P.C. and therefore he was implicated in the case under the Gangsters Act. There is only one case shown against the applicant in the gang chart in which the applicant was acquitted by the competent Court and therefore his implication and trial under Section 2/3 of the Gangsters Act was not justified.

16. From the law of the Apex Court as discussed above it is crystal clear that the trial of the applicant for an offence under Section 2/3 of the Gangsters Act is not justified. In view of the fact that only one case is registered against him and he has been acquitted in that case.

17. In view of the above consideration of the facts of the case and law cited the charge sheet No.119 dated 13.8.2001, under Section 2/3 The U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Meerut, pending in the Court of learned Special Judge Gangster Act, Meerut, is hereby quashed.

18. This application under Section 482 Cr.P.C. henceforth is allowed.

(2020)1ILR 1664

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 27051 of 2016

Sanjay Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ashok Kumar Mishra, Sri Shashi Bhushan Kunwar

Counsel for the Opposite Parties:
A.G.A., Sri Sunil Kumar Singh, Sri V.K. Baranwal

A. Code of Criminal Procedure - Section 482 - This Court is not to give any opinion about facts of the case or any proceeding regarding it-Investigating Officer submitted charge-sheet and Magistrate applied its legal mind and thereby, took cognizance over this offence under Section 354 of IPC, which was substantiated by facts on record-This Court in exercise of inherent power under Section 482 of Cr.P.C. is never expected to make meticulous analysis of facts and evidence for filing of charge-sheet or not-Charge-sheet has been filed on the basis of evidence collected by Investigating Officer-No misuse of process of law- This appeal *(sic application*) merits its dismissal-*Criminal application dismissed*-Applicant directed to surrender before the court below, within 30 days and apply for bail.

Application u/s 482 Cr.P.C finally disposed of. (E-3)

List of cases cited: -

1. St. of A. P. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767

2. Hamida v. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. St., Rep.by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih.Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs. St. of U.P. ,2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 of Cr.P.C. has been filed by Sanjay Verma against State of U.P. and another, with a prayer for setting aside impugned charge-sheet and cognizance taking order dated 31.5.2016, in Criminal Case No. 889 of 2016, State Vs. Sanjay Verma, under Sections 354 of I.P.C., P.S. Kotwali, District Ballia, pending before Court of A.C.J.M. Ist, Ballia.

2. Heard learned counsel for the applicant and learned A.G.A. representing the State.

3. Learned counsel for the applicant argued that opposite party No. 2 Rekha Verma, who is informant-complainant of present case, lodged under Section 354 of IPC, is an accused in a case of murder of Omji Verma, which was manipulated by her to be shown as a railway accident death whereas FIR was got lodged and matter was investigated wherein, final report was submitted, against which protest petition was filed and order for

further investigation was prayed. This is a false case lodged as counter blast for alleged occurrence after a delay. This offence under Section 354 of IPC as Case Crime No. 567 of 2016, was got registered, upon an application moved under Section 156(3) of Cr.P.C., wherein, investigation resulted in submission of charge-sheet No. 71 of 2016 dated 3.4.2016. Cognizance by Magistrate was taken on 31.5.2016. Occurrence was said to be of 3.11.2015 and case was registered on 15.3.2016. In between, above case of murder was got registered, wherein, she has moved an application regarding no enmity with anyone and it being death under railway accident. This was an offence of murder. Hence, this counter blast case was a result of concoction. But, trial Court failed to appreciate it, hence, this application for preventing abuse of process of law. Thereby, prayer for setting aside impugned charge-sheet and cognizance taking order with entire proceeding of above criminal case was prayed for.

4. Learned counsel for other side vehemently opposed with this contention that complainant is widow lady of 25 years, with no issue. Accused applicant is real brother of her husband. With a view to oust her from her property, this false case was got registered because death was owing to railway accident and investigation resulted in submission of final report. This case was reported by G.R.P. too, that it was a case of accident. In the present case, he was subjected to molestation in her room, wherein, accused was residing being elder brother of her deceased husband. For this, she ran from pillar to post for getting cae registered and ultimately, this could be registered and investigated, wherein, charge-sheet has been submitted and cognizance has been taken. Hence, this application.

5. Having heard learned counsels for both sides as well as learned AGA and gone thourgh the material placed on record, it is apparent that a case under Section 302 of IPC was got registered by way of application moved under Section 156(3) of Cr.P.C. for murder of Omji Verma but it resulted in submission of final report and in police record too, it was a case of railway accident. Moreso, this Court is not to give any opinion about facts of above case or any proceeding regarding it but so far as present case is concerned and there is accusation of molestation by complainant-informant against accused-applicant, who is real brother of her deceased husband and it has been substantiated by her in her statement recorded under Section 161 of Cr.P.c. Investigating Officer submitted charge-sheet and Magistrate applied its legal mind and thereby, took cognizance over this offence under Section 354 of IPC, which was substantiated by facts on record.

6. This Court in exercise of inherent power under Section 482 of cr.P.C., is never expected to make meticulous analysis of facts and evidence for filing of charge-sheet or not, charge-sheet has been filed on the basis of evidence collected by Investigating Officer. There seems no misuse of process of law as propounded by Apex Court:-

"Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to

prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474****, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781****, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in* ***Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** *has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** *has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in* ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1****, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

7. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits. This appeal merits its dismissal.

8. **Dismissed**, accordingly.

9. Interim order, if any, got vacated.

10. However, in view of the entirety of facts and circumstances of the case, it is directed that in case the applicant appears and surrenders before the court below within 30 days and no more from today and applies for bail, his prayer for bail

shall be considered and decided in view of the settled law laid by this Court in the case of ***Amrawati and another Vs. State of U.P.*** reported in ***2004 (57) ALR 290*** as well as judgement passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P***. Till then no coercive measure shall be taken against the applicant.

11. With the aforesaid directions, this application is finally **disposed of.**

(2020)1ILR 1667

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2018

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Application U/S 482 Cr.P.C. No. 29654 of 2018

Nandini Jadaun & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Sri Akhilesh Kumar Pandey, Sri Harsh Sharma

Counsel for the Respondents:
A.G.A.

A. Criminal Law-Code of Criminal Procedure - Section 164 - Application filed by the applicant no. 1 to record her statement under Section 164 Cr.P.C. rejected- As a rule, statement under section 164 Cr.P.C. may be recorded only of a person sponsored by the investigating agency-Only exception is the confessional statement of an accused person under investigation-Before recording which the Magistrate may first call for a police report and also seek identification of such a person -No right can be claimed by the applicant no. 1 to get her statement recorded under Section 164 Cr.P.C. as admittedly, she had not been sponsored by the investigating agency. Also, from the perusal of the affidavit of the mother of the applicant no. 1, it appears that that the application was filed only to dilute the statement of the applicant no. 1, as recorded under section 161 Cr.P.C.

Application u/s 482 Cr.Pc rejected. (E-3)

List of cases cited: -

1. Reshma Khan Vs. St. of Jharkhand , Crl. Rev. No. 999 of 2014 decided on 20.01.2015

2. Jogendra Nahak & Ors. Vs. St. of Orissa & Ors, 2000 (1) SCC 272

3. Nafeesa Vs. St. of U.P. and Ors, 2015 (5) ADJ 648

4. Raja Ram Vs. State, AIR 1966 All 192

5. Mahabir Singh Vs. St. of Har. ,2001 (7) SCC 148

6. Ajay Kumar Parmar Vs. St. of Raj. 2012 (12) SCC 406

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Harsh Sharma holding brief of Shri. Akhilesh Kumar Pandey, learned counsel for the applicants and Sri Ankit Srivastava, learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 27.07.2018 passed by the Addl. Sessions Judge, Court No. 5, Aligarh by which that court has rejected the application filed by the applicant no. 1 to record her statement under Section 164 Cr.P.C. in Criminal Misc. Application No. 313 of 2018 that had been filed with

reference to Case Crime No. 399 of 2018, under Section- 306 IPC, Police Station- Quarsi, District- Aligarh.

3. In short, an FIR was lodged on 23.03.2018 alleging commission of offence under Section 306 IPC. During the police investigation in that case, a statement of the applicant no. 1, is claimed to have been recorded by the Investigating Officer on 29.04.2018, under Section 161 Cr.P.C. Such statement has given rise to the dispute in the present case. The applicant no. 1 alleges her statement had been wrongly recorded by the police. On 23.6.2018, her mother filed an affidavit before the S.S.P., Aligarh making that allegation and basically sought to dilute the prosecution case, at this stage. No action appears to have taken on such application and the investigation remained pending. On 5.7.2018 the applicants then filed an application before the learned Court below to record the statement of applicant no. 1 under Section 164 Cr.P.C. Admittedly, the applicant had not been sponsored by the investigating agency and while no order had been passed on the aforesaid application, on 07.07.2018, the investigating agency submitted a charge sheet under Section 173(8) Cr.P.C. whereon cognizance was taken by the learned Court below on the same date without first passing any order on the application filed by the present applicants - under Section 164 Cr.P.C. Subsequently, on 27.07.2018, the impugned order has been passed by which the learned Court below has rejected the application filed by the applicant no. 1 to record her statement under section 164 Cr.P.C.

4. While rejecting that application, the learned Court below has observed since it had already taken cognizance on 07.07.2018 and therefore there remained no occasion to record a statement under Section 164 Cr.P.C.

5. Learned counsel for the applicants submits that the learned Court below has completely erred in rejecting the application to record the statement under Section 164 Cr.P.C. He would submit that the language of Section 164(1) is clear. A statement under Section 164 Cr.P.C. may be recorded at any time during investigation or at any time afterwards but before the commencement of the inquiry or trial. Insofar as other than taking cognizance no other step had been taken by the learned Magistrate as may establish that the inquiry or the trial had commenced, it remained open to the learned Court below to record the statement of the applicant no. 1 under Section 164 Cr.P.C.

6. Second, since the applicant is not a stranger but a person who had been questioned by the investigating agency, her statement should have been recorded under section 164 Cr.P.C. In this regard, he further submitted that in the facts of the present case, the police report had been submitted under Section 173(8) Cr.P.C. and not under Section 173(2) Cr.P.C. He submits that on the own showing of the investigating agency, the investigation was pending. Therefore, undeniably the stage for recording statement under Section 164 Cr.P.C. did survive.

7. As to the need for her statement to be recorded under Section 164 Cr.P.C., it has been submitted, since the police had not conducted a fair and proper investigation inasmuch as the statement of the applicant no. 1 who is a key witness had been recorded in a manner so as to aid

the accused persons, the applicant no. 1 was within her rights to approach the learned Court below to get her statement recorded under Section 164 Cr.P.C.

8. Learned counsel for the applicants has relied on a decision of the Jharkhand High Court in the case of ***Reshma Khan Vs. State of Jharkhand*** passed in ***Criminal Revision No. 999 of 2014 decided on 20.01.2015***, wherein it has been observed as below:

"4. .....On plain reading of the provisions it is apparent that the Magistrate has the power to record the statement of a witness under Section 164 (5) Cr.P.C. but the judicial discretion has to be exercised on consideration of the facts of the case.

5.....

6.....

7. In the instant case the petitioner is the informant of the case. She has categorically stated that her L.T.I. was taken by the police when she was admitted in the hospital and she never made the statement which was converted by the police as her fard bayaan. She has stated that she approached the police to take her statement when she learnt that a person against whom she had no grievance has been made an accused by the police after getting her LTI on a blank paper. She even wrote to the Superintendent of Police in this matter but the investigating officer did not record her statement.

8.....

9. It is well settled that when the case is under investigation by the investigating agency, the court's power is restricted in interfering with the investigation. However, as is abundantly clear from the emergent factual scenario the petitioner being the informant had approached the court for recording her statement being distressed and aggrieved with the attitude of the investigating agency.

In such circumstances the Magistrate should have exercised his judicial discretion under the provision of Section 164 Cr.P.C. before rejecting the prayer of the petitioner."

(emphasis supplied)

9. Last, it has been submitted that no prejudice may be caused, if such statement was to be recorded in support of the prosecution case and not in the aid of defence. Here great emphasis was laid on the fact that the applicant no. 1 is not a stranger to the criminal case inasmuch as her statement had been recorded by the police itself and that therefore she had not rushed to the learned Magistrate to set up a false defence.

10. Sri Ankit Srivastava, learned AGA has opposed the motion. He would submit that once the investigation had been concluded and cognizance of the offence had been taken, there did not survive any stage for the statement under Section 164 Cr.P.C. to be recorded.

11. As to the right claimed by the applicants, he submits, no person, in whatever capacity, can approach the learned Magistrate to get his statement recorded under Section 164 Cr.P.C., unless he is sponsored by the investigating agency, except a person under investigation, who may approach the Magistrate to get his confessional statement recorded or a person covered by provision of section 164(5A) Cr.P.C. Even in the case of a confessional statement, it has been submitted that a police report would necessarily have to be first called

by the learned Magistrate before a such statement may be recorded under Section 164 Cr.P.C.

12. As to the statement of any other person who may want his statement to be recorded under Section 164 Cr.P.C., it has been submitted, he must be sponsored by the investigating agency. Reliance has been placed on a decision of the Supreme Court in the case of ***Jogendra Nahak & Others Vs. State of Orissa & Others*** reported in ***2000 (1) SCC 272*** wherein it has been observed as below:

"2. A strange motion has been made before the High Court of Orissa by four persons who are strangers to a criminal case for direction to a magistrate to record their statements under Section 164 of the CrPC (for short 'the Code').

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20. In re C.W. Cases (supra) Govinda Menon, J. of the Madras High Court (as he then was) expressed the view that:

It is not necessary that the Magistrate should be moved by the police in order that he might record a statement. There may be instances where the police may not desire to have recorded, the statement of a witness for some reason or other. In such a case, there is nothing preventing the witness to go to the Magistrate and request him to record the statement and if a Magistrate records his statement and transmits the same to the court where the enquiry or the trial is to go on, there is nothing wrong in his action.

21. Nevertheless learned Single Judge sounded a note of caution like this:

But such a thing will be very exceptional, as there is always a discretion in the Magistrate to refuse to record the statement. Ordinarily, when a police officer requests the Magistrate to record the statement, of a witness on oath under Section 161 Cr.P.C., such a request will not be refused by the Magistrate. But when a private party seeks to invoke the powers of a Magistrate under Section 164, Cr.P.C. the Magistrate has got a very wide discretion in acting or refusing to act.

22. *The same approach was made by Single Judges in State of Orissa v. A.P. Das (supra) and in Kunjukutty v. State of Kerala (supra).*

23. If a Magistrate has power to record statement of any person under Section 164 of the Code, even without the investigating officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the Magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances, when the investigating officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, ***is no answer to the question*** *whether any intending witness can straightaway approach a Magistrate for recording his statement under Section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses during trial or the court can be requested to summon them under Section 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the investigating officers) we do not find any special reason why the Magistrate should be burdened with the additional task of recording the statements of all and sundry*

who may knock at the door of the court with a request to record their statements under Section 164 of the Code.

……

….

25. Thus, on a consideration of various aspects, we are disinclined to interpret Section 164(1) of the Code as empowering a magistrate to record the statement of a person unsponsored by the investigating agency. The High Court has rightly disallowed the statements of the four appellants to remain on record in this case. Of course, the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it." (emphasis supplied)

13. Further, reliance has been placed on a decision of this Court in the case of ***Nafeesa Vs. State of U.P. and Others*** reported in ***2015 (5) ADJ 648*** wherein following the decision in the case of ***Jogendra Nahak & Others Vs. State of Orissa & Others (supra)***, it was observed as under:

"1. The question raised by way of this petition is as to whether a witness, of his own has the right to approach a Magistrate to record his statement under Section 164 Cr.P.C.; and whether such Magistrate is under a legal obligation to record the statement of such witness under Section 164 Cr.P.C., when investigation in a criminal offence is going on?

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…..

…

12. Considering the law laid down by the Hon'ble Supreme Court of India, and extracted hereinabove, it becomes clear that a Magistrate cannot take note of an individual approaching him directly with a prayer that his/ her statement may be recorded in connection with some occurrence involving a criminal offence. If liberty is given to anybody, and everybody, to approach a Magistrate for recording of statement under Section 164 Cr.P.C. in connection with an occurrence involving criminal offence, and if Magistrates are put under an obligation to record their statement, there is every likelihood that persons sponsored by accused/ culprits might be asked to approach court of the Magistrate for creating record/ evidence in defence with the purpose to help an accused/benefactor. If such a provision is made by way of giving liberty to a person unsponsored by the investigating agency to give statement under Section 164 Cr.P.C., entire investigation process would be derailed.

13. In the opinion of this Court, investigation is a searching enquiry for ascertaining facts; detailed or careful examination. Such Investigation is to be conducted by an investigating agency. In case persons individually are permitted to create "evidence in the process of investigation", the process of investigation would be interfered.

15. Considering the above it becomes illusory and apparent that only a police officer or an investigator can sponsor a witness to a Magistrate for recording of statement under Section 164 Cr.P.C." (emphasis supplied)

14. Other than the confessional statement by an accused person another category of cases where a statement may be recorded under section 164 Cr.P.C. is of persons covered under sub-section 5A of that section. Clearly, such is not the case before us.

15. Having considered the arguments so advanced by learned counsel for the

parties, it is first to be noted that a Full Bench of this Court in the case of ***Raja Ram Vs. State*** reported in ***AIR 1966 All 192*** had the occasion to consider the following question:

"Whether a confession recorded by a Magistrate under Section 164 of the Code of Criminal Procedure after the police had completed its investigation and submitted a charge-sheet, but before the Magisterial enquiry has commenced, is inadmissible in evidence."

16. The concurrent opinion of each of the three judges (comprising the full bench), on the above question was in the negative, and it was held that a statement under Section 164 Cr.P.C. may be recorded after the conclusion of investigation upto before the commencement of the inquiry or the trial. The third opinion expressed by Justice D.P. Uniyal specifically dealt with the point in time when an inquiry may be treated to have commenced. That question was answered in the following words:

"24. Under the provisions of the Code the inquiry under Chapter XVIII commences when the Magistrate takes cognisance of the offence within the meaning of Section 190 (1). After the police had submitted a report under Section 173 cognisance of the offence could be taken by the Magistrate under clause (b) of Subsection (1) of Section 190. In the circumstances of this case the Magistrate would have taken cognisance of the offence when he applied his mind to the contents of the police report for the purpose of proceeding in the manner indicated in Section 207-A of Chapter XVIII of the Code.

25. Sub-section (3) of Section 207-A gives an indication as to the point of time when the inquiry may be said to commence. That sub-section reads thus: "At the commencement of the inquiry the Magistrate shall when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them he shall cause the same to be so furnished."

Sub-section (4) and the subsequent sub-sections provide how the Magistrate should proceed to record evidence produced on behalf of the prosecution and empower the Magistrate to summon such evidence as he may consider necessary, and to call upon the accused if necessary to make a statement in regard to the accusation against him. ***It would thus appear that the inquiry commences only after the Magistrate is satisfied that the documents referred to in Section 173 have been supplied to the accused and when the Magistrate proceeds to take the evidence in support of the prosecution case."*** (emphasis supplied)

17. That being the correct principle, in the present case, it has not been examined by the learned court below whether the documents as required by Section 173(4) Cr.P.C. had been supplied to the accused person on any date prior to 27.07.2018. Thus, at present it cannot be said whether the inquiry had or had not commenced. To that extent, the reasoning given by the learned Court below is incomplete or inadequate. The correct principle to be applied by the learned Court below would have to be one as had been laid down in the full bench of this Court, noted above. However, a decision on that point may not be necessary in the

facts of the present case, in view of what follows herein.

18. In so far as it is the admitted case of the applicant no. 1 that she was not seeking to get her confessional statement recorded, then, irrespective of the stage of the proceedings, her statement could not have been recorded under section 164 Cr.P.C. since she had not been sponsored by the investigating agency. Therefore, the pre-condition to record such statement was not satisfied. In this regard the decision of the Supreme Court, in the case of ***Jogendra Nahak & Others Vs. State of Orissa & Others (supra)*** appears to categorically and unequivocally prescribe - only a person sponsored by the investing agency can approach the Magistrate to get his statement recorded under Section 164 Cr.P.C. The only exception that exists to that inferred principle is the confessional statement of an accused person under investigation.

19. The submission that the said principle would apply only against strangers to the accusation who may rush to the learned Magistrate only to create false or frivolous evidence in support of the accused persons and thus seek to scuttle the investigation is unfounded. From a plain reading of the decision, in ***Jogendra Nahak & Others Vs. State of Orissa & Others (supra)***, the clear principle of law laid down does not create or allow for such an exception to arise or exist. To that extent the principle laid down by the Supreme Court appears to be absolute. It was followed by another coordinate Bench of this Court in the case of ***Nafeesa Vs. State of U.P. and Others (supra)*** where the informant approached the learned Magistrate on second occasion to record her statement under Section 164 Cr.P.C., though such statement had also been recorded earlier.

20. Then, the Supreme Court had the occasion to consider its decision in ***Jogendra Nahak & Others Vs. State of Orissa & Others (supra)***, in the case of ***Mahabir Singh Vs. State of Haryana*** reported in ***2001 (7) SCC 148***. The latter was a case where the learned Magistrate had proceeded to record a statement under Section 164 Cr.P.C., alleged to be a confessional statement, without prior verification of the identity of that person. In that context, it was observed as below:

"20. The sub-section makes it clear that the power of the Magistrate to record any confession or statement made to him could be exercised only in the course of investigation under Chapter XII of the Code. The section is intended to take care of confessional as well as non-confessional statements. Confession could be made only by one who is either an accused or suspected to be an accused of a crime. Sub-sections (2), (3) and (4) are intended to cover confessions alone, dehors non-confessional statements whereas Sub-section (5) is intended to cover such statements. A three Judge Bench of this Court in Jogendra Nahak v. State of Orissa, 1999 CriLJ 3976 has held that so far as statements (other than confession) are concerned they cannot be recorded by a Magistrate unless the person (who makes such statement) was produced or sponsored by investigating officer. But the Bench has distinguished that aspect from the confession recording for which the following observations have been specifically made
(SCC p. 275, para 12)

"12. There can be no doubt that a confession of the accused can be

recorded by a Magistrate. An accused is a definite person against whom there would be an accusation and the Magistrate can ascertain whether he is in fact an accused person. Such a confession can be used against the maker thereof. If it is a confessional statement, the prosecution has to rely on (SIC)against the accused.

21. We have no doubt that an accused person can appear before a Magistrate and it is not necessary that such accused should be produced by the police for recording the confession. But it is necessary that such appearance must be "in the course of an investigation" under Chapter XII of the Code. If the Magistrate does not know that he is concerned in a case for which investigation has been commenced under the provisions of Chapter XII it is not permissible for him to record the confession. If any person simply barges into the Court and demands the Magistrate to record his confession as he has committed a cognizable offense, the course open to the Magistrate is to inform the police about it. The police in turn has to take the steps envisaged in Chapter XII of the Code. It may be possible for the Magistrate to record a confession if he has reason to believe that investigation has commenced and that the person who appeared before him demanding recording of his confession is concerned in such case. Otherwise the Court of a Magistrate is not a place into which all and sundry can gatecrash and demand the Magistrate to record whatever he says as self-incriminatory." (emphasis supplied)

21. No prior verification having been made, for that reason, the alleged confessional statement recorded by the Magistrate (in that case), was treated to be an idle exercise of power, of no consequence or legal effect.

22. Also, the Supreme Court in the case of ***Ajay Kumar Parmar Vs. State of Rajasthan*** reported in ***2012 (12) SCC 406*** reiterated the principle laid down in the case of ***Jogendra Nahak & Others Vs. State of Orissa & Others (supra)*** after taking note of the distinction, on facts, drawn by that Court to the aforesaid judgment in the case of ***Mahabir Singh Vs. State of Haryana (supra)***. In that case, a statement of the informant/victim (being a person covered under section 164 (5A) Cr. P.C.), was recorded by the Magistrate, upon an application of the informant/victim though she had not been sponsored/produced by the investigating agency. By that statement, the informant falsified the F.I.R. allegations. However, a charge-sheet was filed. Relying on the disputed statement (under Section 164 Cr.P.C.) of the victim, the Magistrate did not take cognizance and acquitted the accused person. It was observed by the Supreme Court as below:

*"**11.** A three-Judge Bench of this Court in Jogendra Nahak v. State of Orissa, held that sub-section (5) of Section 164, deals with the statement of a person, other than the statement of an accused i.e. a confession. Such a statement can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. This Court held that, in case such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate's Courts, for the purpose of creating record in advance to aid the said*

culprits. Such statements would be very helpful to the accused to get bail and discharge orders.

12. *The said judgment in Jogendra Nahak case was distinguished by this Court in Mahabir Singh v. State of Haryana, on facts, but the Court expressed its anguish at the fact that the statement of a person in the said case was recorded under Section 164 CrPC by the Magistrate, without knowing him personally or without any attempt of identification of the said person, by any other person.*

13. *In view of the above, it is evident that this case is squarely covered by the aforesaid judgment of the three-Judge Bench in Jogendra Nahak, which held that a person should be produced before a Magistrate, by the police for recording his statement under Section 164 CrPC. The Chief Judicial Magistrate, Sirohi, who entertained the application and further directed the Judicial Magistrate, Sheoganj, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the latter also recorded her statement, without any attempt at identification, by any court officer/lawyer/police or anybody else."*

(emphasis supplied)

23. Thus, in the first place, as a rule, statement under section 164 Cr.P.C. may be recorded only of a person sponsored by the investigating agency. By way of an exception to that rule, a confessional statement (of person facing criminal investigation), may be recorded by the Magistrate, if he has reason to believe that the person seeking to make such a statement is an accused person in a criminal investigation and further, such person seeks to get recorded his confessional statement. Also, for that purpose, the Magistrate may first call for a police report and also seek identification of such a person, before proceeding to record his statement.

24. The Jharkhand High Court, in the case of ***Reshma Khan Vs. State of Jharkhand (supra)*** has clearly held contrary to the view taken by the Supreme Court in ***Jogendra Nahak & Others Vs. State of Orissa & Others (supra)***. The view taken therein had been disapproved by the Supreme Court while dealing with a similar view that had been then taken by the Madras, Orissa and Kerala High Courts.

25. In view of the above clear position of law, no right can be claimed by the present applicant no. 1 to get her statement recorded under Section 164 Cr.P.C. as admittedly, she had not been sponsored by the investigating agency. Also, from the perusal of the affidavit of the mother of the applicant no. 1, it appears that that the application was filed only to dilute the statement of the applicant no. 1, as recorded under section 161 Cr.P.C.

26. Therefore, for the above reasons, the order passed by the learned court below does not warrant any interference, though for reasons different from those contained in the impugned order.

27. The present application lacks merit and is accordingly **dismissed.**

(2020)1ILR 1675

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.10.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

Application U/S 482 Cr.P.C. No. 31732 of 2018

Sumesh Sahani ...Applicant
Versus
State of U.P. & Anr. ...Oposite Parties

Counsel for the Applicant:
Sri Amit Daga, Sri Piyush Kumar Shukla

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

A. Dishonor of cheque - Section 141 - Negotiable Instrument Act, 1881 - cheque issued by Company - company was not impleaded as a party to the complaint proceedings - as per the Judgments of Supreme Court in case of *Aneeta Handa* and *Himanshu* as well as the provisions of Section 141 of the Act, the 'company' who has issued the cheque should be impleaded as the party to the complaint filed under Section 138 of the Act.

That the provisions of Section 141 postulates that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished and in absence of the company being arraigned as an accused, a complaint against the applicant was not maintainable. (Para 11)

Application u/s 482 allowed. (E-10)

List of cases cited: -

1. Aneeta Handa and ors vs. God father Travels and Tours Pvt. Ltd. And ors 2012 (5) SCC 661 *(followed)*

2. Himanshu Vs. B Shivamurthy & anr 2019 Law Suit SC 86 *(followed)*

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Amit Daga, learned counsel for the applicant and learned AGA for the State. Nobody has put in appearance on behalf of O.P. No.2 in spite of service of notice to him.

2. The present petition under Section 482 Cr.P.C. has been filed for quashing the order dated 2.5.2018 passed by Additional Sessions Judge, Court No.5, Jhansi, in Criminal Revision No. 190 of 2017 (Sumesh Sahani Vs. State of U.P. & Anr.) as well as summoning order 30.4.2013 passed Judicial Magistrate Court No. 12 Jhansi, in Criminal Complaint Case No. 475 of 2013 and entire proceedings of Criminal Complaint Case No. 475 of 2013, under Section 138 of Negotiable Instruments Act (hereinafter referred to as the 'Act') P.S. Kotwali, District- Jhansi, pending before the court of Judicial Magistrate Court No. 12 Jhansi.

3. It reflects from the record that the O.P. No.2 has filed a complaint under Section 138 of the Act against the applicant for dishonoring of cheque dated 12.12.2012 amounting to Rs. 3.5 lacs. As per the complaint as well as from the cheque (appended at page 25 of the paper book), it is apparent that the cheque in question was issued by the company "Essex Construction Private Ltd." which is incorporated under the Companies Act, a copy of the certificate of incorporation has been appended at page 54.

4. Learned counsel for the applicant submits, the complaint is wholly incompetent since the cheque (giving rise to the complaint) was issued by the 'company' Essex Construction Private Ltd. and the said company that was not impleaded as an accused person in the complaint. Reliance has been placed on

Section 141 of the Act and also upon the judgments of Hon'ble Apex Court in the Case of **Aneeta Hoda and others Vs. God Father Travels and Tours Pvt. Limited and others, (2012 (5) SCC-661) as well as** in the Case of **Himanshu Vs. B Shivamurthy & Anr. (2019 Law Suit SC 86).**

5. On the other hand, learned AGA justified the prosecution by stating that the partners of the company have been arrayed as an accused, therefore, there is no necessity for impleading the company as an accused person.

6. I have heard learned counsel for the parties and perused the record.

7. At the very outset, it may be pointed out that, there is no dispute to the fact that the cheque has been issued by the company incorporated under the Companies Act.

8. The provisions of Section 141 of the Act are relevant, which read thus:-

"141. Offences by companies.-

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-- For the purposes of this section,--

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

9. A plain reading of the provision makes it clear, if the person committing the offence is a "company", in that event every natural person responsible for such commission as also the artificial person namely the company shall be deemed to be guilty of the offence and be liable to be proceeded against and punished accordingly. Also, certain other natural persons may be held guilty, if so proved. By way of the Explanation (a) attached to that provision of law, the term 'company' (specifically for the purpose of Section 141 of the Act), has been defined to mean

a body corporate or a firm or any other association of individuals.

10. In this regard, paragraph nos. 42 & 43 of the decision of Hon'ble Apex Court in the case of **Aneeta Hoda and others Vs. God Father Travels and Tours Pvt. Limited and others,** may be referred, which are quoted hereinunder:

"42. ..... Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

"43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself."

11. The similar view has been taken by the Hon'ble Apex Court in the latest judgment in the case of **Himanshu Vs. B. Shivamuthy & Anr.** and held that the provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished and in absence of the company being arraigned as an accused, a complaint against the applicant was not maintainable.

12. From the aforesaid decisions of the Hon'ble Apex Court as well as provisions of Section 141, it is apparent that if the "company" who has issued the cheque, has not been arraigned as an accused, than the complaint under Section 138 of N.I. Act cannot be processed.

13. In view of the above, the order dated 2.5.2018 passed by Additional Sessions Judge and order dated 30.4.2013 passed Judicial Magistrate Court No. 12 Jhansi, in Criminal Complaint Case No. 475 of 2013 cannot be sustained in the eyes of law, and are hereby quashed.

14. The present application stands allowed. No order as to costs.

(2020)1ILR 1678

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/S 482 Cr.P.C. No. 35595 of 2019

Sharad Agrawal ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Anil Kumar Pathak, Sri Anuj Srivastava, Sri G.S. Chaturvedi

Counsel for the Respondents:
A.G.A., Sri Aushim Luthra, Sri Manish Tiwari

A. Simultaneous/parallel proceedings - matter gave rise to both civil and criminal liabilities - probate proceedings were going on in civil court while forgery case were going on in criminal court - mere pendency of civil litigation (probate proceedings) does not vitiate criminal proceedings and does not absolve the accused from criminal liability - both proceedings can run concurrently.

The interference is ordinarily done by this Court in those matters where it is found that the ingredients of the criminal offence are not made out from the allegations of the F.I.R. and it is found that deliberately a criminal complexion has been lent to a controversy which is essentially of civil nature. But the cases where rank forgery as reflected from the allegations and the ingredients of offences are apparently made out, the criminal prosecution is not shut down just because of the pendency of civil case. Punishment of imprisonments etc. has to be awarded to the guilty persons in the criminal forum while the civil damages or the annulment of forged documents has to be done in the civil forum. In cases of rank fraud and forgery both the forums have got to be necessarily approached to get complete relief and in order to bring the guilty accused to justice. (Para 11)

While addressing an hypothetical situation of incongruent findings by different Courts on identical and similar issue in case of simultaneous proceedings in two forums,, the Hon'ble Apex Court kept in perspective that the decision of one Court has not been declared by the legislature to be binding on other Court always and has not been recognized as relevant except under certain circumstances and for certain limited purposes only. The only relevant consideration to avoid such kind of incongruity was to avoid the eventuality of embarrassment. No strait jacket cut and dried formula can be laid down in this regard and it all depends from case to case and the nature of two proceedings that are pending at two forums in the light of which the Courts are required to form their opinion whether twin proceedings ought to be allowed to go simultaneously or not and whether on ought to be preferred to the other or whether one of them deserves to be stayed till the other is decided. (Para 14)

Application u/s 482 rejected. (E-10)

List of cases cited: -

1. Chandra Deo Singh Vs. Prokash Chandra Bose AIR 1963 SC 1430

2. Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker AIR 1960 SC 1113

3. Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736

4. R.P. Kapur Vs. State of Punjab AIR 1960 SC 866

5. State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426

6. Tamil Nadu Mercantile Bank Ltd. Vs. State through Deputy Superintendent of Police and anr. 2014 (3) SCC 755

7. M.S. Shariff Vs. The State of Madras and ors AIR 1954 SC 397

8. Puran Singh and ors Vs State of U.P. and anr Application U/s 482 No. 12993 of 2004

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Sri Aushim Luthra, Advocate has filed his vakalatnama on behalf of opposite party no.2, which is taken on record.

2. This application u/s 482 Cr.P.C. has been filed seeking the quashing of the cognizance order dated 16.1.2018 passed by the Metropolitan Magistrate-III,

Kanpur Nagar in Case No. 1663 of 2018, State versus Sharad Agarwal and others and revisional order dated 24.12.2018 passed by the Sessions Judge, Kanpur Nagar in Criminal Revision No. 231 of 2018, Sharad Agarwal versus State of U.P. and others whereby the aforesaid criminal revision has been dismissed affirming the order dated 16.1.2018 of the Magistrate. The applicant has also sought for quashing of the N.B.W. order dated 31.8.2019 passed by the Special Judicial Magistrate, Kanpur Nagar as well as the entire proceedings of aforesaid Case No. 1663 of 2018, State versus Sharad Agarwal and others pending before the court below.

3. Heard Sri G.S. Chaturvedi, learned Senior counsel assisted by Sri Anuj Srivastava and Sri Anil Kumar Pathak, Advocates for the applicant, learned A.G.A. for the State and Sri Manish Tiwari, Advocate assisted by Sri Aushim Luthra, learned counsel for opposite party no.2. Perused the record.

4. Submission of learned counsel for the applicant is that probate proceedings are going on in the civil court where the same issues are to be adjudicated and, therefore, the criminal proceedings are not desirable to be adopted in the case. Further submission is that there is no such express evidence of denial of signature on the will and, therefore, the will cannot be said to be forged. It is also submitted that in the case of co-accused the Court has stayed the proceeding of the case, hence the present applicant may also be given the same relief. Certain other contentions have also been raised by the applicant's counsel but all of them relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by the learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded.

5. Learned counsel appearing for opposite party no. 2 while rebutting the submissions of learned counsel for the applicant has submitted that there is overwhelming evidence collected during the investigation affirming the presence of testator at the relevant point of time in the hospital at Medanta situated at Gurgaon, which is hundreds of miles away from the place of execution of the will, which is said to be executed at Kanpur and thus the claim of her presence at a different place at the time of execution of will is nothing but implied denial of the signature and even if it has not been done in so many words it does not signify anything else than denial of the genuineness of the signature. Further submission is that the contents of the will also reveal some expressions which conclusively prove the concocted nature of the document. Learned counsel has tried to submit that one of the witnesses of the said will contains the parentage written as 'late' Shiv Mangal Singh. while on the day of the will he was very much alive and died much later which also proves that on the alleged day there was no such will executed and the forgery is glaringly apparent on the face of record. Regarding the pendency of probate proceeding it has been submitted that if a particular document is forged it naturally can be cancelled or annulled only by the competent civil court and, therefore, the proceedings in the civil court have got to be resorted to for that purpose. So far as the law with regard to maintainability of

criminal prosecution in regard to matters which also disclose civil liability is concerned, the same has been well settled by a catena of Apex Court's decisions. In many of the disputes the facts and circumstances are such that the matter gives rise to civil and the criminal liabilities both. The matters with regard to civil liability are decided on the basis of preponderance of probability while the matters relating to the criminal liability are to be decided on the basis of proof beyond reasonable doubt. Both of the proceedings can go on against an accused simultaneously and he can be held liable for both the liabilities. The criminal prosecution and the proceedings with regard to civil liability of the same accused are not mutually exclusive to each other. The criminal prosecution should not necessarily wait till the decision of the civil court.

6. It may be observed that the law regarding sufficiency of material which may justify the summoning of accused and also the court's decision to proceed against him in a given case is also well settled. The court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ground to proceed in the matter is required.

7. Through a catena of decisions given by Hon'ble Apex Court this legal aspect has been expatiated upon at length and the law that has evolved over a period of several decades is too well settled. The cases of (1) ***Chandra Deo Singh Vs. Prokash Chandra Bose AIR 1963 SC 1430 ,*** (2) ***Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker AIR 1960 SC 1113 and*** (3) ***Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736*** may be usefully referred to in this regard.

8. The Apex Court decisions given in the case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and in the case of **State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426** have also recognized certain categories by way of illustration which may justify the quashing of a complaint or charge sheet. Some of them are akin to the illustrative examples given in the above referred case of **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736**. The cases where the allegations made against the accused or the evidence collected by the Investigating Officer do not constitute any offence or where the allegations are absurd or extremely improbable impossible to believe or where prosecution is legally barred or where criminal proceeding is malicious and malafide instituted with ulterior motive of grudge and vengeance alone may be the fit cases for the High Court in which the criminal proceedings may be quashed. Hon'ble Apex Court in **Bhajan Lal's** case has recognized certain categories in which Section-482 of Cr.P.C. or Article-226 of the Constitution may be successfully invoked.

9. Illumined by the case law referred to herein above, this Court has adverted to the entire record of the case.

10. A perusal of record of the present case shows that the F.I.R. in the present case was lodged by the opposite party no. 2 against the applicant and other co-accused persons. Allegation is that the wife of the opposite party no. 2 namely Asha Lata Sharma (since deceased) was

owner of the house in dispute. She died on 23.5.2013 and thereafter being her husband as well as only legal heir, the opposite party no. 2 became owner of the said house. Allegation is that the applicant with the aid of other co-accused persons had manipulated a forged will deed of late Asha Lata Sharma and had claimed ownership over the said house. As per the F.I.R. the alleged Will Deed on the basis of which the applicant was claiming his rights, was executed on 02.5.2013 in Kanpur whereas in fact on that date Asha Lata Sharma was in Medanta Hospital, Gurgaon in connection with her treatment. Allegation in the F.I.R. is that on the date of execution of alleged Will Deed the wife of the opposite party no. 2 was not present in Kanpur but the applicant had forged her signature and got the aforesaid Will prepared in his favour. Several other illegalities and anomalous features have also been mentioned in the F.I.R. showing the alleged Will in favour of the applicant of being a forged document. During investigation the investigating officer had recorded the statement of the first informant who had fully supported the prosecution version. He had also given treatment papers as well as train ticket of Asha Lata Sharma to the Investigating Officer showing her presence at Medanta Hospital, Gurgaon on 2.5.2013. The said documents are the part of case diary and are annexed as annexure no. 8 to the present application. In the alleged Will Deed which was executed in favour of the applicant, witnesses of margin are mentioned as Ravindra Bhushan Singh son of late Shiv Mangal Singh and Brahma Dutt Mishra but on that date i.e. on 2.5.2013 father of Ravindra Bhushan Singh namely Dr. Shiv Mangal Singh was quite alive. It is also relevant to note that some of the witnesses and executor of the Will have given conflicting statement/affidavits in connection with the present case regarding their presence at the time of execution of alleged Will Deed. Therefore, it cannot be said at all that there is no evidence against the applicant. It is also well settled law that mere pendency of a civil litigation (i.e. a probate case as is in the present case) does not vitiate criminal proceedings and does not absolve the accused from his criminal liability and both proceedings can run concurrently.

11. The interference is ordinarily done by this Court only in those matters where it is found that the ingredients of the criminal offences are not made out from the allegations of the F.I.R. and it is found that deliberately a criminal complexion has been lent to a controversy which is essentially of civil nature. But the cases where rank forgery is reflected from the allegations and the ingredients of offences are apparently made out, the criminal prosecution is not shut down just because of the pendency of civil case. Punishment of imprisonments etc. has to be awarded to the guilty persons in the criminal forum while the civil damages or the annulment of forged documents has to be done in the civil forum. In cases of rank fraud and forgery both the forums have got to be necessarily approached to get complete relief and in order to bring the guilty accused to justice. In the present matter, it cannot be said that the allegations are deficient and they do not make out any criminal offence or that deliberately a criminal complexion has been lent to a dispute which is otherwise of pure civil nature.

12. The position of law on this point is clearly discernible from the following observation of the Hon. Supreme Court in

the case of **Tamil Nadu Mercantile Bank Ltd. vs. State through Deputy Superintendent of Police and Anr, 2014 (3) SCC 755** :

"10. It is also a law settled by this Court and reiterated in the case of Monica Kumar (Dr.) vs. State of U.P., 2008 (8) SCC 781 that criminal proceedings can continue even if the allegation discloses a civil dispute also. It is only when the dispute is purely civil in nature but still the party chooses to initiate criminal proceeding, the criminal proceeding may be quashed. For such purpose also the Court, save and accept in very exceptional circumstances would not look to any document relied upon by the defence."

13. There are many other similar authorities which may be cited in this regard but that does not appear to be needed.

14. In fact, we have for our guidance the decision given by the Constitution Bench of Hon'ble Supreme Court in the case of **M.S. Shariff versus The State of Madras and others, A.I.R. 1954 S.C.397** whereby the Apex Court went to the extent of giving preference to the criminal prosecution in comparison to the civil proceeding. Sometimes, arguments are raised at the Bar that simultaneous proceedings in two forums, one civil and another criminal, are likely to result in incongruous findings and that possibility cannot be ruled out when different Courts at different point of time return their findings on identical or similar issues. With regard to such kind of contention, the Constitution Bench of the Apex Court did not attribute any great significance to such hypothetical eventuality and did not reckon the same a very relevant consideration. It was kept in perspective by the Hon'ble Supreme Court that the decision of one Court has not been declared by the legislature to be binding on the other Court always and has not been recognized as relevant except under certain circumstances and for certain limited purposes only. The only relevant consideration to avoid such kind of incongruity was to avoid the eventuality of embarrassment. Observations were also made by the Constitution Bench which underlined the desirability of earlier conclusion of criminal prosecution so that the evidence may be adduced in the Court by the witnesses before their memories fade to become untrustworthy. Even the social need to see that the guilty be punished at the earliest with regard to the crime committed by them was also taken note of by the Court. In view of the Apex Court, no straight jacket cut and dried formula can be laid down in this regard and it all depends from case to case and the nature of the two proceedings that are pending at two forums in the light of which the Courts are required to form their opinion whether twin proceedings ought to be allowed to go on simultaneously or not and whether one ought to be preferred to the other or whether one of them deserves to be stayed till the other is decided. It may be apt to quote herein-below the observations made by the Constitution Bench of the Hon'ble Supreme Court given in Shariff's case (supra) which read as thus:-

"As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule ban. be laid

down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things glide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so hear its end as to make it inexpedient to stay it in order to give precedence to a prosecution order of under section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

15. It may also be useful to extract the relevant observations made by the coordinate Bench of this Court in the case of ***Pooran Singh and others versus State of U.P. and another, Case:-Application U/S 482 No. 12993 of 2004*** whereby the issues about the maintainability of parallel proceedings, their feasibility and permissibility were gone into by His Lordship. The relevant pronouncements of the Apex Court were relied upon and detailed references to them were also made and it was concluded that the proceeding in a civil case and the proceeding of the criminal case can well go on together. The relevant portions of the aforesaid judgments may be reproduced herein-below.

"9. The issue is whether the impugned complaint or proceedings are maintainable, since the matter is engaging the attention of the Civil Court in a duly constituted suit. It is no longer res integra that on the basis of same facts, if a civil wrong and an offence are both disclosed, the civil and criminal courts are independent of the other to determine each, in their respective jurisdiction, untrammelled by the findings of the other. It is not that the findings of the civil court on the same fact in issue in a suit before it would work as res judicata, or as an issue estoppel to bar the criminal courts' jurisdiction, or to shut the mouth of parties in proceedings before the criminal court. The two courts in the two jurisdiction, civil and criminal, can reach contrary findings. Also, the judgement of the civil court, as such, is not relevant in criminal proceedings, except to the extent that it is provided to the contrary, by sections 40 to 44 of the Indian Evidence Act. That is not admittedly the case here. It would have been different if the act alleged a criminal offence, in proceedings before the Magistrate what was essentially a civil dispute, and not one that was both a civil wrong and a criminal offence. In the former case, proceedings before the criminal court can well be quashed; but, not in the latter.

10. In a case where an act is both a criminal offence and a civil wrong, the law appears to be consistent that both the civil court and the criminal court would have jurisdiction independent of the other. As already said, both Courts can reach contrary conclusions. In certain cases, depending upon the facts, proceedings before the Civil Court or the Criminal Court may be stayed pending outcome of the case before the other. But on those considerations proceedings before the Criminal Court or before the Civil Court, cannot be quashed or scuttled. In matters where one of the proceedings are stayed, depending on facts obtaining in a particular case, it is to avoid the likelihood of embarrassment. An early Constitution Bench decision of the Supreme Court on the point is ***M.S. Sheriff and another v. State of Madras and others****1 where their Lordships held thus:-*

(quoted paragraph of their Lordships in ***M.S. Sheriff (supra)*** *already extracted above is being omitted to avoid repetition).*

11.The decision aforesaid of their Lordships' was reiterated in the Constitution Bench decision in ***Iqbal Singh Marwah and another vs. Meenakshi Marwah and another2****, where the earlier decision in* ***M.S. Sheriff (Supra)*** *was endorsed :-*

32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. While examining a similar contention in an appeal against an order directing filing of a complaint under Section 476 of the old Code, the following observations made by a Constitution Bench in ***M.S. Sheriff v. State of Madras*** *give a complete answer to the problem posed:(AIR p.399, paras 15-16)*

(quoted paragraph of their Lordship's decision in ***M.S. Seriff (Supra)*** *already extracted above is omitted)*

12. Reiterating the principle in unambiguous words, the Supreme Court in ***P. Swaroopa Rani vs. M. Hari Narayana alias Hari Babu*** *held:-*

11. It is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the facts and circumstances of each case.

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18. It goes without saying that the respondent shall be at liberty to take recourse to such a remedy which is available to him in law. We have interfered with the impugned order only because in law simultaneous proceedings of a civil and a criminal case is permissible.(emphasis by Court).

13. What is clearly deducible from the above authorities is that it is not the law that proceedings before the Criminal Court are to be quashed because the same fact in issue, that is subject matter of criminal proceedings between parties, is also the subject matter of a pending civil suit. In certain situations,

however, proceedings of the Criminal Court, or may be, the Civil Court can be stayed pending decision of the other in order to avoid embarrassment to the parties. However, in those cases where stay of one or the other proceedings is granted pending decision in the other, the stayed proceedings would revive to be carried to their logical conclusion, irrespective of the outcome in the other jurisdiction. This is so because the Criminal and the Civil Court are completely independent of the other, and, on the same fact in issue between parties, they may arrive at contrary conclusions. The judgment of one in no way binds the other. Thus, the prayer to quash criminal proceedings on this ground cannot be granted."

16. In the light of what has been discussed above, the submission of learned counsel for the applicant that the criminal proceedings should be quashed in the wake of pendency of probate proceeding appears to be untenable. This Court also does not see any good reason to stay these proceedings as the commission of criminal offences is unmistakably apparent on the face of record.

17. Even the other submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. I do not find any justification to quash the charge sheet or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

18. So far as the order passed with regard to co-accused Sitanshu Dutta is concerned, his case was on an entirely different footing. No role had been assigned to co-accused with regard to fabrication of the alleged Will deed and there was hardly anything to indicate that the co-accused staked any right or claim over the property on the basis of the allegedly forged Will deed. Even other grounds which persuaded the Court to lean favourably with regard to co-accused are not at all common and there is hardly anything observed in the aforesaid order passed with regard to him which can be made use of for the purpose of giving any advantage to the present applicant who appears to be one of the principal offenders in the case.

19. The order passed by revisional court also does not suffer from any such infirmity or illegality which may call for any interference by this court as the same is well substantiated with relevant law.

20. The prayer for quashing the same is refused as I do not see any illegality, impropriety and incorrectness in the

impugned orders or the proceedings under challenge. There is no abuse of court's process either.

21. The application is accordingly, dismissed.

(2020)1ILR 1687

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 37532 of 2019

Vijendra Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sunil Kumar

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

A. Complaint - similar complaint occurred on different dates with little variance - present occurrence is not subsequent occurrence to previous instituted complaint rather it is a previous occurrence of another date.

B. Inherent Jurisdiction - Section 482 - Cr.P.C. - Scope - the Trial Court and not the High Court is expected to analytically analyze the facts and factual matrix of case.

Application u/s 482 rejected. (E-10)

List of cases cited: -

1. M/s Pepsi Food Ltd. & anr Vs. Special Judicial Magistrate & ors 1998 UPCr.R 118

2. Mahboob and ors Vs. State of U.P. and anr 2017 (2) JIC 320 (All) (LB)

3. Smt. Shiv Kumar and ors Vs. State of U.P. and anr 2017 (2) JIC 589 (All) (LB)B

4. Hariram Verma and 4 Ors Vs. State of U.P. and anr 2017 (99) ALL CC 104

5. Paul George Vs. State 2002 Cri.L.J. 996

6. S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla (2005) 8 SCC 89

7. Anita Malhotra Vs. Apparel Export Promotion Council (2012) 1 SCC 520

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicants, Vijendra Singh, Raghuraj Singh and Udham Singh, against State of U.P. and Lekhraj, Son of Ratan Singh, with a prayer for quashing of entire criminal proceeding, including, setting aside summoning order, dated 17.7.2019, passed by the Judicial Magistrate, Jewar, Gautam Buddh Nagar, in Complaint Case No. 103 of 2017 (Incorrectly mentioned as Criminal Complaint Case No.103 of 2015 in the Application), Lekhraj vs. Vijendra and others, for ofences, punishable, under Sections 323, 504 and 506 of IPC, Police Station- Jewar, Distric-Gautam Buddh Nagar

2. Learned counsel for applicants argued that an application, under Section 156(3) of Code of Criminal Procedure, 1973, (In short 'Cr.P.C.'), has been filed by Mukesh against Kishan Singh, Vikas @ Bablu, Girdhari Lal Saini and Shyam Lal Saini, for an occurrence, alleged to be of 4.1.2017, wherein, the Magistrate took cognizance over it, treating it to be a complaint case, and examined the complainant, Mukesh, under Section 200

of Cr.P.C. and his witness, under Section 202 of Cr.P.C., whereupon, accused persons, therein, Kishan, Vikas @ Bablu, Girdhari Lal Saini, Shyam Lal Saini and Bijendra, were summoned, for offences, punishable, under Sections 452, 458, 508 and 120B of Indian Penal Code (In short 'IPC'). This order was challenged before this Court, in a proceeding, under Section 482 of Cr.P.C., being **Application U/S 482 No.27477 of 2018, Vijendra Singh vs. State of U.P. and another**, wherein, summoning order was quashed, vide order, dated 27.8.2018, relying upon principles laid down by the Apex court as well as this Court, mentioned in above order. Again, with same malice, this false complaint was filed, with a little variance of date of occurrence by the father of the complainant, i.e., Lekhraj, wherein, occurrence is said to be of 26.8.2016, at 9.30 PM, in night, and it was for causing damage to the boundary wall of the house of the complainant, but no summoning was there, for offence, punishable, under Section 427 of IPC, rather, impugned summoning order was passed for offences, punishable, under Section 323, 504 and 506 of IPC, and it was based on the enquiry made by the Magisrate, wherein, statements of complainant, Lekhraj, was recorded, under Section 200 and his son, under Section 202 of Cr.P.C., and on this testimony only, impugned summoning order has been passed, whereas, in previous proceeding, this Court has appreciated principles laid down, by the Apex Court, in the case of **M/S. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, reported in 1998, UPCr.R 118**, that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. But, impugned summoning order, passed herein, is apparently, without application of judicial mind by the Magistrate, concerned. Hence, it was misuse of process of court and, therefore, this proceeding, with above prayer for setting aside same.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. Heard learned counsel for both sides and gone through materials on record as well as impugned summoning order.

5. From very perusal of the complaint, which was filed for an occurrence of 4.1.2017, it is apparent that dispute regarding boundary wall, in between Vijendra and complainant, has been there and for this dispute, alleged occurrence has been said to have been committed, wherein proceedings, under Sections 107/116 of Cr.PC, in between two sides, were said to have been taken by the Executive Magistrate.

6. This fact of dispute and same being a motive for this repeated filing of complaint is being argued by learned counsel for applicants.

7. Present occurrence is not a subsequent occurrence to above previous instituted complaint, rather, it was a previous occurrence of another date of 26.8.2016, at 9.30 PM, for which an Application, under Section 156(3) of Cr.P.C. was filed and it was subsequently treated to be a complaint, by way of taking cognizance by the Magistrate and it was numbered as Complaint Case No. 103 of

2017, whereupon, the Magistrate made its enquiry in which, complainant, Lekhraj, was examined, under Section 200 of Cr.P.C. and his witness was examined under Section 202 of Cr.P.C., thereupon, this impugned summoning order was passed.

8. Contention, in this complaint, was that on 26.8.2016, at 9.30 PM, while, complainant, alongwith his son, Mukesh, was at home, situated at Modalpur, on hearing some noise, he thrown light of Torch towards that direction and saw that 7-8 persons were demolishing the wall of his house. They were Vijendra Singh, Raghuraj Singh and Udham Singh, Residents of Village Chorauli, Police Station Jewar, District Gautam Buddh Nagar, accompanied by 4-5 other unknown persons, who can be identified by him in identification parade, if any. On being objected by the complainant, they did assault, with abuse and scuffle, and they also extended threat of dire consequences. On making hue and cry, many persons rushed due to which accused persons ran away from the spot. Earlier also, these persons committed such occurrence on 11/12.02.2016, for which an application was given at Police Station-Jewar, on 12.2.2016. Proceeding, under Section 107/116 of Cr.P.C., was taken by the Police, in between. Thenafter, this occurrence was again committed by the accused persons on 26.8.2016, for which this complaint.

9. Above statement of complainant is fully intact in the statement, recorded, under Section 200 of Cr.P.C. as well as under Section 202 of Cr.P.C. Accordingly, order for summoning, for offences, punishable, under Sections 323, 504 and 506 of IPC, is substantiated by evidence, collected by the Magistrate, in its enquiry.

10. This Court, in the case of **Mahboob and others vs. State of U.P. and another, reported in 2017 (2) JIC, 320, (All) (LB)** held as follows.

"(10) Hon'ble Apex Court has further dealt with the nature of inquiry which is required to be conducted by the Magistrate and referring the case of Vijay Dhanuka (supra) it was held as under:

"14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry " has been defined under Section 2(g) of the Code, the same reads as follows:

"2. (g) "inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court,"

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."

(11) In the present case, the learned Magistrate has not conducted any inquiry so as to satisfy himself that the allegations in the complaint constitute an offence and when considered alongwith the statements recorded and the result of such inquiry. There is ground for

proceedings against the petitioners under Section 204 Cr.PC. There is nothing on record to show that the learned Magistrate has applied his mind to arrive at a prima facie conclusion. It must be recalled that summoning of accused to appear the criminal court is a serious matter affecting the dignity self-respect and image in the society. A process of criminal court cannot be made a weapon of harassment.

(12) Learned Magistrate has passed a very cryptic order simply by saying that the statement of complainant as well as witnesses recorded under Sections 200 and 202 CrPC are perused and accused are summoned such order per se itself illegal which could not stand the test of law."

11. Reliance is also placed upon the judgement of this Court in the case of **Smt. Shiv Kumar and others vs. State of U.P. and another, reported in 2017 (2) JIC, 589, (All) (LB)B**, wherein, this Court has observed as follows:-

"Learned Magistrate was required to atleast mention in the order about the prima facie satisfaction for summoning the accused. The order must reflect that the learned Magistrate has exercised his jurisdiction in accordance with law after satisfying himself about the prima facie allegations made in the complaint. The accused cannot be summoned mechanically merely by writing that perused the statements under Sections 200 and 202 Cr. P. C."

12. Reference may also be made to the judgement of this Court in the case of **Hariram Verma and 4 Others Vs. State of U.P. and Anohter, reported in 2017 (99) ALL CC 104**, wherein, the following has been observed:

"A perusal of this impugned summoning order indicates that learned Magistrate had noted in the impugned order the contents of complaint and evidences u/s 200 and 202 CrPC but had neither any discussion of evidence was made, nor was it considered as to what overt act had allegedly been committed by accused. This contention of learned counsel for the applicants cannot be ruled out that leaned counsel have noted the contents of complaint and statements without considering its probability or prima facie case, and whether he had actually considered statements u/ss 200, 202 CrPC or the documents of the original. At stage of summoning, the Magistrate is not required to meticulously examine or evaluate the evidence. He is not required to record detailed reasons. A brief order which indicate the application of mind is all that is expected of him at the stage.

But in impugned order there is nothing which may indicate that learned Magistrate had even considered facts of the case in hand before passing the summoning order. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence or law. Therefore it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law.

13. In the case of **M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, 1998 UPCrR 118,** Apex Court held as follows :-

"Summoning of an accused in a criminal case is a serious matter. Criminal

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

14. In the case of **Paul George vs. State, 2002 Cri.L.J. 996,** Apex Court, laid down as under:-

"We feel that whatever be the outcome of the pleas raised by the appellant on merit, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas.- - - - - It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of the jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons or discussion may not be necessary but some brief indication by the application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merits of the matter or nature of pleas raised does not meet the requirement of decision of a case judicially."

15. In the case of **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89, the Apex Court** has laid down as under:

"Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for

proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."

16. In the case of **Anita Malhotra v. Apparel Export Promotion Council, (2012) 1 SCC 520,** the Apex Court had held as under:

"As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction u/s 482 of the Code."

17. In view of law laid down by the Courts, as above, the factual aspect, which is apparently on record, is in support of above summoning order, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make analytic analysis of factual aspect, having been submitted by learned counsel for applicants, that applicants are old age persons, having no criminal antecedents, and one of whom is also a Government employee, and is posted as the Secretary of Mandi Samiti, at Aligarh, but facing this false prosecution, being malicious, is to be seen, by the Trial court, at the time of appreciation of evidence, to be recorded, under Section 244 of Cr.P.C. and in further proceeding, under Section 245 of Cr.P.C. At this juncture, there appears to be sufficient evidence on record.

18. In view of what has been discussed, hereinabove, this Application, being devoid of merit, deserves to be dismissed and it stands dismissed accordingly.

19. However, the Magistrate, will consider factual aspects argued and presented before him, at the time of hearing of Application, moved, under Section 245 of Cr.P.C.

(2020)1ILR 1692

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 44730 of 2019

Ramesh Kumar Patel ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Archana Hans

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

A. Code of Criminal Procedure - Section 482 - Discharge application rejected- Complaint- contention of complainant was reiterated in the statement u/s 200

of Cr.P.C. corroborated by statement recorded u/s 202 of Cr.P.C.- No ground for setting aside impugned summoning order or proceeding of criminal case- Previous application u/s 482 of Cr.P.C. relief for quashing summoning order rejected by a Coordinate Bench-Order issuing Non-Bailable Warrant is a process of the court and it has been issued only in the absence of accused applicant-High Court, in exercise of inherent power under Section 482 of Cr.P.C., is not expected to make a meticulous analysis of factual aspect because the same is a question to be gone into during course of trial, by the Trial court. (Para 7 & 8)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. St., Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam,J.)

1. Supplementary affidavit, filed today, by the learned counsel for applicant, is taken on record.

2. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicant, Ramesh Kumar Patel, with a prayer for setting aside summoning order, dated 4.4.2014, passed by Additional Chief Judicial Magistrate, court no. 6, Varanasi, in Complaint Case No.3497 of 2012, Upendra Nath Shukla vs. Kanhaiya & others, under Sections-323, 363, 364-A, 384, 386, 387 and 388 of IPC, Police Station-Shivpur, District Varanasi, as well as, impugned order of issuing Non-Bailable Warrant, dated 13.3.2019.and, thereby, entire criminal proceeding.

3. Learned counsel for applicants argued that the accused-applicant is a witness of a deed for execution of a notarised agreement to sale, with which, applicant has no concern. One of the accused, Anurag Kumar, has, earlier, filed a proceeding, under Section 482 of the Cr.P.C., being Application U/S 482 No.47441 of 2014, Anurag Kumar vs. State of U.P. and another, wherein, this Court has passed the order, dated 19.11.2014, staying further proceeding of above complaint case, with a direction for disposal of discharge application, moved before the Magistrate. While rejecting above discharge application, straightaway, Non-Bailable Warrant was issued and only thereafter, applicant came to know about the impugned summoning order. Hence, it was misuse of process of law and as such this Application with above prayer.

4. Learned AGA, representing State of U.P., has vehemently opposed this Application.

5. From perusal of the impugned order, it is apparent that a complaint was filed wherein the Magistrate took cognizance, thenafter, he decided to treat it as a complaint case and examined complainant, under Section 200 of Cr.P.C., and statements of his two witnesses, Uday Nath Shukla, as PW-1 and Ram Sharan

Upadhyay, as PW-2, under Section 202 of Cr.P.C. Besides this, there were documentary evidences, too, and on the basis of it, impugned summoning order was passed against Kanhaiya Lal Maurya, Mrityunjay Maurya, Ramesh Kumar @ Puddan and Anurag Kumar, for offences, punishable, under Sections 386, 387, 388, 323, read with Section 34 of IPC. Against this order, a proceeding, under Section 482 of Cr.P.C., was initiated, wherein, order, as referred to above, was passed. Thenafter, while disposing of discharge application, the same was rejected.

6. Contention of complainant was that a notarial agreement to sale was executed regarding sale of agricultural land, wherein, money was paid. Subsequently, this could not be materialised. Hence, again payment was made back. Thenafter, entire payment of advance paid back, as was written in complaint, even then, a conspiracy was hatched and in connivance of Sub Inspector Anurag Kumar, Incharge Harhua, Police Outpost, complainant was taken to the said Police outpost, where, he was compelled to make payment of Rs.3,95,0000/- to Kanhaiya Lal Maurya, otherwise, be ready either for dying or for false implication in many other criminal cases as well and even to face encounter. All this was done, under assistance and in connivance of Sub Inspector, Anurag Kumar, as a result of which, a cheque in the name of Kanhaiya Lal Maurya for an amount of Rs.3,50,000/- and a cheque of Rs.45,000/-, in the name of Mrityunjaya Maurya was got issued, whereas, no such liability was there. Thereafter, this complaint was filed.

7. This contention of complainant was reiterated in the statement, under Section 200 of Cr.P.C., which stood corroborated, by the statement, recorded, under Section 202 of Cr.P.C., hence, there is no ground for setting aside impugned summoning order or proceeding of above criminal case. More so, in previously instituted proceeding, under Section 482 of Cr.P.C., above relief was rejected by the Coordinate Bench, hence, above summoning order was not set aside. So far as order, issuing Non-Bailable Warrant, is concerned, it is a process of the court and it has been issued only in the absence of accused applicant, who had been summoned for such heinous offence.

8. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make a meticulous analysis of factual aspect because the same is a question, to be gone into, during course of trial, by the Trial court.

9. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844**, has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474**, Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed*

with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296**, has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

10. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494**, has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

11. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

12. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

13. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

14. For a period of 30 days from today, no coercive action shall be taken against the applicants.

15. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)1ILR 1695

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 45214 of 2019

Santarpal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Gaurav Singh Chauhan

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

A. Code of Criminal Procedure - Section 204 - Section 482-Indian Penal Code-Section 323- Magistrate is to make application of its judicial mind and to find as to whether there is existence of prima facie case for summoning of accused persons for offences made out in it or not-No detailed and meticulous reasoned order is expected at this stage-Litigation pending between the parties may be a motive for commission of this offence or for false implication- same is a question of fact to be seen by Magistrate during trial-For an offence punishable under Section 323 I.P.C. i.e simple hurt, there need not be a compulsory presence of medico legal report or medical injury-Prayer for quashing impugned summoning order and proceeding refused-No coercive action for a period of four weeks or till the disposal of the application for grant of bail whichever is earlier. (Para 5, 6 & 7)

Criminal Misc. Application u/s 482 Cr.P.C disposed of. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs. State of U.P., 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. State of U.P ,2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicants, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the entire proceeding as well as impugned summoning order dated 19.04.2019, passed by learned Judicial Magistrate, Baghpat in Complaint Case No. 544 of 2019 (Netrapal Versus Santarpal and others), under Sections 323, 504, 506 I.P.C., Police Station Singhawali Aheer, District Baghpat and all the consequential proceedings thereon.

2. Heard learned counsel for the applicants and learned A.G.A. representing the State.

3. Learned counsel for applicants argued that Santarpal and Netrapal are real brothers. Civil suit is pending in between. Many cases were filed by Netrapal against Santarpal, which ended either in form of final report or in acquittal. The list of same has been filed at page no. 54 of this paper book. The present case was a malicious prosecution in furtherance of misuse of process of law. Hence, this application with above prayer.

4. Learned A.G.A. has vehemently opposed the application.

5. At the stage of Section 204 Cr.P.C., for passing any summoning order,

Magistrate is to make application of its judicial mind and to find as to whether there is existence of prima facie case for summoning of accused persons for offences made out in it or not. No detailed and meticulous reasoned order is expected at this stage. Both sides are real brothers. They are inimical to each other. Litigation are pending. This may be a motive for commission of this offence or for false implication, but in both cases, it is a question of fact to be seen by Magistrate during trial.

6. The complainant had reiterated the contention of complaint in its statement recorded under Section 200 Cr.P.C. that on 24.02.2019 at about 5 P.M. when complainant along with his family was working at his field Sattarpal, Rajeev and Rajkumar, armed with lathi and Tamancha, did assault over them and abused. They chased complainant, who tried to hide himself in a room of tube-well, but they did criminal tress-pass thereat and assaulted him there too. Seema too was assaulted by them. A threat of dire consequences was extended. This matter was reported at police station and ultimately this complaint was filed. The same contention is of Seema and other witness enquired under section 202 Cr.P.C. Learned counsel for applicants argued that there is no medico legal report, but for an offence punishable under Section 323 I.P.C. i.e simple hurt, there need not be a compulsory presence of medico legal report because for a simple hurt even one slap will be sufficient, having no medical injury.

7. Moreso, saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".* In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474**, hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice".* In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court

in Popular **Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

8. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. The prayer for quashing summoning order as well as proceeding of the aforesaid criminal case is refused.

11. However, in the interest of justice, it is provided that if the applicants appear and surrender before the court below within four weeks from today and apply for bail, then the bail application of the applicants be considered and decided in view of the settled law laid by this Court in the case of ***Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290*** as well as judgment passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P***

12. For a period of four weeks from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants.

13. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

14. With the aforesaid directions, this application is finally **disposed of.**

(2020)1ILR 1698

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr.P.C. No. 45474 of 2019

Sugreev Nishad & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mahboob Ahmad, Zia Qadir

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

A. Code of Criminal Procedure - Section 482 - High Court in exercise of inherent

jurisdiction under Section 482 Cr.P.C. is not expected to embark upon the factual matrix because the same is question before trial court to be seen during trial-Prayer for quashing refused-For a period of four weeks or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants. (Para 6 & 11)

Criminal Misc. Application u/s 482 Cr.P.C disposed of. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr Vs. St. of U.P. 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicants, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the impugned summoning order dated 13.09.2017, bailable warrant dated 30.07.2018 and 22.10.2019, issued by Additional Chief Judicial Magistrate Ist, Ballia as well as entire proceeding of Complaint Case No. 345 of 2013 (Pramila Devi Vs. Sugreev Nishad and others), pending in the court of learned Additional Chief Judicial Magistrate Ist, Ballia, under Section 392 I.P.C., Police Station Kotwali Rasra, District Ballia.

2. Heard learned counsel for the applicants and learned A.G.A. representing the State.

3. Learned counsel for applicants argued that applicant no. 2 is father of applicant no. 1. As per prosecution itself, there had been enmity regarding preparation of Visa and this was the reason that this malicious prosecution. No such occurrence ever occurred. Police report of this fact is there that no such occurrence has occurred, even then, impugned summoning order has been passed. Hence, this application with above prayer.

4. Learned A.G.A. has vehemently opposed the application with this contention that complaint is reiterated in statement under Sections 200 and 202 Cr.P.C.. Prima facie, there was sufficient evidence for passing of summoning order.

5. From the perusal of material brought on record, it is apparent that an application under Section 156(3) Cr.P.C. was moved with this contention that on 09.11.2013, complainant along with her jethani Sushila Devi and Gulabchandra was on her way to her home. At about 2.30 P.M. after getting withdrawal of Rs.2,00,000/- from Union Bank Siuri Amhat, Sugreev Nishad, his father Vikram Nishad along with two other unknown apprehended and snatched pocket having Rs.2,00,000/- kept in it. On hue and cry, many persons rushed, but they could not be apprehended. Matter was reported at police station. This contention has been reiterated in statement recorded under

Sections 200 and 202 Cr.P.C. and on the basis of evidence, collected by Magistrate in its enquiry, impugned summoning order for offence punishable under Section 392 I.P.C. was passed.

6. This Court in exercise of inherent jurisdiction under Section 482 Cr.P.C. is not expected to embark upon the factual matrix because the same is question before trial court to be seen during trial.

7. Moreso, saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588**: **(2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474**, hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

8. Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**,

Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not"*.

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. The prayer for quashing summoning order as well as proceeding of the aforesaid criminal case is refused.

11. However, in the interest of justice, it is provided that if the applicants appear and surrender before the court below within four weeks from today and apply for bail, then the bail application of the applicants be considered and decided in view of the settled law laid by this Court in the case of ***Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290*** as well as judgment passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.***

12. For a period of four weeks from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants.

13. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

14. With the aforesaid directions, this application is finally **disposed of.**

(2020)1ILR 1701

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 Cr. P.C. No. 45587 of 2019

Smt. Mamta Rani ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kuldeep Kumar

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

A. Code of Criminal Procedure - Section 482- Sections 93, 418 and 494 IPC - Bigamy-Accused persons got married during pendency of suit for dissolution of marriage ,u/s 13 of the Hindu Marriage Act, and persistence of earlier marriage– Complaint filed –Magistrate passed summoning order after conducting inquiry u/s 200 / 2002 of Cr.Pc-Well within law and passed on the basis of evidence, collected by the Magistrate, during enquiry- High Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon of factual aspect because the same is a question to be gone into, during course of trial, by the Trial court. (Para 4, 5 & 7)

Criminal Misc. Application u/s 482 Cr.P.C rejected. (E-3)

List of cases cited: -

1. St. of A.P Vs. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs. Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs. St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs. State, Rep. by Insp. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicant, Smt. Mamta Rani, with a prayer for quashing of entire further proceeding, pursuant to summoning order, dated 7.2.2014, passed by the Judicial Magistrate-Ist, District Bulandshahr, in Complaint Case No. 02 of 2014, Mukesh vs. Mamta and others, under Section 494 of IPC, Police Station-B.B. Nagar, District-Bulandshahr, as well as order, dated 31.8.2019, passed by the Additional Sessions Judge, Court No.1, District Bulandshahr, in Criminal Revision No.456 of 2017, Smt. Mamta Rani vs. State of U.P. and others.

2. Learned counsel for applicants argued that it was a false and malicious prosecution, under misuse and mis-exercise of process of law. There was admitted fact of marriage of Smt. Mamta Rani with Mukesh, Opposite party no.2, but this marriage was dissolved, then, second marriage was performed by her with Subhash Singh. No offence was ever committed, but learned Magistrate failed to appreciate it and the learned court of revision, wherein, this fact was raised, also, failed to appreciate it. Hence, this proceeding, for avoiding abuse of process of law and for ensuring ends of justice, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From very perusal of the complaint, it is apparent that it was filed by Mukesh against Smt. Mamta and his second husband, Subhash Singh, for offences, punishable, under Sections-93, 418 and 494 of IPC, with this contention that Mamata Rani was married with complainant on 11.12.1993, as per Hindu Rituals. A suit for dissolution of marriage, under Section 13 of the Hindu Marriage Act, was filed and this was decreed on 29.3.2008, but, knowing this fact that the said suit is pending and marriage is still in persistence, accused persons got married on 15.1.2008, which was an offence of bigamy. Hence, this complaint. Magistrate, enquired, by recording statement of complainant, under Section 200 and his witness, Udayvir Singh, under Section 202 of Cr.P.C., wherein, it was specifically stated that Mamta, while, being legally wedded wife of Mukesh, remarried with Subhash Singh on 15.1.2008, when first marriage was in existence, hence, on the basis of above facts and evidence, impugned summoning order was passed. It was well within law and was passed on the basis of evidence, collected by the Magistrate, during his enquiry.

5. Argument that marriage was dis-solved is not tenable because the marriage was dis-solved, by way of a decree, which is on record, and is being pressed by learned counsel for applicant, on 29.3.2008, whereas, second marriage is said to have been performed on 15.1.2008, i.e., prior to dissolution of first marriage, and as such, there was no mis-use of process of law. As per admitted position, first marriage was in existence and it was

dis-solved on 29.3.2018 and before this dissolution, second marriage of Mamta was performed with Subhash Singh on 15.1.20018, hence, in view of this, impugned summoning order was rightly passed, in accordance with provisions of law.

6. Revisional court has rightly dismissed revision on the ground that there was sufficient ground for passing impugned summoning order and as such it does not require interference by revisional court.

7. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon of factual aspect because the same is a question, to be gone into, during course of trial, by the Trial court.

8. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844,** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice"*. In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296,** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings"*.

9. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court*

would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

(2020)1ILR 1704

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 57 of 2019
connected with Service Single No. 654 of 2019

Smt. Rashmi Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
A.P. Singh, Amarendra Pratap Singh

Counsel for the Respondents:
C.S.C.

A. Petitioners-Health Education Officer (Class-III-Non-Gazetted)-Challenging transfer order-within district-passed by CMO-not incompetent-administrative control-transfering within district-of sub-ordinates lies with CMO-transfer being exigency-if not stigmatic order-not to be interfered with-hence-order not arbitrary or illegal.

B. Held, the impugned order dated 18.12.2018 is neither stigmatic nor has been passed to accommodate the private respondent, rather, it has been passed by the Competent Authority i.e. the Chief Medical Officer.

Writ Petition disposed of. (E-8)

List of cases cited: -

1. Anil Kumar Srivastava vs. State of U.P. & others [2015 (33) LCD 694]

2. Somesh Tiwari vs. Union of India [2009 (2) SCC 592]

3. Shiv Shanker Ram vs. State of U.P. & others [2007 (25) LCD 1241]

4. S.C. Saxena vs. Union of India and others (2006) 9 SCC 583

5. State of Haryana and others vs. Kashmir Singh and another (2010) 13 SCC 306

6. Ajay Kumar Mishra vs. Inspector General of Police (Establishment) & others (Service Single No.20789 of 2018)

7. Rajendra Singh vs. State of U. P. (2009) 15 SCC 178

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

1. Heard Sri A.P. Singh, learned Senior Advocate assisted by Sri Amarendra Pratap Singh, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. Since by means of the aforesaid writ petitions the transfer order dated 18.12.2018 passed by the Chief Medical Officer, Lucknow has been assailed whereby both the petitioners of the aforesaid writ petitions have been transferred and the grounds to assail the aforesaid impugned order are more or less same and both the writ petitions are being listed by connecting each other, therefore, with the consent of learned counsel for the parties, both the writ petitions are being decided by a common judgment.

3. The brief facts of the aforesaid cases are that the petitioners are serving on the post of Heath Education Officer (Class-III Non-Gazetted). The Appointing Authority for the aforesaid post is the Director General, Family Welfare, U.P. and presently both the petitioners are discharging their duties at Lucknow under the local administrative control of the Chief Medical Officer, Lucknow. The Chief Medical Officer, Lucknow has full administrative control and, as such, he is vested with the authority regarding the transfer and posting of his subordinate officials and officers within the district. However, if the transfer of the Health Education Officer is made out of the district, such authority vests with the Director General, Family Welfare, U.P..

4. In both the writ petitions, mainly two grounds have been taken in assailing the impugned transfer order dated 18.12.2018 i.e. (i) the impugned transfer order has been passed by the Incompetent Authority as the Chief Medical Officer has passed the transfer order whereas it should have been passed by the Director General, Family Welfare, U.P. (ii) the impugned transfer order has been passed to accommodate the private respondent, namely, Smt. Keerti Neha.

5. In the counter affidavit filed by the Chief Medical Officer, Lucknow on behalf of the opposite parties, both the aforesaid grounds have been categorically denied. So far as the ground regarding incompetence of the authority is concerned, the Chief Medical Officer has categorically indicated in para-5 of the counter affidavit that the Chief Medical Officer being highest administrative authority of the district having full administrative control over the subordinates to make transfer and posting within the same district.

6. So far as the ground regarding adjustment of private respondent (Smt. Keerti Neha) is concerned, the Chief Medical Officer has categorically denied this allegation saying that by means of transfer order private respondent has not been adjusted. As a matter of fact, Smt. Sunita Srivastava while posting at Community Health Centre, Chander Nagar committed negligence by not filling up online applications of the beneficiaries under the Pradhan Mantri Swachchha Rastriya Yojna Ayushman Bharat despite the specific directions given by the Superintendent and under the Mission Indra Dhanush Survey and Tikakaran the work was not done by her, therefore, after calling an explanation her salary for the month of August was withheld and again vide letters dated 07.12.2018 and 15.12.2018 she was asked to submit her explanation but she did not submit her explanation, therefore, vide order dated 18.12.2018 she was transferred from Community Health Centre, Chander Nagar to Community Health Centre, Bakshi-ka-Talab. Smt. Rashmi Singh, the petitioner, was transferred from Community Health Centre, Bakshi-ka-Talab to Community Health Centre, Intauja. Accordingly, on the vacant post at Community Health Centre, Chander Nagar the private respondent has been posted.

7. As per the counter affidavit, on 27.06.2016 Smt. Rashmi Singh was transferred from Lucknow to Lakhimpur Kheri by order being passed by the Director General and against that transfer order Smt. Rashmi Singh has filed writ petition bearing Writ Petition No.29624 (S/S) of 2016 (Smt. Rashmi Singh vs.

State of U.P. & others), which was disposed of finally vide order dated 15.12.2016 with the direction not to relieve the said petitioner till 07.04.2017. However, Smt. Rashmi Singh has assailed the order dated 04.07.2017 by filing special appeal bearing Special Appeal No.33 of 2017 and the said special appeal was decided finally directing the authority concerned to take appropriate decision on the representation of the petitioner without interfering the order dated 07.04.2017 passed by the Single Judge. Pursuant to the aforesaid order being passed the petitioner retained at Bakshi-ka-Talab, however, some complaint against Smt. Rashmi Singh was received in the office of the Chief Medical Officer, Lucknow, therefore, she was transferred to Bal Mahila Chikitsalaya and Prasooti Grih, Tudiaganj, Lucknow on 02.11.2018. Smt. Rashmi Singh appeared before the Chief Medical Officer and has given her undertaking that she shall not commit any mistake in future so she may be permitted to retain at Bakshi-ka-Talab. Her request was acceded to and vide order dated 13.11.2018 she was permitted to retain at Bakshi-ka-Talab. Thereafter, 49 Asha Bahu and Asha Sangini posted at Community Health Centre, Bakshi-ka-Talat jointly made complaint in writing in Tehsil Diwas before the District Magistrate on 20.11.2018 levelling serious charges against Smt. Rashmi Singh that she has received illegal gratification while making payment of their honorarium and on the said complaint received through the District Magistrate, the petitioner, Smt. Rashmi Singh, has been transferred from Bakshi-ka-Talab to Intauja. As per the counter affidavit Smt. Rashmi Singh was relieved on 26.12.2018 pursuant to the direction being issued by the District Magistrate, Lucknow.

8. The submission of learned Additional Chief Standing Counsel is that the aforesaid transfers have been made due to administrative exigencies and strictly in accordance with law, therefore, these transfer orders may not be interfered with.

9. Replying to the aforesaid contention of learned Additional Chief Standing Counsel, Sri A.P. Singh, learned Senior Advocate for the petitioners has submitted that the law is settled on the point that the transfer order may not be issued as a substitute of punishment as no transfer order should be passed on the complaint.

10. In support of his submission, Sri A.P. Singh, learned Senior Advocate for the petitioners has referred the judgment of Single Judge of this Court rendered in re:- ***Anil Kumar Srivastava vs. State of U.P. & others*** reported in ***[2015 (33) LCD 694]*** wherein this Court considering various dictum of Hon'ble Supreme Court including the case of ***Somesh Tiwari vs. Union of India*** reported in ***[2009 (2) SCC 592]*** has held that the transfer order should not be punitive nor stigmatic and if the transfer order is issued on the basis of complaint atleast an opportunity of hearing should be afforded to the employee.

11. Sri A.P. Singh, learned Senior Advocate for the petitioners has also placed reliance upon the judgment of the Division Bench of this Court rendered in re: ***S.K. Majumdar vs. State of U.P. & others*** reported in ***[1996 (14) LCD 887]*** by submitting that the transfer order can only be passed by the Disciplinary/ Appointing Authority and if any transfer order is passed other than such authority, the same shall be nullity in the eyes of law.

12. Sri A. P. Singh, learned Senior Advocate has also placed reliance upon the

Division Bench judgment of this Court rendered in re: ***Shiv Shanker Ram vs. State of U.P. & others*** reported in ***[2007 (25) LCD 1241]*** by submitting that if the transfer is made on malafide intention accommodating any person, that can be interfered with by this Court.

13. Per contra, learned Additional Chief Standing Counsel has placed reliance upon the judgment of Hon'ble Supreme Court rendered in re: ***S.C. Saxena vs. Union of India and others*** reported in ***(2006) 9 SCC 583*** by submitting that the Hon'ble Supreme Court has held that it is the duty of the government servant to comply with the transfer order atonce and after complying with the transfer order he / she may submit his / her representation if there is any grievance. If the employee does not submit his/ her joining on the basis of transfer order, that may be treated as misconduct. In the given cases, both the petitioners have not submitted their respective joining at their transferred places, therefore, necessary departmental actions are required against those employees.

14. Learned Additional Chief Standing Counsel has also placed reliance upon the judgment of Hon'ble Supreme Court rendered in re: ***State of Haryana and others vs. Kashmir Singh and another*** reported in ***(2010) 13 SCC 306*** by submitting that the Hon'ble Supreme Court has held that the transfer ordinarily is an incidence of service, and the courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal. The Hon'ble Supreme Court has further held that the 'Courts should not, in our opinion, interfere with purely administrative matters except where absolutely necessary on account of violation of any fundamental or other legal right of the citizen. After all, the State administration cannot function with its hands tied by judiciary behind its back…'

15. Learned Additional Chief Standing Counsel has also placed reliance upon the Single Judge judgment of this Court rendered in re: ***Ajay Kumar Mishra vs. Inspector General of Police (Establishment) & others (Service Single No.20789 of 2018);*** whereby considering the various judgments of Hon'ble Supreme Court, this Court vide order dated 31.07.2018 dismissed the writ petition, wherein the transfer order has been assailed on the ground that such transfer order was passed on the complaint and the same should not be permissible. In the judgment in re: ***Ajay Kumar Mishra (supra)***, this Court has considered and followed the various decisions of Hon'ble Supreme Court including ***Somesh Tiwari (supra)*** and held that after decision of ***Somesh Tiwari (supra)*** two judgments of Hon'ble Supreme Court in re: ***Registrar General High Court vs. R. Perachi reported in (2011) 12 SCC 137 and Rajendra Singh vs. State of U.P***. reported in ***(2009) 15 SCC 178*** have come, therefore, the subsequent decisions of Hon'ble Supreme Court in re: ***R. Perachi (supra) and Rajendra Singh (supra)*** have been followed.

16. In the case of ***R. Perachi (supra)***, the Hon'ble Apex Court even after considering that the transfer order of the employee concerned was on the basis of report of Registrar (Vigilance) and it had also been informed by the District Judge concerned that the retention of the employee in his district was undesirable from the point of view of the administration, held that the transfer is an

exigency of service and one cannot make grievance if the transfer is made on administrative ground without any stigma.

17. On the basis of the aforesaid cases, the learned Additional Chief Standing Counsel has submitted that the impugned transfer order dated 18.12.2018 has been passed due to administrative exigency and no stigma has been casted upon the petitioners, therefore, it should have not been interfered with.

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

19. The first ground to assail that the impugned transfer order dated 18.12.2018 has been passed by the incompetent authority is not correct inasmuch as the Chief Medical Officer of the district being highest Administrative Authority of the district is vested with the authority regarding transfer and posting of the subordinate officers/ officials within the district for local arrangement. This is not a transfer of the petitioners out of the district, therefore, shifting the petitioners from one Community Health Centre to another Community Health Centre within the district on account of administrative exigency by the Chief Medical Officer is within the competence of the authority and there is no illegality of any kind whatsoever and, therefore, the case cited by Sri A.P. Singh, learned Senior Advocate for the petitioners in re: ***S.K. Majumdar (supra)*** would not be applied in these cases.

20. Likewise, the relevant records do not disclose that the impugned transfer order has been passed on account of any malafide intention or to adjust the private respondent, therefore, the case so cited by Sri A.P. Singh, learned Senior Advocate for the petitioners in re: ***Shiv Shanker Ram (supra)*** would not be applied in the present cases.

21. So far as the ground that the impugned transfer order is punitive in nature, therefore, an opportunity of hearing should be afforded to the petitioners is concerned, the Hon'ble Supreme Court in re: ***R. Perachi (supra), Kashmir Singh (supra) and Rajendra Singh (supra)*** has held that the transfer being exigency of service and if no stigma is casted upon the employee concerned, it should not be interfered with. In the present case, the transfer order is not stigmatic order.

22. In both the aforesaid cases, this Court granted interim protection to both the petitioners inasmuch as Smt. Rashmi Singh was granted an order of status-quo on 04.01.2019 and Smt. Sunita Srivastava was granted an order that no coercive steps shall be taken against her vide order dated 16.01.2019. However, as per learned Additional Chief Standing Counsel before the aforesaid interim protection being granted by this Court, both the petitioners have been relieved ex-parte. Therefore, both the aforesaid petitioners could have not been permitted to discharge their respective duties at the place from where they were transferred. He has also apprised that both the petitioners have not submitted their respective joining at the transferred place, therefore, they may be subjected to departmental inquiry. On being asked as to whether any departmental action has been taken against the petitioners, learned Additional Chief Standing Counsel has submitted that on account of pendency of these writ petition,

no departmental action has been initiated against them.

23. However, the impugned transfer order does not suffer from any illegality or arbitrariness, but the fact remains that this Court has granted interim protection in favour of the petitioners and no departmental action against the petitioners have been taken for not submitting their respective joining at the transferred place, therefore, it appears that any appropriate order is required to be passed in the case of the petitioners.

24. The impugned order dated 18.12.2018 is neither stigmatic nor has been passed to accommodate the private respondent, rather, it has been passed by the Competent Authority i.e. the Chief Medical Officer.

25. Further, since no departmental action has yet been taken against the petitioners due to pendency of the writ petition, therefore, in the given circumstances they should not be compelled to face the departmental inquiry for not submitting their respective joining at the transferred place, however for the period they have not submitted their joining at the transferred place despite the fact that before interim protection being granted in their favour they were relieved, the Chief Medical Officer, Lucknow may pass appropriate orders in respect of making payment of salary for that period by affording an opportunity of hearing to the petitioners and seeking explanation if any order involves the civil consequences.

26. The liberty is given to the petitioners to prefer a representation taking all pleas and grounds which are available with them enclosing therewith the certified copy of this order within a period of seven days and the Competent Authority shall pass appropriate orders, strictly in accordance with law, with expedition, preferably within a period of three weeks thereafter.

27. In view of the aforesaid terms, both the writ petitions are ***disposed of finally***.

28. No order as to costs.

(2020)1ILR 1709

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.01.2020

BEFORE
THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE ALOK MATHUR, J.

Special Appeal Defective No. 520 of 2019

Kundan Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Dr. V.K. Singh

Counsel for the Respondents:
C.S.C., Abhinav N. Trivedi, Gyanendra Kumar Srivastav

A. Allahabad High Court Rules, 1952 - Chapter VIII Rule 5 & Constitution of India - Article 226 - challenge to- Public office- appellant challenged the appointment of one Doctor as a professor who later became vice-chancellor- Since, post of professor is not mentioned as officer in Chapter III of the King George Medical University Act, 2002 - only post of Vice -chancellor shown in the officers of the university- writ of quo warranto would not lie. (Para 23, 24, 27, 32, 33)

"Public Office" which would, fall under the scrutiny of the Court's while exercising the discretionary power of issue a writ of quo warranto would be the offices created by the

Constitution or any statute and such offices should have a fixed tenure apart from being conferred some portion of the sovereign power of the Government. (Para 22)

Special Appeal (D) dismissed. (E-6)

List of cases cited: -

1. Bharati Reddy Vs. St. of Karnataka, (2018) 6 SCC 162

2. B. Srinivasa Reddy Vs. Karnataka Urban Water Supply & Drainage Board Employees' Assn., (2006) 11 SCC 731 (2)

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

1. Heard Sri Amit Bose, Senior Advocate assisted by Dr. V.K. Singh, learned counsel for the appellant, Sri Manish Mishra, learned counsel for respondent no. 1, Sri Anil Kumar Tewari, Senior Advocate assisted by Sri Abhinav N. Trivedi, learned counsel for respondent nos. 2 and 4 and Sri Gyanendra Kumar Srivastava, learned counsel for respondent no. 5.

2. This special appeal has been filed with delay of seven days. The delay condonation application no. 132204 of 2019, supported by an affidavit has been filed for condonation of delay in filing the appeal. The learned counsels for the respondents have no objection to the application. The cause shown in the affidavit explaining the delay in filing the appeal is sufficient and the delay is hereby condoned.

3. This special appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 has been filed against the judgment and order dated 16.08.2019, passed by the learned Single Judge in Writ Petition No. 19119 (S/S) of 2019 - Kundan Singh Vs. State of U.P. and Others.

4. The aforesaid writ petition was filed by the petitioner seeking writ in the nature of quo-warranto, directing the opposite party no. 3 (Dr. M.L. Bhatt) to show authority of law under which he occupied the post of Associate Professor and Professor in the King George's Medical University (hereinafter referred to as "the KGMU") thereby declaring his appointment on the post of Associate Professor and Professor to be illegal and void abinitio.

5. It was submitted by the petitioner-appellant before the writ Court that respondent no. 3 was appointed as Assistant Professor in the KGMU on 27.04.2002, Associate Professor on 02.12.2003 and Professor on 08.12.2004, contrary to the Act, Statute, Regulations prevailing in the KGMU. However, he became Vice Cancellor of the KGMU in the month of March, 2017. It was further submitted that Dr. M.L. Bhatt, respondent no. 3 was granted promotion in utter violation of the Rules and norms existing without any selection committee constituted for the said purpose, even the date of his confirmation or the conversion of the same in permanent nature is without jurisdiction.

6. The aforesaid writ petition was contested by the KGMU by filing counter affidavit, questioning the maintainability of the writ petition. Another objection which was raised by the respondents with regard to the maintainability of the writ petition was that the petitioner did not challenge the present posting of respondent no. 3 inasmuch as the respondent no. 3 is discharging the functions of Vice Chancellor of the KGMU and his tenure would expire in the month of April, 2020. It was submitted

that writ of quo warranto has been sought by the petitioner against respondent no. 3, to show authority of law under which he occupied the post of Associate Professor and Professor at the KGMU, which posts are not being occupied by him presently and he is not usurper of Office and therefore, no writ of quo warranto would lie to challenge occupation of office which is not held by the incumbent at the time of filing of writ petition.

7. The respondents had also raised objection that the writ of quo warranto would lie only to challenge the occupation of "public office" and the posts of Associate Professor and Professor would not qualify to be called as "public office" and therefore, writ of quo warranto would not be issued by this Court in exercise of powers under Article 226 of the Constitution of India. It was lastly submitted on behalf of respondents with regard to bonafide of the petitioner in preferring the writ petition seeking writ of quo warranto challenging the office occupied by respondent no. 3 after a delay of more than fifteen years.

8. The learned Single Judge while dismissing the aforesaid writ petition has considered the submissions made by the parties in great detail and in paragraph 7 it has been observed as under :

"7. The obvious question cropped up in the mind of the Court as to why no challenge was made in the year 2003 when the opposite party no. 3 became Associate Professor and in the year 2004 when he became Professor. Not only the above the aforesaid position of the opposite party no. 3 has not been assailed by the petitioner till filing of this writ petition when admittedly the opposite party no. 3 is discharging the duties and liabilities of Vice Chancellor of KGMU w.e.f. 14.04.2017. The said anxiety compels the Court to go into the detail of the petitioner as to why he has filed this writ petition in the year 2019, what is his status, what are the source of information of the petitioner regarding opposite party no. 3 and what may be the purpose in filing this writ petition after more than 15 years from the time when the opposite party no. 3 was actually holding the post of Associate Professor and Professor."

9. It has further been observed by the learned Single Judge that writ in the nature of certiorari may be invoked by the aggrieved person but such relief may not be granted in the garb of writ of quo-warranto by a busybody. A writ of quo-warranto may not be substitute of writ of certiorari. It is trite law that the writ of quo-warranto may be refused where it is an outcome of malice or ill-will and it has been held by the writ Court in para 11 that writ petition has been filed by one busy body who is having no public interest except for personal gain or private profit either of himself or as a proxy of others for any extraneous motivation or for glare of publicity.

10. With regard to the objection raised by the respondents that post of Associate Professor and Professor would not qualify as "public office"; inasmuch as these posts must be created by Constitution, Legislature or authority conferred by the Legislature. Further, portion of sovereign power of Government must be delegated to such position and therefore on the touchstone aforesaid office of Associate Professor and Professor could not be said to be "public office" for which a writ of quo-warranto may be issued.

11. For the aforesaid reasons the learned Single Judge dismissed the writ petition against which present special appeal has been preferred by the petitioner.

12. Sri Amit Bose, learned Senior Advocate has submitted that he had cited various judgment before the writ Court which have not been duly considered on the aspect that posts of Associate Professor and Professor would qualify to be "public office" and for which writ of quo-warranto can be issued by the writ Court.

13. It was also submitted by Sri Amit Bose that respondent no. 3 is discharging the functions of the post of Professor, inasmuch as he is taking classes in the University and the issue raised by the petitioner by means of the present writ petition would not be a purely academic question and would necessitate a requisite consideration.

14. With regard to the Bona fide of the petitioner, it was submitted that any person can maintain petition for questioning the holder of a public office with regard to his eligibility and qualification for holding the same, and therefore the petitioner had sufficient interest in maintaining the writ petition.

15. The special appeal has been opposed by Sri Manish Mishra, learned counsel for respondent no. 1, Sri Anil Kumar Tewari, Senior Advocate assisted by Sri Abhinav N. Trivedi, learned counsel for respondent nos. 2 and 4 and Sri Gyanendra Kumar Srivastava, learned counsel for respondent no. 5 and have stated that the judgment and order of learned Single Judge is just and proper and does not require any interference.

16. Heard the counsel for the petitioners as well as the standing counsel.

17. The writ of quo warranto is a judicial remedy by which a person who holds independent substantial public office of franchise as may be duly determined, and that in case the finding is that the holder of the office has no right or title, he would be ousted from the office by the judicial order. In other words the procedure of quo warranto gives the judiciary the authority to proceed against any bid to control the exhibitor from making appointments to public office against law and to protect a citizen for being deprived of public office to which he has a right. These proceedings also tend to protect public office from the usurpers of public office, he might be allowed to continue either with the connivance of the executive or by reasons of its apathy. It is thus be seen that before a person can effectively maintain a writ of quo warranto to satisfy the court that the office in question is a public office and is held by the usurper without legal authority and that inevitably would lead to the enquiry as to whether the appointment of alleged usurper has been made in accordance with law or not. For issuance of a writ of quo warranto, the Court should be satisfied that the appointment is contrary to the statutory rules, and the person holding the post has no right to hold it.

18. In order to examine the contention of the counsel for the appellant, whether the posts of Assistant Professor and Professor are "public office', it would be beneficial to refer to the various pronouncements of the Supreme Court.

19. The Hon'ble Apex Court in **Bharati Reddy v. State of Karnataka, (2018) 6 SCC 162**, has held as under :

"38. In Rajesh Awasthi v. Nand Lal Jaiswal [Rajesh Awasthi v. Nand Lal Jaiswal, (2013) 1 SCC 501 : (2013) 1 SCC

(Cri) 521 : (2013) 1 SCC (L&S) 192] , the Court noted that a writ of quo warranto will lie when the appointment is made contrary to the statutory provisions as held in Mor Modern Coop. Transport Society Ltd. [Mor Modern Coop. Transport Society Ltd. v. State of Haryana, (2002) 6 SCC 269] Further, relying on the decisions in B. Srinivasa Reddy v. Karnataka Urban Water Supply and Drainage Board Employees' Assn. [B. Srinivasa Reddy v. Karnataka Urban Water Supply and Drainage Board Employees' Assn., (2006) 11 SCC 731 (2) : (2007) 1 SCC (L&S) 548 (2)] and Hari Bansh Lal v. Sahodar Prasad Mahto [Hari Bansh Lal v. Sahodar Prasad Mahto, (2010) 9 SCC 655 : (2010) 2 SCC (L&S) 771] , wherein the legal position has been restated that the jurisdiction of the High Court to issue a writ of quo warranto is a limited one which can only be issued if the appointment is contrary to the statutory rules and the Court has to satisfy itself that the appointment is contrary to the statutory rules. In that case, the Court after analysing the factual matrix found, as of fact, that there was non-compliance with sub-section (5) of Section 85 of the Electricity Act, 2003, in the matter of appointment of the incumbent to the post of Chairperson of the Commission for which it became necessary to issue a writ of quo warranto. In the supplementing judgment by one of us Dipak Misra, J. (as his Lordship then was), the settled legal position expounded in B.R. Kapur [B.R. Kapur v. State of T.N., (2001) 7 SCC 231] , University of Mysore [University of Mysore v. C.D. Govinda Rao, AIR 1965 SC 491 : (1964) 4 SCR 575] , High Court of Gujarat [High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat, (2003) 4 SCC 712 : 2003 SCC (L&S) 565] , Centre for PIL v. Union of India [Centre for PIL v. Union of India, (2011) 4 SCC 1 : (2011) 1 SCC (L&S) 609] has been recapitulated in paras 29 to 33 of the reported decision."

20. The Supreme Court in **Bharati Reddy (supra)** has observed as under :

"39. We have adverted to some of those decisions in the earlier part of this judgment. Suffice, it to observe that unless the Court is satisfied that the incumbent was not eligible at all as per the statutory provisions for being appointed or elected to the public office or that he/she has incurred disqualification to continue in the said office, which satisfaction should be founded on the indisputable facts, the High Court ought not to entertain the prayer for issuance of a writ of quo warranto.

The learned senior advocate appearing on behalf of the appellant had drawn the attention this court to the judgement passed by the Bombay High Court in the case of Dr D.K.Belsare vs Nagpur University where the division bench was examining the appointment of the respondent to the post of Professor of zoology in the writ of quo warranto. The Division Bench relying on the judgement in the case of Dr P.S.Venkataswamy vs University of Mysore affirm that in India we have a republican Constitution. Hence in India the nature of office in respect of which quo warranto would like must be taken to be an office created by the Constitution itself or by any statute and invested the power of charged with duty of acting in execution or in the enforcement of the law. The court subsequently considered the provisions of the Mysore University act and the list of statutory authorities prescribed therein and concluded that it cannot be held that the post of Professor of zoology is a public

office and, therefore, a writ of quo warranto cannot be issued."

21. In the case of **B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn., (2006) 11 SCC 731 (2)** the Hon'ble Apex Court, in this regard observed as under :-

"76. The notification dated 31-1-2004 clearly states that the appointment is on contract basis and until further orders. While laying down the terms of appointment in its order dated 21-4-2004, the Government of Karnataka clearly stated that the "term of contractual appointment of Shri B. Srinivasa Reddy shall commence on 1-2-2004 and will be in force until further orders of the Government and this is a temporary appointment". Section 6(1) of the Act categorically states that the Managing Director shall hold office during the pleasure of the Government. The power and functions of the Board are laid down in Chapter V of the Act. A reading of the Act clearly shows that neither the Board nor its Managing Director is entrusted with any sovereign function. Black's Law Dictionary defines public office as under:

"Public office.--Essential characteristics of "public office' are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of Government; key element of such test is that "officer' is carrying out sovereign function. Spring v. Constantino [168 Conn 563, 362 A 2d 871, 875] . Essential elements to establish public position as "public office' are: position must be created by Constitution, legislature or through authority conferred by legislature, portion of sovereign power of Government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control or superior power other than law, and position must have some permanency and continuity. State v. Taylor [260 Iowa 634, 144 NW 2d 289, 292] ."

77. Carrying out sovereign function by the Board and delegation of a portion of sovereign power of the Government to the Managing Director of the Board and some permanency and continuity in the appointment are quintessential features of public office. Every one of these ingredients are absent in the appointment of the appellant as Managing Director of the Board. This aspect of the matter was completely lost sight of by the High Court."

22. Considering the judicial pronouncements with regard to "Public Office" which would, fall under the scrutiny of the Court's while exercising the discretionary power of issue a writ of quo warranto would be the offices created by the Constitution or any statute and such offices should have a fixed tenure apart from being conferred some portion of the sovereign power of the Government.

23. On the touchstone of the aforesaid principles the post of Professor in the KGMU deserves to be examined. A perusal of the King George Medical University Act, 2002, Chapter III provides for the officers of the University which are as follows:-

"CHAPTER-III

Officers of the University Officers of the University

14- The following shall be the officers of the University:-

(a) the Chancellor;

(b) the Vice-Chancellor;

[(c) the Pro-Vice-Chancellor;]12

(d) the Finance Officer;

(e) the Registrar;

(f) the Controller of examination, if any;

(g) the Deans of the Faculties;

(h) the Dean of the Students Welfare;

(i) such other officers as may be declared by the Statutes to be the Officers of the University."

24. Needless to say that the post of Professor is missing from the officers of the University. Professors of the University clearly do not exercise any Government functions nor are vested with the power or charged with the duty of acting in execution of enforcement of the law. They are merely employees under a statutory body, and therefore, cannot in any sense be described as public offices in respect of which a writ of quo warranto would lie.

25. Sri Amit Bose, learned Senior Advocate vehemently tried to persuade us by citing certain pronouncements of learned Single Judge's of other High Courts, but we do not agree with the said decisions, and even otherwise would not have any persuasive value.

26. The 2nd contention raised by the counsel for the appellant was that respondent no. 3 was also working on the post of Professor and therefore a writ of quo warranto would be maintainable, despite the fact that presently he has been appointed as Vice Chancellor and is discharging his duties as such.

27. The paragraph 24 of the impugned judgment dated 16/08/2019, deals with the contention which has been raised by the counsel for the appellant, and the learned Single Judge has recorded the following :-

"...it is an admitted fact by the petitioner himself that the opposite party number 3 is presently not occupying the post of associate professor of Professor."

28. It has been has submitted on behalf of the appellant that he has filed certain documents which indicate that the respondent no. 3 continued as a professor of the University even after his appointment as Vice Chancellor and the said finding was erroneous.

29. With regard to the aforesaid contentions we are of the view that once an admission has been made by the petitioner himself before the Writ Court, which has been duly considered, it is not open for them to challenge the said finding in the intra-Court appeal. We also perused the averments made by the appellant in the writ petition, and no such pleading was made before the learned Single Judge with regard to the continuance of the respondent no. 3 on the post of Professor as well, and therefore, while exercising the limited jurisdiction in an intra-Court appeal the admission made by the petitioner before the writ court cannot be interfered with, at his instance that the same was erroneously recorded.

30. The writ petition preferred by the petitioner-appellant, was also liable to be rejected on the grounds of bona fide of the petitioner. An identical writ was filed earlier bearing Writ Petition No. 16635 (S/S) of 2019, by one Professor Ashish Waklu which was dismissed as not pressed with liberty to file fresh petition. The said

petitioner chose not to exercise the liberty granted by the Court, but the appellant herein file a writ petition which is almost verbatim of the same filed earlier. The aforesaid facts apart from the fact that the respondent no. 3 is occupying the post of Vice Chancellor, which is not under challenge, but his appointment to the post of Associate Professor and Professor are under challenge which were held by him in 2003 and 2004, raises enough suspicion in absence of any fact that the writ petition was motivated and appears to be a proxy petition for extraneous considerations.

31. No other point was argued by the Appellant.

32. Considering the entire factual matrix, the judgment of the learned Single Judge, and the arguments raised by the counsel for the appellant and the respondents, we do not find any infirmity or illegality in with the impugned judgment of the learned Single Judge.

33. For the reasons stated herein above the special appeal lacks merit and is hereby **dismissed.**

(2020)1ILR 1716

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Special Appeal No. 538 of 2018

Brij Raj Krishan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Sanjay Kumar Singh, Sri Bhuwan Raj, Sri Ravi Prakash

Counsel for the Respondents:
C.S.C., Sri Avanish Tripathi, Sri M.N. Singh

A. Service – Appointment/Recruitment – Eligibility criteria - U.P. Transport Subordinate Technical (Fourth Amendment) Service Rules, 2014 - Part time training of the appellant cannot be covered and considered in the category of 'Working Experience' in terms of advertisement issued for the post of Regional Inspector (Tech.). (Para 27)

Certificates of requisite qualification submitted by the appellant were issued after the last date of submission of application. Moreover, appellant had undertaken training on part time basis, which could not be treated at par to the candidates who had undertaken full time training especially when there was a Government Order as well as the decision of the Commission stating that the part time working and work without remuneration would not be treated as an experience under the relevant Rules. (Para 23, 24)

Appeal dismissed. (E-4)

Present appeal is against judgment and order dated 07.05.2018, passed by learned Single Judge in Writ-A No. 10164 of 2018.

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

1. Heard Shri. S.K. Singh, learned counsel for the appellant, Shri. Avanish Tripathi and learned Standing Counsel for respondents.

2. The present special appeal is preferred against the judgment and order dated 07.5.2018 passed by the learned Single Judge in Writ-A No.10164 of 2018, whereby the said writ petition filed by the petitioner-appellant has been dismissed.

3. The appellant-petitioner had preferred the writ petition before the learned Singe Judge wherein following reliefs were sought:

"(i) A writ order or direction in the nature of mandamus directing the respondent no.3 to allow the petitioner to appear in practical examination and further examination which is going to be scheduled on 25.4.2018, 26.4.2018, 27.4.2018 and 28.4.2018 by treating the training certificate of petitioner in consonance with the qualification as being so enumerated in sub para-3 of Cause 11 of the advertisement.

(ii) A writ, order or direction in the nature of which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iii) Award cost to the humble petitioner throughout of the present writ petition."

4. Briefly the facts which are relevant for the disposal of the present special appeal are as follows:

i. The respondent no.3 (U.P. Public Service Commission, (hereinafter referred to as "respondent no.3") issued an advertisement dated 13.12.2014 bearing No.A-5/E-1/2014 for the post of Regional Inspector (Tech).

ii. Clause 11 of the said advertisement prescribed Essential Qualification for the posts of Regional Inspector (Tech) Transport Department in accordance with the U.P. Transport Subordinate Technical (Fourth Amendment) Service Rules 2014. For reference, the said essential qualifications are mentioned hereinafter:

Clause 11: Educational Qualifications: Mandatory: (1) Essential to pass High Schools Examination of the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognized by the Government as equivalent there to and

(2) (i) A diploma in Automobile Engineering (3 years course) or

(ii) A diploma in Mechanical Engineering awarded by the State Board of Technical Education (3 years Course) or

(iii) Any qualification in either of the above discipline declared equivalent, by the Central Government or State Government, and

(3) Working experience of at least one year in a reputed automobile workshop which undertakes repairs of both light motor vehicles, heavy goods vehicle and heavy passenger motor vehicles fitted with petrol and diesel engine, and

(4) Must hold a driving license authorizing him to drive motor cycle, heavy goods vehicle and heavy passenger motor vehicles;

(5) Must have thorough knowledge of Hindi language written in Devanagari script.

5. The petitioner-appellant in pursuance of the abovementioned advertisement submitted online application on 29.1.2015 wherein he had mentioned that he possessed all the requisite essential educational qualifications including "Working experience of at least one year' in a reputed automobile workshop which undertakes repairs of both light motor vehicles, heavy goods vehicle and heavy passenger motor vehicles fitted with petrol and diesel engine.

6. In the application form, the petitioner-appellant had also given a declaration "that all the entries/statement

made in the application are true complete and correct to the best of my knowledge and belief".

7. The petitioner-appellant appeared in the written test on 08.11.2015. Almost after two years, the respondent No.3, published a notification dated 14.7.2017, whereby it was directed that the applicants who had appeared in the examination for the post of Regional Inspector (Technical) 2014 are required to download the application form available on the website of the Commission and send the filled form along with all the certificates of the essential educational qualifications to the Commission.

8. Accordingly, the petitioner-appellant despatched the filled form along with all the certificates. The petitioner also annexed a working experience certificate of a reputed automobile work shop. The certificate was dated 16.5.2016 issued by the Ghaziabad Automobiles. For reference, the contents of the said certificate is reproduced hereinafter:

"TO WHOM SO EVER IT MAY CONCERN "This is to certify that Sh. Brijraj Krishan S/o Sh. Maharaj Krishan R/o B-7 G F Parsvnath Paradise, Mohan Nagar, Ghaziabad (U.P.) who is an employee of RTO office Ghaziabad has taken part time but full fledged training as Motor Mechanic in the evening session w.e.f. 07/10/2011 to till date without any remuneration.

He has submitted duly acquired permission from department in the workshop. He had good knowledge of Motor Vehicle repairs Overhauling and inspection of both light motor vehicle, heavy goods vehicle & heavy passenger motor vehicles fitted with Petrol & Diesel Engines.

We wish him all success in life & profession.

For:Ghaziabad Automobiles

Auth.Signatory"

9. The respondent no.3 on 12.4.2018 issued a list of candidates who were found to be eligible after scrutinising their records for practical test. However, the name of the petitioner-appellant was found missing in the said list. The petitioner-appellant made a querry before the Commission and sought specific reasons for rejection of his application. The Commission provided an E-mail dated 12.4.2018 communicating the reply from the respondent no.3, which stated:

"FOR THE ABOVE QUESTION KINDLY INFORM YOU THAT YOU HAVE NOT FULFIL THE ESSENTIAL QUALIFICATION THAT MENTIONED ADVERTISEMENT PARA NO-11 SUB PARA-3' (sic)

This means that the petitioner did not possess the required working experience of at least one year in a reputed automobile shop.

10. In these circumstances, the petitioner-appellant approached before learned Single Judge by way of filing the writ petition and sought reliefs as mentioned in paragraph 3 above.

11. Counter and rejoinder affidavits were exchanged before the learned Single Judge. In the counter affidavit filed on behalf of the respondent no.3, it was specifically mentioned that the petitioner-appellant had part time experience of repairing work under Ghaziabad Automobile without any remuneration, therefore, the petitioner did not hold

essential qualification no.3, in terms of Clause 11 of the advertisement, therefore, his candidature was rejected by the respondent no.3.

12. Reliance was also placed in the counter affidavit on the letter dated 08.5.2000 and also the decision of the Commission taken in its meeting held on 31.8.2001 that the part time work and any work done without any remuneration could not be treated as an experience within the meaning of U.P. Transport (Subordinate Technical Service Rules, 1980) as amended.

13. Rejoinder affidavit was filed before the learned Single Judge, wherein it was reiterated that the petitioner- appellant fulfilled all the pre-requisite qualifications seeking appointment on the post of Regional Inspector (Tech). The petitioner-appellant had also filed an amendment application before the learned Single Judge whereby the letter of Transport Commissioner dated 08.5.2000 was also challenged.

14. The learned Single Judge after considering the submissions made by the parties as well as the material available on record, dismissed the writ petition vide judgment and order dated 07.5.2018 and held as under:

"In the facts and circumstances of the case, this Court is of the view that the experience certificate dated 16.5.2016 (page '20' of the paper book) and 13.4.2018 (page '41' of the paper book) both being of later date than last date of the submission of the application form cannot be taken into consideration to hold that the petitioner possessed requisite qualification on the date of submission of the application form. Challenge to the communication dated 8th May, 2000 of the Transport Commissioner to the Secretary, Public Service Commission is, therefore, of no relevance."

15. In these circumstances, the appellant-petitioner has filed the present special appeal, questioning the judgment and order dated 07.5.2018 passed by the learned Single Judge.

16. Counter and rejoinder affidavits have been exchanged.

17. In the counter affidavit, the respondent no.3 had specifically stated that the post of Regional Inspector (Tech) demands that persons selected on the said post must possess requisite and perfect knowledge of work and maintenance of the machine required to be operated. The intent behind experience of one year regular work was to have complete knowledge which could not be achieved while working as part time trainee by the incumbent.

18. In the rejoinder affidavit, the appellant has reiterated and reaffirmed the grounds and averments mentioned in the special appeal and stated that experience certificate of the appellant was genuine. Remuneration or no remuneration does not in any way or in any manner renders the experience certificate obtained by appellant as nugatory. Appellant had an experience of more than 1 year which is self evident from the certificate appended.

19. Shri. S.K. Singh, learned counsel appearing on behalf of the appellant vehemently argued that the appellant took part time training from the Ghaziabd Automobiles, and the training was full

fledged training as motor mechanic in the evening session (5.30 to 8.30 p.m. daily and full time on Sunday) w.e.f. 7.10.2011 to 16.5.2016 without any remuneration. He has also relied upon the certificate issued by the Ghaziabad Automobiles dated 16.5.2016, wherein it was certified that the appellant had good knowledge of motor vehicles repairs, overhauling and inspection of both light motor vehicle and heavy goods vehicle and heavy passenger motor vehicles fitted with petrol and diesel engines.

20. Learned counsel for the appellant further submitted that for the purpose of training the department had granted requisite permission and the training period was more than one year as required for the purpose of selection. Even though it was part time, it could not be said that the appellant had not gained adequate experience in that field. The advertisement had not distinguished the experience certificate on the basis of full time or part time, therefore, the rejection of his candidature was not correct.

21. Per contra, learned Standing Counsel has opposed the submissions made by the learned counsel for the appellant on the ground that the experience certificate required under the rules was to be based on the full fledged training and the certificate based on part time training would not be considered to be sufficient for essential educational qualifications. He placed reliance on the Government Order dated 08.5.2000 as well as the decision of the Commission taken on 31.8.2001 to the effect that the part time work and work done without remuneration would not be treated as experience within the meaning of Uttar Pradesh Transport Rules, 1988 as amended. He further submitted that last date of submission of application was 29.1.2015, whereas the certificate submitted by the appellant-petitioner was dated 16.5.2016 and 13.4.2018, therefore, appellant was not qualified on the date of submission of form.

22. We have considered the submissions made by the learned counsel for the rival parties and perused the record.

23. One of the essential educational qualifications for the post of Regional Inspector (Technical) was "(3) Working experience of at least one year in a reputed automobile workshop which undertakes repairs of both light motor vehicles, heavy goods vehicle and heavy passenger motor vehicles fitted with petrol and diesel engine." The appellant had submitted two documents first was the certificate dated 16.5.2016 issued by the Ghaziabad Automobiles which certifies that the appellant-petitioner had taken part-time but full fledged training as motor mechanic in the evening session w.e.f. 7.10.2011 till date without any remuneration and second was a certificate dated 13.4.2018 issued by the Ghaziabad Automobiles which states that the petitioner had good knowledge of motor vehicle repairs, overhauling and inspection of both light motor vehicles, heavy goods vehicles and heavy passenger motor vehicles fitted with petrol and Diesel engines. Both of these certificates were issued after the last date of submission of application form which was 03.2.2015, therefore, the learned Single Judge has rightly held that the petitioner did not possess requisite experience as on the last date of submission of application form.

24. The appellant had undertaken training on part time basis, which could

not be treated at par to the candidates who had undertaken full time training especially when there was a Government Order dated 8.5.2000 as well as the decision of the Commission dated 31.8.2001 to the contrary that the part time working and work without remuneration would not be treated as an experience under the relevant rules.

25. Learned counsel for the appellant has failed to show any material that the part time training is equivalent to the full time training.

26. The purpose of one year regular training is that the person must possess requisite and perfect knowledge of work and maintenance of the machine required to be operated. There is no challenge to any of the requisite essential qualifications.

27. Having heard learned counsel for the parties and having perused the material on record as well as the impugned judgment and order passed by the learned single judge, we are of the considered opinion that one year part time work that too without remuneration in Ghaziabad Automobiles undertaken by the appellant is nothing but a training acquired by the appellant with the firm, cannot be covered and considered in the category of "Working Experience' in terms of the advertisement. As such there is no illegality in the impugned judgment and order of the learned Single Judge, which calls for no interference by this Court and the appeal deserves to be dismissed.

28. In view of the above, the appeal is dismissed. No costs.

(2020)1ILR 1721

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Bench No. 988 of 2013 (Now S/S)

Jai Prakash Pal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Suresh Chandra Yadava

Counsel for the Respondents:
C.S.C.

A. Service – Promotion – Uttar Pradesh Secretariat Service Rules, 1983: Rules 3(g), 5, 9, 11(i) & (ii), 12; Uttar Pradesh State Government Servants Confirmation Rules, 1991: Rule 5(1); Uttar Pradesh Government Servants Probation Rules, 2013 (Amended Probation Rules, 2016): Rule 2, 4, 5 – Probation or confirmation will not be necessary if the source of recruitment for the post in question is promotion only and such promotion has been made following the due procedure of law. (Para 28 & 32)

B. General law Vs. Specific law: When there is a conflict between specific law and general law, specific law shall have overriding effect upon the general law. Therefore, Confirmation Rules, 1991, Probation Rules, 2013 (Amended Rules, 2016) shall have an overriding effect on Rule 11 of the Rules, 1983. (Para 29 & 32)

C. Doctrine of 'reading down' discussed: Rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the law - Reading down of Rule 5 of Rules, 1983 has been applied for the present case as it is found inconsistent with provisions of Probation Rules, 2013 and Confirmation Rules, 1991 as well as unworkable as it restricts duly promoted

petitioner to get the benefit of promotion. (Para 30, 33, 35 to 40)

Writ Petition allowed. (E-4)

Precedent followed: -

1. Rapti Commission Agency Vs. State of U.P. and others, (2006) 6 SCC 522 (Para 36)

2. Union of India and others Vs. Ind-Swift Laboratories Limited, (2011) 4 SCC 635 (Para 37)

3. Subramaniam Swamy and others Vs. Raju through Member, Juvenile Justice Board and another, (2014) 8 SCC 390 (Para 38)

Petition assails the office memo dated 28.06.2013, passed by the Under Secretary of the department.

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

1. Heard Sri S.C. Yadava, learned counsel for the petitioner and Sri Vishal Verma, learned State counsel for the State-respondents.

2. By means of this petition, the petitioner has assailed the office memo dated 28.6.2013 passed by the Under Secretary of the department holding that since the petitioner has not completed one year's probation period on the post of Deputy Secretary, therefore, he cannot be promoted on the post of Joint Secretary under the relevant Rules.

3. The petitioner retired on 30.6.2013 after attaining the age of superannuation.

4. The brief facts of the case are that the petitioner initially appointed on the post of Upper Divisional Assistant (now the nomenclature of the post is known as Samiksha Adhikari) by the selection held by the Public Service Commission in the year 1981 and he has submitted his joining on such post on 5.8.1983. In the year 1997, the petitioner was promoted on the post of Section Officer. On 3.11.1998, the petitioner was promoted on the post of Under Secretary and he has submitted his joining accordingly. On 26.5.2012, the petitioner was promoted on the post of Deputy Secretary.

5. As per learned counsel for the petitioner, work and conduct of the petitioner has been found exemplary, up to the entire satisfaction of the authorities concerned and the entire service record of the petitioner has been unblemished. On 28.5.2013, the Principal Secretary, Sachivalaya Administration, State of U.P. has issued an order for sanctioning 10 posts of Special Secretary and 26 posts of Joint Secretary. The feeding cadre to be promoted on the post of Joint Secretary is Deputy Secretary. On the said post, the petitioner was discharging his duties w.e.f. 26.5.2012.

6. As soon as the petitioner came to know that his name has not been placed in the eligibility list of Deputy Secretaries for promotion on the post of Joint Secretary, he preferred a representation dated 30.5.2013 to the Principal Secretary, Sachivalaya Administration, State of U.P. apprising the fact that he is fulfilling all requisite qualification to be promoted on the post of Joint Secretary in the selection year, therefore, requested that he be considered for promotion on the said post.

7. Despite the aforesaid representation having been preferred, name of the petitioner was not considered in the Departmental Promotion Committee, which met on 6.6.2013.

8. Feeling aggrieved out of the aforesaid inaction, the petitioner preferred

present writ petition seeking prayer that the opposite parties be directed to hold the Department Promotion Committee meeting for promotion to the post of Joint Secretary in terms of Government Order dated 19.5.2001 and candidature of the petitioner be considered for promotion prior to his retirement i.e. on 30.6.2013 and in the meantime, no promotion order be issued for the post of Joint Secretary.

9. This Court passed an order dated 19.6.2013 directing the opposite parties to hold the Departmental Promotion Committee within a week to consider petitioner's promotion on the post of Joint Secretary as contemplated in para-10 of the Government Order dated 19.5.2001 and declare the result immediately thereafter prior to his retirement.

10. In compliance of the aforesaid order of this Court, the impugned office memo dated 28.6.2013 has been issued rejecting the claim of the petitioner for consideration of promotion on the post of Joint Secretary as the petitioner has not completed his requisite period being probationer on the post of Deputy Secretary for the particular selection year. The said order has been assailed by means of amendment and after amendment application being allowed, office memo dated 28.6.2013 has been enclosed as Annexure No.11 to the writ petition.

11. Service condition of the petitioner is governed by the Uttar Pradesh Secretariat Service Rules, 1983 (hereinafter referred to as "Rules, 1983"). Rule 3 (g) of the Rules, 1983 explains the year of recruitment as follows:-

"(g) 'Year of recruitment' means a period of twelve months commencing from the first day of July of a calendar year."

12. Rule 5 (1) to Rule 5 (4) of the Rules, 1983 are being reproduced herein below:-

"5. (1) Recruitment to the various categories of posts in the Service shall be made from the following sources:

(1)	*Section Officer*	*By promotion from amongst permanent Assistant Superintendents and such permanent Upper Division Assistants as have put in at least ten years service (including temporary service) as Upper Division Assistants or/ and on any higher post.*
(2)	*Under Secretary*	*By promotion from amongst permanent Section Officer who have put in at least five years service (including temporary service) as Section Officer or/and on any higher post.*
(3)	*Deputy Secretary*	*By promotion from amongst permanent Under Secretaries.*
(4)	*Joint Secretary*	*By promotion from amongst permanent Deputy Secretaries.*

13. Rule 9 of the Rules, 1983 explains the procedure for recruitment to the post of Deputy Secretary and Joint Secretary as follows:-

"9. (1) Recruitment to the post of Deputy Secretary and Joint Secretary shall be made on the basis of seniority subject to

the rejection of unfit through a Selection Committee constituted as follows:

(i) Chief Secretary .... Chairman

(ii) Secretary, Secretariat Administration Department ..... Member

(iii) Secretary to Government to be nominated by the Chief Secretary ..... Member"

14. Rule 11 (i) & (ii) of the Rules, 1983 is being reproduced herein below:-

"Rule 11 (i) A person on appointment in or against a substantive vacancy to a post of –

(1) Section Officer, Under Secretary or a Deputy Secretary shall be placed on probation for a period of one year, and

(ii) Joint Secretary shall be placed on probation for a period of six months."

15. Rule 12 of the Rules, 1983 explains confirmation, which follows as under:-

"12. A probationer shall be confirmed in his appointment at the end of the period of probation or the extended period of probation if-

(a) his work and conduct is reported to be satisfactory;

(b) his integrity is certified; and

(c) the appointing authority is satisfied that he is otherwise fit for confirmation."

16. In the light of the aforesaid Rules, learned counsel for the petitioner has submitted that the petitioner was promoted on the post of Deputy Secretary on 26.5.2012, however he was on probation for a period of one year and on 6.6.2013, he had completed more than one year's period on probation serving on the post of Deputy Secretary, therefore, he could have been promoted on the post of Joint Secretary under the Rules. The reason for non-consideration of his candidature for promotion on the post of Joint Secretary is that as per Rule 3 (g), the year of recruitment starts from the first day of July and ends on 30th June, so in the particular recruitment year for the year 2012-13, some period of the petitioner was short as it completed on 30.6.2013, but before the said date, the Departmental Promotion Committee met on 6.6.2013.

17. Learned counsel for the petitioner has drawn attention of this Court towards the Uttar Pradesh State Government Servants Confirmation Rules, 1991 (hereinafter referred to as "Confirmation Rules, 1991") referring Rule 5 (1) of the aforesaid Rules, which follows as under:-

"5. (1) Confirmation will not be necessary if a Government servant is promoted, on a regular basis, after following the prescribed procedure to a post in the cadre where promotion is the only source of recruitment."

18. On the basis of the aforesaid argument, learned counsel for the petitioner has submitted that since the promotion on the post of Joint Secretary is to be made only from the feeding cadre i.e. Deputy Secretary, therefore, if any employee is serving on the post of feeding cadre and the promotion is only source of recruitment, then confirmation will not be necessary for the employee. Hence, even if the petitioner was not confirmed on the

post of Deputy Secretary under the Rules, 1983, even then he could have been promoted on the post of Joint Secretary treating him confirmed Deputy Secretary under the Confirmation Rules, 1991.

19. Learned counsel for the petitioner has referred the Government Order dated 19.5.2001, which explains the modality to fill up the promotional avenue within the recruitment year when the vacancies arose and as per the guidelines it should be implemented in its letter and spirit. On the strength of the aforesaid Government Order, learned counsel for the petitioner has submitted that the employees should be given out right with regard to promotional avenue during the period they became entitle and the matter should not be kept pending till they reach at the verge of superannuation or superannuated from service. Therefore, the petitioner, who had competed more than one year's period of probation on the post of Deputy Secretary, he should have been considered for promotion on the post of Joint Secretary. Since he has been retired from service, therefore, he should have been given notional promotion.

20. Learned counsel for the petitioner has also submitted that the Confirmation Rules, 1991 are specific rules dealing with the issue of confirmation and clearly mandates that the confirmation will not be necessary if the Government servant is promoted on a regular basis after following the prescribed procedure to the post where the promotion is only source of recruitment and in the given case, the petitioner was promoted on the post of Deputy Secretary on the regular basis after following the prescribed procedure and the post of Deputy Secretary can only be filled up through promotion from the post of Under Secretary, therefore, the specific rules shall have overriding effect over the general rules.

21. Learned counsel for the petitioner has also referred the Uttar Pradesh Government Servants Probation Rules, 2013 (hereinafter referred to as "Probation Rules, 2013") referring Rule 5, which explains the condition where probation is not required. Rule 5 of the Probation Rules, 2013 is being reproduced herein below:-

"5. It will not be necessary to place a person on probation if he is promoted on a regular basis after following the prescribed procedure to a post belonging to same Group where promotion is the only source of recruitment."

22. The aforesaid Rule 5 specifically provides that the employee should not be placed on probation if he is promoted on a regular basis after following the prescribed procedure on the post belonging to the same group where promotion is the only source of recruitment.

23. The case of the present petitioner squarely qualifies the condition of Rule 5 of Confirmation Rules, 2013.

24. The aforesaid Probation Rules, 2013 have been amended by First Amendment Rules, 2016. By means of the aforesaid amendment, Rule 5 has been made absolute mandating that there is no need to place any person on probation if he is promoted on regular basis after following the prescribed procedure to the post which can be filled up from such promotional post, which is the only source of recruitment.

25. Again the Amended Rules, 2016 squarely covers the case of the present petitioner.

26. However, learned State counsel has tried to justify the impugned order by submitting that since the period of one year of probation of the petitioner on the post of Deputy Secretary was not completed within selection year, therefore, he could have not been given promotion on the post of Joint Secretary. On being confronted on the point that the Confirmation Rules, 1991, Probation Rules, 2013 and Amended Probation Rules, 2016 clearly provide that in a given circumstances, the petitioner should not be placed under probation and even if he is placed under probation, treating him confirmed on the post of Deputy Secretary, his candidature should be considered on the post of Joint Secretary inasmuch as the specific rules shall have overriding effect upon the general rules, learned State counsel has submitted that since Service Rules, 1983 clearly provide that those Deputy Secretary can be promoted on the post of Joint Secretary when they are permanent and they could have been made permanent only after completion of one year's probation period on the post of Deputy Secretary and since the petitioner has not assailed those rules in this writ petition, therefore, he cannot be given any relief in this writ petition.

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

28. In the present case, the question to be considered as to whether there is any fruitful purpose to place an employee on probation if such employee has been promoted on the regular basis after following the prescribed procedure on the post which can only be filled up through promotion as promotion is the only source of recruitment.

29. The second question is to be considered as to whether if there is conflict between specific rules and general rules, what rule would prevail.

30. The third question is to be considered is that if any rule has not been assailed but it appears that its interpretation is not harmonious with other rules, so for making that particular rule workable and to bring it in harmony with other provisions of statute/ statutes, the said provisions can be read down.

31. So far as to answer the first question, I would like to first refer Rules 5 of the Rules, 1983, which clearly mandates that the source of recruitment on the post of Deputy Secretary is by way of promotion only from the post of Under Secretary and likewise. The source of recruitment on the post of Joint Secretary is the post of Deputy Secretary only by way of promotion. The modality thereof has been prescribed under Rule 9 of the Rules, 1983 that the recruitment to the post of Deputy Secretary and Joint Secretary shall be made on the basis of seniority subject to the rejection of unfit through the Selection Committee constituted under the law. Therefore, if any Deputy Secretary or Joint Secretary is recruited, the same could have been recruited by way of promotion following the procedure. In the present case, the petitioner was promoted on the post of Under Secretary and on the post of Deputy Secretary strictly in accordance with law, therefore, there was no fruitful purpose to place the petitioner on probation on the post of Deputy Secretary

in view of Rule 5 of the Probation Rules, 2013 as amended in the year 2016. The Probation Rules 2013 have been made by the Hon'ble Governor exercising powers under Article 309 of the Constitution of India and shall apply to all the persons holding a civil post in connection with the affairs of Uttar Pradesh. Rule 2 of the Probation Rules, 2013 clearly mandates that 'the provisions of these rules shall have effect notwithstanding anything to the contrary contained in any other rules made by the Governor under the proviso to Article 309 of the Constitution, or orders, for the time being in force'. Likewise, Rule 5 (1) of the Confirmation Rules, 1991 clearly mandates that confirmation will not be necessary if the Government servant is promoted on regular basis after following the prescribed procedure to a post in the cadre where promotion is the only source of recruitment. These rules have also been made by the Hon'ble Governor exercising power of Article 309 of the Constitution of India.

32. When the aforesaid specific rules clearly provide that probation or confirmation will not be necessary if the source of recruitment for the post in question is promotion only and such promotion has been made following the due procedure of law, then the employee concerned should be treated confirmed on the promotional post without placing him on probation. The law is trite on the point that when there is conflict between specific law and general law, specific law shall have overriding effect upon the general law, therefore, the second question is being replied accordingly in favour of the petitioner.

33. Now the question as to whether Rule 5 of Rules, 1983 can be read down for the present case; the answer would be 'yes' for the reason that Rule 5 does not appear to be workable in the given circumstances and does not appear to be in harmony with other provisions of statute/statutes.

34. The term 'probation' has been explained under Probation Rules, 2013 itself. For brevity, Rule 4 of the Probation Rules, 2013 is being reproduced herein below:-

"4.(1) A person on substantive appointment to a post through direct recruitment shall be placed on probation for a period of two years. The appointing authority may, for reasons to be recorded, extend the period of probation in individual cases specifying the date upto which the extension is granted:

Provided that, save in exceptional circumstances, the period of probation shall not be extended beyond one year and in no circumstance beyond two years.

(2) A person on substantive appointment to a post by promotion, if direct recruitment is one of the sources of recruitment, shall be placed on probation for a period of two years. The appointing authority may, for reasons to be recorded, extend the period of probation in individual cases specifying the date upto which the extension is granted:

Provided that, save in exceptional circumstances, the period of probation shall not be extended beyond one year and in no circumstance beyond two years.

(3) A person appointed on a post by adjustment absorption or merger in accordance with the procedure prescribed in the relevant service rules, shall be placed on probation for a period of one

year. The appointing authority may, for reasons to be recorded, extend the period of probation in individual cases specifying the date upto which the extension is granted :

Provided that, save in exceptional circumstances, the period of probation shall not be extended beyond six months and in no circumstance beyond one years.

(4) A person on substantive appointed to a post where promotion is the only source of recruitment, if the post belongs to a different Service or Group, shall be placed on probation for a period of one year. The appointing authority may, for reasons to be recorded, extend the period of probation in individual cases specifying the date upto which the extension is granted :

Provided that, save in exceptional circumstances, the period of probation shall not be extended beyond six months and in no circumstance beyond one years."

35. Perusal thereof clearly reveals that a person on substantive appointment to the post through direct recruitment should be placed on probation for a period prescribed under the law and such period of probation can be extended strictly in accordance with law. In the light of the aforesaid provisions, it appears that no fruitful purpose is served if any employee, who is promoted on the post which can be filled up through promotion only, is placed on probation, therefore, Rule 5 of the Probation Rules, 2013 specifically bars placing any employee on probation where promotion is the only source of recruitment. Therefore, in the given circumstances, Rule 5 of Rules, 1983 can be read down.

36. Hon'ble Apex Court in re; **Rapti Commission Agency v. State of U.P. and others, (2006) 6 SCC 522** has observed the condition under which the principle of reading down can be applied. Para-7 of the aforesaid judgment is being reproduced herein below:-

"7. Coming to the plea of alternative remedy, we find that such a plea does not appear to have been raised by the respondent as there is no discussion in the High Court's judgment in this regard. Further, the constitutional validity of Section 8-E issue could not have been decided by the statutory authorities. Be that as it may, we find that the High Court has thoroughly confused the issues. The decisions of this Court in Steel Authority of India case [(2000) 3 SCC 200] and Nathpa Jhakri case [(2000) 3 SCC 319] related to legislative competence in the matter of deduction of tax under a State statute in respect of an inter-State transaction. The High Court commented upon the correctness of the judgments observing that several larger Benches' decisions were not considered. To say the least the High Court's approach is inappropriate. The decisions in Steel Authority case [(2000) 3 SCC 200] and Nathpa Jhakri case [(2000) 3 SCC 319] related to issues on which there appears to be no contrary view taken by any larger Bench. The High Court could not have sat in judgment over the correctness of the judgments of this Court. The High Court appears to have proceeded on the basis that this Court should have read down the provisions under consideration to uphold them. What is the basic fallacy in this approach is illuminatingly analysed in Minerva Mills Ltd. v. Union of India [(1980) 3 SCC 625] . In paras 64 and 65, the concept of reading down was succinctly stated as follows: (SCC p. 657)

"64. ... The principle of reading down the provisions of a law for the purpose of saving it from a constitutional challenge is well known. But we find it

impossible to accept the contention of the learned counsel in this behalf because, to do so will involve a gross distortion of the principle of reading down, depriving that doctrine of its only or true rationale when words of width are used inadvertently. The device of reading down is not to be resorted to in order to save the susceptibilities of the lawmakers, nor indeed to imagine a law of one's liking to have been passed. One must at least take Parliament at its word when, especially, it undertakes a constitutional amendment.

65. ... If Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends. In fact, to accept the argument that we should read down Article 31-C, so as to make it conform to the ratio of the majority decision in Kesavananda Bharati [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] , is to destroy the avowed purpose of Article 31-C as indicated by the very heading "Saving of certain laws' under which Articles 31-A, 31-B and 31-C are grouped. Since the amendment to Article 31-C was unquestionably made with a view to empowering the legislatures to pass laws of a particular description even if those laws violate the discipline of Articles 14 and 19, it seems to us impossible to hold that we should still save Article 31-C from the challenge of unconstitutionality by reading into that article words which destroy the rationale of that article and an intendment which is plainly contrary to its proclaimed purpose."

37. The Hon'ble Apex Court in re; **Union of India and others v. Ind-Swift Laboratories Limited, (2011) 4 SCC 635**, has held in para-19 as under:-

"19. This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute....."

38. The Hon'ble Apex Court in re; **Subramanian Swamy and others v. Raju through Member, Juvenile Justice Board and another, (2014) 8 SCC 390**, explains the condition under which the principle of reading down can be applied. Para-61 of the aforesaid judgment is as under:-

"61. Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the "reading down" doctrine can be summarised as follows. Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act

may be read down to save it from unconstitutionality. The above is a fairly well-established and well-accepted principle of interpretation which having been reiterated by this Court time and again would obviate the necessity of any recall of the huge number of precedents available except, perhaps, the view of Sawant, J. (majority view) in DTC v. Mazdoor Congress [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] which succinctly sums up the position is, therefore, extracted below: (SCC pp. 728-29, para 255)

"255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible--one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only is it no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."

39. In view of the aforesaid dictums of Hon'ble Apex Court, I find that Rule 5 of the Rules, 1983 is not harmonious with the specific provisions of the Probation Rules, 2013 and Confirmation Rules, 1991. Further, the application of Rule 5 of Rules, 1983 is not properly workable which restricts the duly promoted Deputy Secretary to get the benefit of promotion on the post of Joint Secretary without having plausible and fruitful purpose, therefore, such rule i.e. Rule 5 of Rules, 1983 is hereby read down.

40. It is made clear that reading down Rule 5 of the Rules, 1983 shall be applied only for the present case so as to make the particular provision of law workable and harmonious with other provisions of law.

41. Accordingly, the said question is answered.

42. Considering the facts and circumstances of the issue in question and considering the various dictums of the Hon'ble Apex Court, I hereby quash the office memorandum dated 28.6.2013 passed by the Under Secretary, Sachivalaya Administration, Section-1, State of U.P. (Annexure No.11 to the writ petition).

43. A writ in the nature of mandamus is issued commanding the opposite parties

to provide the notional service benefits e.g. benefit of pay scale and retiral benefits notionally considering the candidature of the petitioner for promotion to the post of Joint Secretary w.e.f. the date when his juniors, if any, have been promoted on the said post notionally.

44. Liberty is given to the petitioner to prefer a representation taking all pleas and grounds enclosing therewith the copies of relevant documents as well as certified copy of this order within a period of three weeks.

45. The opposite parties shall make compliance of this order with expedition, preferably within a period of three months from the date of production of certified copy of this order.

46. The writ petition is accordingly **allowed.**

47. No order as to costs.

(2020)1ILR 1731

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 1772 of 2010

Smt. Narayani Yadav ...Petitioner
Versus
Nagar Palika Parishad Sikohabad district Firozabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri H.N. Singh, Sri Rishabh Srivastava

Counsel for the Respondents:
C.S.C., Sahab Tiwari, Sri Satish Mandhyan, Sri Saurabh Tiwari, Sri Sita Tiwari

A. Allahabad High Court Rules, 1952 - Chapter VIII Rule 5 & Uttar Pradesh Basic Education Act, 1972 - Section 9 read with Rules 1981 - appellant claiming benefit of end of Academic Session and higher age of superannuation-School in question was not established by Board - Section 9 is not attracted as his appointment was not made by Board but by EO, NPP,SKB-Rules 1981 will not be applicable as the same were made available only to such teachers stood transferred who were employed in Basic Schools on appointed date i.e. date of establishment of Board-recognised school does not come in the purview of Rules 1975 - Hence, appellant has rightly been informed about date of retirement. (Para 5 to 25)

Special Appeal dismissed. (E-6)

List of cases cited: -

1. Smt. Mithlesh Singal Vs. St. of U. P. & Ors. (W. P. No.46178 of 2009) decided on 03.09.2009

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

1. Heard Sri H. N. Singh, Senior Counsel assisted by Sri Rishabh Srivastava, learned counsel for appellant and learned Standing Counsel for State-respondents.

2. Smt. Narayani Yadav, petitioner-appellant (hereinafter referred to as "appellant") having failed in getting any relief before learned Single Judge due to dismissal of Writ Petiton No.26650 of 2004 vide judgment dated 04.10.2010, has preferred this intra-Court appeal under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 (hereinafter referred to as "Rules, 1952). She has prayed for relief of setting aside aforesaid judgment of learned Single Judge as also to issue a writ

of certiorari and quash retirement notice dated 26.04.2004 issued by Executive Officer, Nagar Palika Parishad, Shikohabad, District-Firozabad (hereinafter referred to as "EO, NPP, SKB").

3. By the aforesaid notice dated 26.04.2004, EO, NPP, SKB has informed appellant that she is completing age of superannuation on 31.07.2004, therefore, would retire on that date and should hand over charge to Principal of Bal Mandir, Nagar Palika Parishad, Shikohabad (hereinafter referred to as "School") wherein appellant was working as a Assistant Teacher.

4. Facts in brief giving rise to present appeal are as under.

5. The School was established, run and managed by Nagar Palika Parishad, Shikohabad, District-Firozabad (hereinafter referred to as "NPP, SKB") sometimes prior to 1968 and it was granted permanent recognition on 18.05.1968 by District Inspector of Schools, Mainpuri (hereinafter referred to as "DIOS"), since, at that time Shikohabad was part of District-Mainpuri and subsequently, it became part of District-Firozabad. School is a Basic Primary School (also called 'Junior Primary School') imparting education from Class I to V.

6. U. P. Legislature enacted U. P. Basic Education Act, 1972 (hereinafter referred to as "Act, 1972") to manage, control and regulate basic education in State of U. P. It received assent of Governor on 17.08.1972 and was published in U. P. Gazette (Extra-Ordinary) on 19.08.1972. All schools run by 'Local Bodies' were transferred under control of U. P. Basic Education Board (hereinafter referred to as "Board") and thereupon School also came within ambit of Act, 1972 and Rules and Regulations framed thereunder.

7. The service conditions of teachers of Basic Primary Schools came to be governed by U. P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "Rules, 1981"). Under Rule 29 of Rules, 1981, age of superannuation was prescribed as 60 years.

8. By Government Order dated 04.02.2004, decision of government was communicated to Director, Basic Education, Lucknow that age of superannuation of teachers of Primary Schools run by Board and also aided Primary Schools is increased to 62 years. It also provided that such teachers who have completed age of superannuation in July 2003, but continuing under benefit of end of Session, will also get benefit of increased age of retirement.

9. Appellant's date of birth is 01.08.1944 as per her High School Certificate of 1962. Therefore, she completed 60 years age on 31.07.2004 and 62 years on 31.07.2006. She could not have been retired prior thereto i.e. 31.07.2006. Further since she was attaining age of superannuation on 31.07.2006, therefore, entitled for Session end benefit and would have continued up to 30.06.2007, if age of retirement is taken as 62 years or 30.06.2005, if age of retirement is taken as 60 years. It is said that notice dated 26.04.2004, informing appellant that she would retire on 31.07.2004, is illegal and contrary to Statute.

10. Writ petition was contested by respondents-1 and 2 by filing a counter affidavit, sworn by Md. Afaque, Head Moharrir, NPP, SKB stating that 'School' is not under control of Board though recognized under Act, 1972, therefore, appellant is not governed by Rules, 1981. It further says that Government Order dated 04.02.2004, firstly is not applicable to Schools run by Local Bodies and secondly, being an executive order, unless Rules are amended, no otherwise claim can be made. Further appellant earlier filed Writ Petition No.44014 of 2002 stating that under Act, 1972, Schools run by Local Bodies, mostly, have been transferred to Board, but School in question run by NPP, SKB, which was recognized in 1962, continued to be managed and controlled by NPP, SKB, therefore, it should also be directed to be taken over by Board and should be governed by terms, conditions and Rules of Board including salaries applicable to teachers and staff of Primary Schools managed by Board. The above writ petition was disposed of vide judgment dated 01.03.2004 directing State Government to take decision on demand of teachers of Schools run by Local Bodies with regard to parity in pay scale with teachers of Primary Schools managed by Board. Pursuant to said judgment, a representation was made by teaching and non-teaching staff including present appellant, copy whereof is filed as Annexure-4 to counter affidavit. Government consequently passed order dated 26.10.2004 holding that teachers of Schools managed by Local Bodies are not entitled to claim parity with teachers of Primary Schools managed by Board. Paras 2 and 3 of Government Order dated 26.10.2004 rejecting claim of appellant and others is reproduced as under :

*''2. उक्त के अनुक्रम में याची के प्रत्यावेदन निस्तारण हेतु दिनांक 14.4.2004 को एक बैठक आहूत की गयी जिसमें अध्यक्ष नगर पालिका परिषद शिकोहाबाद, फिरोजाबाद ने प्रतिभाग किया। सहायक शिक्षा निदेशक (बेसिक) आगरा मण्डल, से आख्या प्राप्त की गयी। प्राप्त आख्यानुसार इस विद्यालय को स्थायी मान्यता वर्ष 1968–69 में प्रदान की गयी थी। मान्यता प्राप्त विद्यालयों को बेसिक शिक्षा परिषद, उ0प्र0 में शामिल करने की नीति नहीं है। उ**0प्र0 बेसिक शिक्षा अधिनियम 1972 के अधीन गठित उ0प्र0 बेसिक शिक्षा परिषद के अधीन वे ही विद्यालय लिए गये जो अधिनियम प्रख्यापित होने के समय जिला विद्यालय निरीक्षक व उप विद्यालय निरीक्षक द्वारा ग्रामीण क्षेत्रों के तथा इसी प्रकार नगर निकायों में जिला विद्यालय निरीक्षक एवं शिक्षा अधीक्षकों द्वारा शिक्षकों/शिक्षणेत्तर कर्मियों से सेवाएँ नियंत्रित होती थी।***

3. उ0प्र0 बेसिक शिक्षा अधिनियम 1972 की धारा 9 के अन्तर्गत ही शिक्षा कर्मी सम्बन्धित निकायों के माध्यम से वेतन पा रहे थे, उनकी सेवाएँ उ0प्र0 बेसिक शिक्षा परिषद में स्थानान्तरित कर दी गयी। इस अधिनियम के अन्तर्गत मान्यता प्राप्त विद्यालयों को बेसिक शिक्षा परिषद के अधीन नहीं लिया जाता है। वर्तमान में राज्य सरकार की ऐसी कोई नीति नहीं है। अतः बाल विद्या मंदिर फिरोजाबाद एवं मान्यता प्राप्त विद्यालय होने के कारण उ0प्र0 बेसिक शिक्षा परिषद के अधीन लिए जाने का कोई औचित्य नहीं है।''

"2. In pursuance of the above, a meeting was called on 14.04.2004 for disposal of the representation filed by the petitioner which was attended by the Chairman of Nagar Palika Parishad, Shikohabad, Firozabad. A report was obtained from the Assistant Director of Education (Basic), Agra Division. As per the report so obtained, this school was granted permanent recognition in the year 1968-69. There is no policy to include the recognized schools in Basic Education Board, Uttar Pradesh. ***Only those schools were included under the Uttar Pradesh Basic Education Board constituted under the Uttar Pradesh Basic Education Act, 1972 where the services of teaching/non-teaching staff used to be governed at the time of enforcement of the Act by the District Inspector of Schools and Deputy***

Inspector of Schools in case of rural areas and, similarly, by the District Inspector of Schools and Superintendents of Education in case of municipal bodies.

3. The services of the teaching staff, who was getting salary through the concerned bodies well under Section 9 of the Uttar Pradesh Basic Education, Act, 1972, were transferred to the Uttar Pradesh Basic Education Board. The recognized schools under this Act are not taken under Basic Education Board. At present, there is no such policy of the State Government. Hence, there is no justification for taking Bal Vidya Mandir, Firozabad under the Uttar Pradesh Basic Education Board as it being a recognized school."

(emphasis added)

(English translation by Court)

11. Appellant and others, therefore, are continuing as employees of NPP, SKB and governed by terms, conditions and rules applicable to employees of NPP, SKB. Since there is no provision of giving advantage of two years extension to the age of retirement to employees of NPP, SKB, appellant's claim otherwise cannot be accepted. Similarly, there is no provision in NPP, SKB that an employee may continue even after attaining age of superannuation with Session benefit, claim of appellant for continuance till end of Session, also cannot be accepted.

12. In the rejoinder affidavit filed by appellant it is stated that Government Order dated 04.02.2004 is applicable to all recognized Primary Schools, therefore, will apply to teaching staff of Schools run by Local Bodies namely, NPP, SKB also.

13. Learned Single Judge has accepted contention of respondent that 'School' is controlled and managed by NPP, SKB, therefore, it is not governed by Rules applicable to teachers of Primary School managed by Board. It has also followed another Single Judge judgment in **Smt. Mithlesh Singal Vs. State of U. P. and others (Writ Petition No.46178 of 2009) decided on 03.09.2009**, hence, dismissed writ petition.

14. Parties have also filed certain affidavits before Court to place on record documents relating to recognition granted to 'School' by concerned Educational Authorities and other relevant documents, which we shall discuss at appropriate stage.

15. Certain facts evident from pleadings as also relevant Statutes and provisions contained therein, relied by the parties, it would be appropriate, to place in a chronological manner to make the things straight and more explicit :

18.05.1968 - DIOS, Mainpuri sent letter to Chairman, NPP, SKB communicating him about grant of permanent recognition to Bal Mandir Monterssary Vidyalaya, Shikohabad i.e. 'School' with a condition that it shall be shifted in a newly constructed school building near Nagar Palika Office by 25.06.1968, failing which, recognition order shall be cancelled.

10.07.1972 - U. P. Basic Education Ordinance, 1972 (U.P. Ordinance No.14 of 1972) was promulgated.

25.07.1972 - Under Section 3 of U. P. Ordinance No.14 of 1972, U. P. Basic Education Board was constituted/established.

19.08.1972 - U. P. Basic Education Act, 1972 (U. P. Act No.34 of 1972) was enacted and vide Section 20, U. P. Ordinance No.14 of 1972 was repealed.

19.08.1972 - Every teacher, officer and other employee serving under a Local Body exclusively in connection with Basic Schools, immediately before appointed date, stood transferred to and became a teacher, officer or other employee of Board.

19.08.1972 - Vide Section 18 (3) (b) of Act, 1972, Section 73 of U.P. Municipalities Act, 1916 (hereinafter referred to as Act, 1916) ceased to apply in relation to 'Basic Schools'.

25.04.1978 -Thereafter, vide U. P. Act No.10 of 1978, proviso was added to Section 73 of Act, 1916, which reads as under :

*"Provided that the **appointment of a teacher or Head of an institution** shall be governed by the provisions of the **Uttar Pradesh State Universities Act, 1973**, or **the Intermediate Education Act, 1921**, as the case may be." (emphasis added)*

02.08.1978 - Petitioner was appointed as Assistant Teacher by EO, NPP, SKB.

03.01.1981 - Rules, 1981 were framed and enforced. Section 3 thereof provides extent of application and reads as under :

"3. Extent of application.-These rules shall apply to :

(i) All teachers of local bodies transferred to the Board under Section 9 of the Act ; and

(ii) all teachers employed for the Basic and Nursery Schools established by the Board." (emphasis added)

21.06.1999 - Vide Section 13 A of Act, 1972, provisions of Act, 1972 were given overriding effect over Act, 1916.

21.06.1999 - Vide Section 9-A of Act, 1972, control of teacher and properties of Basic Schools stood transferred to Gram Panchayat and Municipalities within whose territorial limit, Basic Schools were situated. It reads as under :

***"9-A. Control of teacher and properties of basic schools.-** (1) Nothwithstanding anything contained to the contrary in any other provisions of this Act, **on and from the date of commencement** of the Uttar Pradesh Basic Education (Amendment) Act, 2000, -*

(a) every teacher of the basic school serving under, the Board immediately before such commencement shall be under the. administrative control of the Gram Panchayat or the Municipality, as the case may be, within whose territorial limits the basic school, is situated;

*(b) **all buildings, properties and assets of the Board in respect of a basic school shall stand transferred to**, and **vest in**, the **Gram Panchayat** or **the Municipality**, as the case may be, **within whose territorial limits the basic school is situated;***

(c) where any building or part thereof is occupied by a tenant by the Board for the purpose of a basic school immediately before such commencement, the tenancy in respect of such building or part thereof shall, notwithstanding anything contained in any contract, lease or other instrument, stand transferred in favour of the Gram Panchayat, or the Municipality, as the case may be;

(d) the Board shall cease to be the licensee in respect of the building or part thereof referred to in sub-section (2) of Section 18-A and the Gram Panchayat or the Municipality, as the case may be,

within whose territorial limits such building is situated shall, if it is not already owner thereof, be deemed to have become licensee in respect of such building or part thereof on such terms and conditions as may be determined by the State Government.

(2) No Gram Panchayat or Municipality shall have the power to transfer by sale, gift, exchange, mortgage, lease or otherwise any building, property or assets transferred to, and vested in, such Gram Panchayat or Municipality, as the case may be, under sub-section (1)]. (emphasis added)

21.06.1999 - Certain functions were assigned to Municipalities vide Section 10-A of Act, 1972, which reads as under :

"10A. Functions of Municipalities. *- Without prejudice to the powers and functions of Municipalities under the Uttar Pradesh Municipal Corporations Act, 1959 or the Uttar Pradesh Municipalities Act, 1916, as the case may be,* ***every Municipality*** *shall,* ***subject to superintendence and control of the Board or the State Government, perform all or any of the following functions, namely :-***

(a) to ***establish, administer, control and manage basic schools in the Municipal area;***

(b) to take all such necessary steps as may be considered necessary to ensure punctuality and attendance of teachers and other employees of basic schools;

(c) to prepare schemes for the development, expansion and improvement of such basic schools;

(d) to promote and develop basic education, non-formal education and adult education in the Municipal area;

(e) to ***make recommendation for minor punishment in such manner as may be prescribed on a teacher or other employee of a basic school situate within the*** *limits of the municipal area." (emphasis added)*

16. In the present case, appellant is claiming benefit of Section 9 of Act, 1972 read with Rules, 1981 to claim higher age of superannuation and benefit of end of Academic Session.

17. So far as Section 9 of Act, 1972 is concerned, a perusal thereof clearly shows that only such teachers stood transferred who were employed in Basic Schools on appointed date i.e. date of establishment of Board i.e. 25.07.1972. Appellant was not at all in employment in 1972. Therefore, Section 9 of Act, 1972 is not attracted.

18. Appellant admittedly was appointed on 02.08.1978. His appointment was not made by Board but by EO, NPP, SKB. Even proviso to Section 73 of Act, 1916 has no application, since it talks of U. P. State Universities Act, 1973 or U. P. Intermediate Education Act, 1921 and not Act, 1972.

19. Now coming to Rules, 1981, we find that the same were made applicable, vide Rule 3 of Act, 1972, to teachers and lecturers of Local Bodies, who stood transferred to Board under Section 9 of Act, 1972 or all teachers employed for Basic and Nursery schools established by Board.

20. The School in question was not established by Board. Hence, Section 9 of Act, 1972 was not available. Since appellant was appointed in 1978,

therefore, by virtue of Rule 3, Rules, 1981, are not applicable to the case of appellant.

21. Learned counsel for appellant drew attention of this Court to U. P. Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and Other Conditions) Rules, 1975 (hereinafter referred to as "Rules, 1975") which came into force on 01.07.1975 (Except Rule 11 which was made effective from 20.05.1975) when Rules were published in U. P. Gazette (Extra-Ordinary). Aforesaid Rules, 1975 are applicable to every recognized Schools as provided in Rule 3 and "Recognized School" is defined in Rule 2 (e) as under :

"2(e). "Recognised School" ***means any Junior Basic School,*** *not* ***being an institution belonging to or wholly maintained by the board or any local body, recognised by the Board before the commencement of these rules*** *for imparting education from Class I to V."*
(emphasis added)

22. Definition of "Recognised School" clearly shows that it is not applicable to a Junior Basic School which belongs to or wholly maintained by Board or any local body. Rules, 1975 are applicable to other Junior Basic Schools which are recognised by Board. Infact Junior Basic School i.e. school imparting education upto Class V which belong to or wholly maintained by Board or any local body are excluded from application of Rules, 1975.

23. Reliance is also placed on U. P. Recognised Basic Schools (Junior High Schools)(Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as "Rules, 1978") which came into force on 13.03.1978 i.e. the date on which said Rules were published in U. P. Gazette (Extra-Ordinary). Here also we find that by virtue of Rule 2 (e), these are applicable only to 'Junior High School' i.e. school imparting education from Class VI to VIII while School in question is clearly a Junior Basic School as it is imparting education from Class I to V, as is evident from para 2 of affidavit filed along with stay application in this appeal, therefore, aforesaid Rules are also not applicable.

24. In absence of any provision as relied by appellant, we have no manner of doubt that appellant having been appointed in 1978 by E.O., NPP, SKB continued to be an employee of said local body and age of retirement, therefore, in absence of any other provision applicable to appellant, would be such as were applicable to employees of NPP, SKB. Hence, appellant has rightly been informed about date of retirement on which she was to complete 60 years of age i.e. 31.07.2004 as the Rules applicable to employees of NPP, SKB.

25. We, therefore, find no legal or otherwise flaw or error in the judgment of learned Single Judge so as to warrant interference in this appeal

26. Appeal lacks merit. Dismissed accordingly.

(2020)1ILR 1737

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.01.2020

BEFORE
THE HON'BLE ABDUL MOIN, J.

Service Single No. 6000 of 2019
Connected With
56 Other Service Single Cases

Alok Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sudeep Seth, Onkar Singh Kushwaha

Counsel for the Respondents:
C.S.C., Ajay Kumar, Durga Prasad Shukla

A. Service – Appointment/Recruitment – Eligibility criteria/conditions – Uttar Pradesh Basic Education (Teachers) Service (Twentieth Amendment) Rules, 2017: Rules 2(w), 2(x), 2(y); Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 - The question before the Court is as to whether once the selection process had commenced, the eligibility marks prescribed to be obtained by the candidates belonging to respective categories could be permitted to be changed after the last date fixed for receipt of applications.

The rules of the game cannot be changed at the verge of or towards the end of the game. Change of criteria in the midst of selection process is not permissible – Once the selection/recruitment process starts no change can be made in the eligibility conditions after the last date fixed for receipt of applications. The rules which are prevailing at the time of issue of advertisement/guidelines would be considered and not the subsequent amendment. (Para 42, 43, 46, 47, 59 & 63)

B. Violation of natural justice – "Useless formality theory" - If on admitted or indisputable factual position, only one conclusion is possible the Court need not issue a writ merely because there is violation of principle of natural justice, as in no opportunity of hearing was given to petitioners. There was no justification for the issue of the GO dated 21.05.2018 taking into consideration the settled proposition of law and as such, no infirmity was found in the GO dated 20.02.2019 being issued to withdraw the GO dated 21.05.2018. (Para 54, 55, 60 & 70)

C. Principle of legitimate expectation - The legitimacy of expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure - Whenever the question of legitimate expectation arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. In the present case, issue of GO dated 21.05.2018 lowering the eligibility marks would run against the settled proposition of law as there cannot be said to be any sanction or custom by the Government to reduce the eligibility marks after the commencement of selection process. (Para 65 & 66)

Writ Petitions dismissed. (E-4)

Precedent followed: -

1. K. Manjusree Vs. State of Andhra Pradesh, (2008) 3 SCC 512 (Para 15, 36, 52, 56 & 57)

2. Tej Prakash Pathak and another Vs. Rajasthan High Court and others (2013) 4 SCC 540 (Para 15, 17, 49, 50 & 56)

3. M.C. Mehta Vs. Union of India and others, (1999) 6 SCC 237 (Para 33, 54, 55 & 70)

4. Canara Bank Vs. V.K. Awasthy, (2005) 6 SCC 321 (Para 33, 55 & 70)

5. Gopal Krushna Rath Vs. M.A.A.Baig (Dead) by Lrs and others, (1999) 1 SCC 544 (Para 36, 52 & 57)

6. T. Nadu Computer SC B.Ed. G.T. Welf. Society Vs. Higher Sec. Scl. Computer Tech. Assn. and others, (2009) 14 SCC 517 (Para 42, 46, 47 & 48)

7. State of Bihar and others Vs. Mithilesh Kumar, (2010) 13 SCC 467 (Para 43 & 47)

8. Bhupinderpal Singh and others Vs. State of Punjab and others, (2000) 5 SCC 262 (Para 44 & 47)

9. Ashok Kumar Sharma and others Vs. Chander Shekhar and another, (1997) 4 SCC 18 (Para 45 & 47)

10. Bishnu Biswas and others Vs. Union of India (UOI) and others, (2014) 5 SCC 774 (Para 46 & 47)

11. Food Corporation of India Vs. Kamdhenu Cattle Field Industry, (1993) 1 SCC 71 (Para 65)

12. Union of India Vs. Hindustan Development Corporation, (1993) 3 SCC 499 (Para 65)

13. Mohd. Raisul Islam and others Vs. Gokul Mohan Hazarika and others, (2010) 7 SCC 560 (Para 71)

Precedent distinguished: -

1. Executive Officer, Arthanareswarar Temple Vs. R. Sathyamoorthy and others, (1999) 3 SCC 115 (Para 21 & 64)

2. Kalabharati Advertising Vs. Hemand Vimalnath Narichania and others, (2010) 9 SCC 437 (Para 21 & 64)

3. K.S. Bhoopathy and others Vs. Kokila and others, (2000) 5 SCC 458 (Para 21, 64)

4. Yogesh Yadav Vs. Union of India, (2013) 14 SCC 623 (Para 20 & 62)

5. Rajya Sabha Secretariat and others Vs. Subhash Baloda and others, (2013) 5 SCC 169 (Para 24, 68 & 69)

6. Barot Vijaykumar Balakrishna and others Vs. Modh Vinaykumar Dasrathlal and others, (2011) 7 SCC 308 (Para 24 & 68)

7. State of U.P and Ors Vs. Anand Kumar Yadav, (2018) 13 SCC 560 (Para 27 & 71)

8. Shree Chamundi Mopeds Ltd. Vs. Church or South India Trust Association, (1992) 3 SCC 1 (Para 16 & 60)

Precedent cited: -

1. Union of India and another Vs. Lieutenant Colonel P.K. Choudhary and others, (2016) 4 SCC 236 (Para 22)

2. Shankarsan Dash Vs. Union of India, (1991) 3 SCC 47 (Para 33)

3. S.S. Balu and another Vs. State of Kerala and others, (2009) 2 SCC 479 (Para 33)

4. Union of India Vs. Pushpa Rani and others, (2008) 9 SCC 242 (Para 33)

5. Union of India and others Vs. S. Vinodh Kumar and others, (2007) 8 SCC 100 (Para 33)

6. Ramesh Chandra Shah and others Vs. Anil Joshi and others, (2013) 11 SCC 309 (Para 33)

Petition challenges Government Order dated 20.02.2019, by which GO dated 21.05.2018, changing the eligibility criteria was made redundant.

(Delivered by Hon'ble Abdul Moin,J.)

1. Heard Sri S.K. Kalia, Senior Advocate, assisted by Sri Avdhesh Shukla and Sri Sameer Kalia, Sri Jai Deep Narain Mathur, Senior Advocate, assisted by Sri Devendra Upadhyay, Sri Sandeep Dixit, Senior Advocate, assisted by Sri Manoj Mishra, Sri Sudeep Seth, Senior Advocate, assisted by Sri Onkar Singh and Ms. Ishita Yadav, Dr. L.P. Mishra, Sri Y.S. Srivastava, learned counsel for the petitioners in this writ petition and other connected matters, Sri Kuldeep Pati Tripathi, learned Additional Advocate General, assisted by Sri Prafulla Yadav and Sri Pratyush Tripathi, learned Standing Counsel appearing for State-respondents and Sri Ajay Kumar, learned counsel appearing for respondent no.3/Uttar Pradesh Basic Education Board.

2. There is consensus at the Bar between the counsel for the parties that as all the cases pertain to a common issue and these writ petitions have been heard together, as such they be decided by a common judgment. Accordingly, the facts

of Writ Petition (S/S) No.6000 of 2019 are being considered for deciding this bunch of writ petitions.

3. By means of the present petition, the petitioners have prayed for quashing of the Government Order dated 20.2.2019, a copy of which is Annexure-1 to the writ petition. Further prayer is for a mandamus commanding the respondents to declare the result of the Assistant Teacher Recruitment Examination-2018 on the basis of Government Order dated 21.5.2018, a copy of which is Annexure-2 to the writ petition.

4. Brief facts as set forth by the petitioners are that a Government Order had been issued by the respondents giving guidelines for holding an examination, namely, Assistant Teacher Recruitment Examination-2018 (hereinafter referred to as the 2018 Recruitment), a copy of which is Annexure-4 to the writ petition. A notification was issued on 23.1.2018, a copy of which is Annexure-6 to the writ petition, giving the schedule for applying for the 2018 Recruitment by eligible candidates in terms of the guidelines dated 9.1.2018 and the Government Order dated 17.1.2018, a copy of which is Annexure-5 to the writ petition. The Government Order dated 17.1.2018, as has been referred to in the notification dated 23.1.2018, gave the schedule for issue of advertisement, dates of submission of applications etc. Subsequent thereto, the respondents issued another time schedule dated 7.5.2018, a copy of which is Annexure S-1 to the supplementary affidavit, by which the last date fixed for receipt of applications was specified as 17.5.2018 and the candidates could make correction on-line in their application by 21.5.2018. The date of examination was also specified as 27.5.2018. It is contended that as per para 7 of the guidelines that were part of the Government order dated 9.1.2018, it was provided that the minimum marks to be obtained by a candidate, so far as they pertain to general and other backward category candidates, was 67 marks out of 150 marks i.e 45 percent while the minimum marks for Scheduled Caste/ Scheduled Tribe category was 60 marks out of 150 marks i.e 40 per cent. Even before the examination could be held on 27.5.2018, the respondents issued a Government Order dated 21.5.2018, a copy of which is Annexure-2 to the writ petition, by which the marks, so far as they pertained to general and other backward category candidates, were reduced to 33 percent while for other categories i.e. the reserved categories was reduced to 30 per cent.

5. The said Government Order was challenged by one Sri Diwakar Singh by filing Writ Petition No.20404 of 2018 before this Court. The basic ground to challenge the said Government Order was that once the selection process had commenced and the date of examination was fixed as 27.5.2018 then the respondents while issuing the Government Order dated 21.5.2018 could not have changed the selection criteria.

6. This Court vide order dated 24.7.2018 restrained the respondents from implementing the guidelines issued under the Government Order dated 21.5.2018 in the selection proceedings initiated in pursuance to the Government order dated 9.1.2018 and the advertisement issued in pursuance thereto. Copy of the interim order dated 24.7.2018 is Annexure-10 to the writ petition.

7. Being aggrieved with the order dated 24.7.2018, a bunch of special appeals leading being Special Appeal No.432 of 2018 In re: Avnish Kumar and others vs. Shri Diwakar Singh and others

was filed before this Court. This Court vide judgment and order dated 24.9.2018, a copy of which is Annexure-21 to the writ petition, remanded back the matter to the Hon'ble Single Judge to decide the same finally as early as possible. It is also contended that as the selection had proceeded, the State Government issued a Government order dated 08.08.2018, a copy of which is annexure 11 to the petition resolving to comply with the interim order dated 24.7.2018 and granting permission to prepare and declare the result as per the guidelines dated 9.1.2018. In pursuance thereof, the result was declared on 13.8.2018.

8. It has also been stated in paragraph 16 of the writ petition that out of 68500 vacant posts only 41556 candidates qualified as per the minimum qualifying marks prescribed as per the guidelines dated 9.1.2018. It has also been contended that the petitioners have not qualified as per the qualifying marks prescribed as per the guidelines dated 9.1.2018 but may qualify as per the lowered qualifying marks prescribed as per the Government order dated 21.5.2018.

9. Subsequent thereto, the respondents issued the impugned order dated 20.2.2019, a copy of which is Annexure-1 to the writ petition, by which the Government Order dated 21.5.2018 was made redundant. It is contended that through an order dated 28.2.2019 passed in a bunch of writ petitions the leading being Writ Petition (S/S) No.20404 of 2018, all of which had been filed challenging the order dated 21.5.2018, the said petitions were dismissed as infructuous keeping in view the order dated 20.2.2019 but it was left open to the affected parties to raise all pleas and grounds in the subsequent writ petition wherein the Government Order dated 20.2.2019 is under challenge, if any.

10. It is argued that the Government on 09.11.2017 has issued the Uttar Pradesh Basic Education (Teachers) Service (Twentieth Amendment) Rules, 2017 (hereinafter referred to as "Twentieth Amendment") to amend the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "Rules, 1981") which provide in Rule 2 (w) as under:-

"2(w). "Assistant Teacher Recruitment Examination"means a written examination conducted by the Government for recruitment of a person in junior basic schools run by Basic Shiksha Parishad.

11. Likewise Rule 2 (x) reads as under:-

"2(x). "Qualifying Marks of Assistant Teacher Recruitment Examination"means such minimum marks as may be determined from time to time by the Government."

12. The Rule 2 (y) reads as under:-

"2(y). "Guidelines of Assistant Teacher Recruitment Examination"means such guidelines as may be determined from time to time by the Government."

13. Placing reliance on Rule 2 (x) it is contended that qualifying marks of Assistant Teachers Recruitment Examination would mean such minimum marks as may be determined from time to time by the Government and thus once such power is vested in the Government to determine the minimum marks

consequently once the Government issued the Government order dated 21.05.2018 revising and lowering the marks, as such the same are deemed to have been issued by exercising the power vested in the Government in terms of Rule 2 (x) and thus validly no challenge could be raised to the same and once the marks had been determined, it could not be said that the same amounted to change in the rule of the game so as to cause any grievance to any of the candidates and thus the order dated 21.05.2018 having been validly issued, there was no occasion for the respondents to have withdrawn the said order through the impugned Government order dated 20.02.2019.

14. It is also argued that the process of recruitment would only start when the actual recruitment for Assistant Teachers is held i.e after the result of the qualifying examination i.e 2018 Recruitment and thus once no recruitment was involved in the qualifying examination that was held by the respondents, as such merely because the Government exercising the power vested in it under Rule 2 (x) of the Twentieth Amendment having validly exercised the said power and the 'game' was still to begin after the persons had qualified in the said examination and attained eligibility for the purpose of finally staking their claim for their appointment in terms of the recruitment still to be conducted, as such there was no occasion for this Court to have passed the interim order dated 24.07.2019 and thereafter there was no occasion for the Government to have withdrawn the same through the Government order dated 20.02.2019 based on the said interim order.

15. Another argument is that the interim order dated 24.07.2018 was passed on the basis of the judgment of the Apex Court in the case of **K.Manjusree Vs. State of Andhra Pradesh** reported in (2008) 3 SCC 512 which itself has been held to be *per incuriam* in a subsequent judgment of the Apex Court in the case of ***Tej Prakash Pathak and Anr Vs. Rajasthan High Court and Ors*** reported in **(2013) 4 SCC 540** and the respondents while issuing the impugned order dated 20.02.2019 having passed the said order on the basis of the interim order which resulted in the respondents proceeding with the selection on the basis of the earlier Government order and declaring the result whereafter the Government order dated 21.05.2018 was made redundant meaning thereby that the very base of the order dated 20.02.2019 is the interim order of this Court dated 24.07.2018 which itself being based on a judgment of the Apex Court being held *per incuriam* meaning thereby that the order dated 20.02.2019 is itself vitiated in the eyes of law.

16. Placing reliance on the judgment of the Apex Court in the case of **Shree Chamundi Mopeds Ltd vs Church Or South India Trust Association** reported in **(1992) 3 SCC 1** it is contended that the order dated 24.07.2018 of this Court was only an interim order meaning thereby that the Court was still to pronounce on the validity of the Government order dated 21.05.2018 and thus merely because the Government order dated 21.05.2018 had been stayed by this Court, the same would not take away the effect of the Government order dated 21.05.2018 inasmuch as a distinction has to be made between quashing of an order and stay of operation of an order and thus by no stretch of imagination could the interim order of this Court dated 24.07.2018 have been taken as a final order by the respondents while proceeding to pass the

impugned Government order dated 20.02.2019 in order to make redundant the Government order dated 21.05.2018 the validity of which was still to be tested by this Court in a bunch of petitions.

17. Placing reliance on **Tej Prakash Pathak (supra)** it is argued that it was not the eligibility condition which had been interfered with by the respondents with the issue of the Government order dated 21.05.2018 rather a conscious decision was taken by the Government while issuing the Government order dated 21.05.2018 to reduce the minimum marks which could validly be done by the Government taking into consideration Rule 2 (x) of the Twentieth Amendment.

18. It is also argued that no reasons are forthcoming in the impugned order dated 20.02.2019, apart from giving reference to the interim order of this Court, as to why the respondents thought it fit to make the Government order dated 21.05.2018 redundant and as such any reason that may be taken in the counter affidavit cannot be considered by this Court while going into the validity and veracity of the impugned order dated 20.02.2019.

19. It is further argued that even if the reduced marks would have resulted in a large number of candidates qualifying in the exam yet the merit of final selection for appointment would not be compromised as in terms of Rule 14 (1) (c) (3) (a) of the Twentieth Amendment in Rule, 1981, the name of the candidates in the list prepared under Sub Rule (2) in accordance with Clause (a) of Sub Rule (1) of Rule 14 has to be arranged in accordance with the quality points and weightage as specified in appendix (I). The appendix (I) prescribes quality points and weightage as per the percentage of marks in the Assistant Teacher Recruitment Examination to be taken as 60 percent of marks in the examination i.e percentage of marks in the examination X 60/100. The percentage of marks in the examination of BTC training, Graduation Degree, Intermediate and High School have also been indicated. Thus, in case a candidate qualifies the Assistant Teacher Recruitment Examination with a lesser percentage, lesser quality points would contribute towards the selection of candidate as provided under the Twentieth Amendment whereby reducing his merit.

20. Reliance has also been placed on the judgment of the Hon'ble Supreme Court in the case of **Yogesh Yadav Vs. Union of India** reported in **(2013) 14 SCC 623** to contend that bench mark could be fixed even after the examination has been held which would be permissible in the eyes of law and the same would not amount to change of the rule of the game after the examination commenced.

21. Learned counsel for the petitioners has also argued that once this Court was seized of the matter in Writ Petition (S/S) No.20404 of 2018 and other connected matters wherein the validity of the order dated 21.5.2018 had been raised, consequently the said order dated 21.5.2018 could not have been withdrawn by the respondents during pendency of the aforesaid writ petitions. In this regard, reliance has been placed upon the judgment of the Apex Court in the case of ***Executive Officer, Arthanareswarar Temple vs. R. Sathyamoorthy and others*** reported in ***(1999)3 SCC 115, Kalabharati Advertising vs. Hemand Vimalnath Narichania and others*** reported in

(2010)9 SCC 437 and ***K.S. Bhoopathy and others vs. Kokila and others*** reported in ***(2000)5 SCC 458***.

22. Learned counsel for the petitioners also argue that once the Government Order dated 21.5.2018 had been issued lowering the qualifying marks from 45 to 33 percent for general and other backward category candidates and from 40 to 30 percent for other candidates i.e. reserved category candidates, as such the petitioners have acquired a legitimate right and expectation for being considered in terms of the modified qualifying marks. In this regard, reliance has been placed on the judgment of the Apex Court in the case of ***Union of India and another vs. Lieutenant Colonel P.K. Choudhary and others*** reported in ***(2016)4 SCC 236.***

23. Another ground taken on behalf of the petitioners is that as approximately 27713 posts are still lying vacant, as such it would be equitable for this Court to direct the respondents to fill in the remaining vacancies with the relaxed qualifying marks i.e. as per the Government Order dated 21.5.2018 itself.

24. As regards the ground on which the interim order dated 24.7.2018 had been passed by this Court in Writ Petition (S/S) No.20404 of 2018 i.e. with the issue of the Government Order dated 21.5.2018 the rules of the game having been changed, reliance has been placed on the judgment of the Apex Court in the case of ***Rajya Sabha Secretariat and others vs. Subhash Baloda and others reported in (2013)5 SCC 169 and Barot Vijaykumar Balakrishna and others vs. Modh Vinaykumar Dasrathlal and others*** reported in ***(2011)7 SCC 308*** to assert that amended or modified rules can be considered after the selection process has commenced.

25. It is also argued on behalf of the petitioner that no valid reason is forthcoming in the order dated 20.02.2019 for withdrawal of Government order dated 21.05.2018 inasmuch as the grounds indicated in the said order for making redundant the Government order dated 21.05.2018 are that in compliance with the interim order dated 24.07.2018, the Government order dated 08.08.2018 had been issued for adhering to the Government order dated 09.01.2018 which provided the eligibility marks of 45 percent and 40 percent for the General and Reserved Category candidates and for proceeding with the selection accordingly and that as the result has been declared subsequent thereto, as such the Government order dated 21.05.2018 has become redundant. It is contended that once the entire action of issue of the Government order dated 08.08.2018 has been taken in pursuance to the interim order dated 24.07.2018 and even the result declaration has taken place in pursuance to the Government order dated 08.08.2018 and ultimately Writ Petition No. 20404 (SS) of 2018 had been dismissed as infructuous meaning thereby that the entire action had been taken on the basis of the interim order and thus once the lis was already before this Court, consequently there was no occasion for the respondents to have passed the order dated 08.08.2018 and to have proceeded further with the selection and thus merely because the result has been declared would not make the Government order dated 21.05.2018 redundant as contended in the impugned order dated 20.02.2019. Thus, the grounds taken in the said order cannot be said to be sufficient and sustainable in the eyes of law.

26. Another ground which has been taken on behalf of the petitioners is that the Government order dated 09.01.2018 had been issued after the Twentieth Amendment in the Rules, 1981 which

provided in Rule 2 (w) for an Assistant Teacher Recruitment Examination and further the academic qualification, so far as it pertains to the post of Assistant Master and Assistant Mistresses of Junior Basic Schools provided the eligibility condition of a candidate as having passed the Assistant Teacher Recruitment Examination. An amendment was also made in Appendix I in the Rules, 1981 by way of the Twentieth Amendment which gave quality points for a candidate having passed the Assistant Teacher Recruitment Examination. By the 22nd Amendment dated 15.03.2018 made in the Rules, 1981, the academic qualification, as was introduced in Rule 8 by the Twentieth Amendment, was done away with so far as it pertains to a teacher passing the Assistant Teacher Recruitment Examination, however the said condition was added as Rule 14 (1) (b) by indicating that for every notified vacancy under Rule 14 (1) (a) of the Rules for Recruitment of Assistant Master or Assistant Mistresses of Junior Basic School, a separate Assistant Teacher Recruitment Examination shall be conducted by the Government. Rule 14 (1) (a) provides for determination of vacancies as also the number of vacancies to be reserved and applications to be invited from candidate possessing prescribed training qualification and having passed the Teacher eligibility test and Assistant Teacher Recruitment Examination conducted by the Government. It is thus argued that once condition in Rule 8 was done away with in terms of the 22nd Amendment, consequently the Government order reducing the eligibility marks for General and Reserved Category candidates was correctly issued and hence there could not be any occasion for the respondent to withdraw the said Government order.

27. Elaborating this, learned counsel for the petitioners submit that the Apex Court in the case of **State of U.P and Ors Vs. Anand Kumar Yadav** reported in **(2018) 13 SCC 560** in a matter pertaining to Shiksha Mitras has provided that as regularization of Shiksha Mitras as teachers is not permissible but at the same time they ought to be given opportunity to be considered for recruitment, if they have acquired or they now acquire, the requisite qualification in terms of advertisement for recruitment for next two consecutive recruitments by giving them suitable age relaxation and some weightage for their experience and considering this fact, the Government order dated 21.05.2018 had been issued reducing the marks and, as such there cannot be said to be any infirmity with the said Government order on this ground also.

28. Per contra, Sri Kuldeep Pati Tripathi, learned Additional Advocate General assisted by Sri Prafful Yadav, learned Standing counsel submits and argues on the grounds as raised by the petitioners as well as on the basis of the averments contained in the counter affidavit which has been filed in Writ Petition No. 6313 (SS) of 2019 and has been adopted in all other petitions that in terms of the Twentieth Amendment in Rules, 1981 which was introduced on 09.11.2017, Rule (2) (w), 2 (x) and 2 (y) were introduced. Rule 2 (w) for the very first time brought in the concept of Assistant Teacher Recruitment Examination for recruitment of a person in Junior Basic Schools. Rule 2 (x) gave the power to fix qualifying marks of Assistant Teacher Recruitment Examination to be determined from time to time by the Government and Rule 2 (y) gave the guidelines of Assistant Teacher Recruitment Examination as may be determined from time to time by the academic authority. The Twentieth Amendment to the Rules, 1981 also

brought an amendment in Rule 8 of the Basic Education Service Rules which provided, so far as the academic qualification of Assistant Master and Assistant Mistresses of Junior Basic Schools was concerned, that they should have passed the Assistant Teacher Recruitment Examination conducted by the Government. Appendix I which pertains to quality points and weightage for selection candidates was also substituted to bring in the quality points by introducing Assistant Teacher Recruitment Examination marks also within the ambit of quality points. Taking into consideration the aforesaid amendments, the Government order dated 09.01.2018 was issued giving the guidelines for the purpose of holding Assistant Teacher Recruitment Examination, 2018 for 68,500 vacancies. The said guidelines provided the procedure for submitting of applications by the candidates and Clause 7 of the guidelines prescribed the qualifying marks for the General and Reserved Category candidates which were 45 percent for the General and Other Backward Caste and 40 percent for the Scheduled Caste and Scheduled Tribe Candidates respectively i.e 87 out of 150 marks and 60 out of 150 marks respectively. In terms of the guidelines dated 09.01.2018 an advertisement for holding 2018 Recruitment was issued on 23.01.2018 giving the schedule of online registration from 25.01.2018. However, subsequently another Government order dated 07.05.2018 was issued by the Government giving the date of advertisement, the last date as to by when the eligible candidate could apply for appearing in the examination as well as the date by which they could correct any error in their application. In terms of the said order dated 07.05.2018, the date of issue of advertisement was fixed as 08.05.2018, the date for registration of online applications was fixed from 14.05.2018, while the last date fixed for receipt of applications was fixed as 17.05.2018. Those candidates who had applied and finding an error in their applications, could log in and correct any error in their applications by 21.05.2018. The examination was also notified to be held on 27.05.2018. After the last date fixed for receipt of application i.e 17.05.2018, Government order dated 21.05.2018 was issued changing and reducing the qualifying marks as specified in Clause 7 of the guidelines issued vide Government order dated 09.01.2018 and fixing them at 33 percent for General Category and Other Backward Classes Candidate and 30 percent for Scheduled Caste and Scheduled Tribe Reserved Category candidates. A Writ Petition No. 20404 (SS) of 2018 was filed challenging the said Government order dated 21.05.2018 and a detailed interim order was passed by this Court staying the Government order dated 21.05.2018. After considering the entire facts and circumstances, the Government decided to proceed with the selection in terms of the guidelines dated 09.01.2018 and on the basis of the qualifying marks fixed in the said guidelines i.e 45 percent and 40 percent respectively. It is contended that the said Government order dated 08.08.2018 was issued not only in pursuance to the interim order of this Court but also after a conscious decision had been taken to proceed with the selection in terms of the Government order dated 09.01.2018 and cut off marks fixed therein. Thereafter, the result was declared on 13.08.2018 and the process of issue of the appointment letters to the selected candidates started w.e.f 05.09.2018. Subsequent thereto, as the selection had

proceeded in pursuance to the order dated 08.08.2018 and the process of issue of appointment letter to the selected candidates had also started w.e.f 05.09.2018, as such the order dated 20.02.2019 was passed withdrawing the order dated 21.05.2018 which was again a conscious decision that had been taken by the respondents taking into consideration the developments that had taken place in the interregnum period.

29. Learned counsel appearing for the respondents further argues that once the petitioners had consciously applied in pursuance to the Advertisement dated 23.01.2018 and 07.05.2018 by which applications were invited from eligible candidate for the 2018 Recruitment and it was specified that the same was being issued in pursuance to the Government order dated 09.01.2018 and 17.01.2018 whereby the cut off marks of 45 percent and 40 percent had been fixed and the last date fixed for receipt of applications was 17.05.2018 meaning thereby that they were perfectly satisfied with the cut off marks that had been fixed in terms of the Government order dated 09.01.2018, consequently, when the second Government order dated 22.05.2018 was issued reducing the cut off marks, it cannot be said that the petitioners were sought to be put in any disadvantageous position inasmuch as they had consciously chosen to participate on the basis of the cut off marks as specified in the Government order dated 09.01.2018 and hence reduction of marks through the subsequent Government order and thereafter withdrawal of the said Government order through the impugned order dated 20.02.2019 would not give them any right to assert to the contrary.

30. It is also contended that there has been no violation of any rights of the petitioners, inasmuch as they consciously offered to participate in the said examination in terms of the cut off marks issued through the order dated 09.01.2018 which had been fixed in consonance with the Twentieth Amendment in Rules, 1981 that had been introduced w.e.f 09.11.2017 and exercising the power in terms of Rule 2 (x).

31. So far as the order dated 20.02.2019 is concerned, it is contended that a perusal of the said order would itself indicate that the order was occasioned on account of the subsequent Government order dated 08.08.2018 which had been issued after conscious decision had been taken by the respondents of proceeding with the selection on the basis of the cut off marks fixed through the Government order dated 09.01.2018 and the result having been declared thereafter and accordingly once such a conscious decision was taken, the impugned order dated 20.02.2019 cannot be challenged on the ground that it was only based on an interim order passed by this Court.

32. So far as the 21st and 22nd Amendments are concerned whereby Rule 8 and Rule 14 had been amended, it is argued that the said amendments being of a subsequent date would not affect the guidelines that had been issued on 09.01.2018 considering the Twentieth Amendment in the rules and it being a settled proposition of law that an advertisement is to be issued taking into consideration the prevalent rules and mere amendment in the rules subsequently would not render either the advertisement bad in the eyes of law or make out any claim for amendment of the said advertisement.

33. Learned counsel for the respondents, in support of his submissions, has placed reliance on the following judgments:-

(i) ***Union of India and others vs. S. Vinodh Kumar and others*** reported in ***(2007)8 SCC 100;***

(ii) ***Shankarsan Dash vs. Union of India*** reported in ***(1991)3 SCC 47.***

(iii) ***S.S. Balu and another vs. State of Kerala and others*** reported in ***(2009)2 SCC 479.***

(iv) ***Union of India vs. Pushpa Rani and others*** reported in ***(2008)9 SCC 242.***

(v) ***M.C. Mehta vs. Union of India and others*** reported in ***(1999)6 SCC 237.***

(vi) ***Ramesh Chandra Shah and others vs. Anil Joshi and others*** reported in ***(2013)11 SCC 309.***

(vii) ***Canara Bank vs. V.K. Awasthy*** reported in ***(2005)6 SCC 321.***

34. Heard learned counsel appearing for the contesting parties and perused the records.

35. From a perusal of records it comes out that the Twentieth Amendment in the Rules, 1981 was issued on 09.11.2017 amending Rule 8 of the Rules, 1981 and making passing of Assistant Teacher Recruitment Examination as an eligibility condition for being appointed on the post of Assistant Master and Assistant Mistress of Junior Basic School. For the said purpose, Rule 2 (w),(x) and (y) were also introduced of which Rule 2 (w) defines the "Assistant Teacher Recruitment Examination" as a written examination conducted by the Government for recruitment of a person in Junior Basic Schools, Rule 2 (x) defines "Qualify marks of Assistant Teacher Recruitment Examination" as such minimum marks as may be determined from time to time by the Government and Rule 2 (y) defines "Guidelines of Assistant Teacher Recruitment Examination" as such guidelines as may be determined from time to time by the academic authority with the approval of the Government. Subsequently, the Government order dated 09.01.2018 was issued giving guidelines for holding the Recruitment, 2018. Clause 7 of the said guidelines specified the essential marks which were to be obtained by the General and Other Backward Class candidates which were specified as 67 out of 150 marks or 45 percent and 60 out of 150 marks i.e 40 percent for Schedule Caste and Schedule Tribe category candidates so as to be declared as pass and issue of certificate in the Assistant Teacher Recruitment Examination. A notification was issued on 23.01.2018 giving the schedule for applying for the Recruitment, 2018 by the eligible candidates in terms of the guidelines dated 09.01.2018 and 17.01.2018. Subsequently, another time schedule dated 07.05.2018 was issued by which the date of advertisement was specified as 08.05.2018, the date for submission of online applications was specified as 14.05.2018 and last date fixed for receipt of applications was specified as 17.05.2018. Those candidates who had applied in pursuance to the said advertisement and finding an error in their application could correct their applications online by 21.05.2018 while the examination was scheduled to be held on 27.05.2018. The effect of issue of notification dated 17.05.2018 was that the applications could be submitted by those candidates who were desirous of applying for Recruitment, 2018 knowing fully well the conditions as in the Government order dated 09.01.2018 including the eligibility marks that they had to obtain i.e 45 percent and 40 percent for the General/ Other Backward Class candidates and Reserved Category Candidate respectively.

After the last date expired for submission of applications i.e 17.05.2018, the respondents issued the Government order dated 21.05.2018 by which the eligibility marks, as were specified in the guidelines dated 09.01.2018 i.e 45 percent and 40 percent for General/ Other Backward Candidates and Reserved Category Candidates respectively, were reduced to 33 percent and 30 percent respectively for the respective category. The said Government order dated 21.05.2018 was challenged by one Sri Diwakar Singh by filing Writ Petition No. 20404 (SS) of 2018 before this Court on the basic premise that once the selection process had commenced and the date of examination was fixed as 27.05.2018 then the respondents could not have changed the selection criteria while issuing the Government order dated 21.05.2018.

36. This Court considering the law laid down by the Hon'ble Supreme Court in the case of **K. Manjushree (supra)** and **Gopal Krushna Rath Vs. M.A.A.Baig (Dead) by Lrs and Ors** reported in **(1999) 1 SCC 544** directed that until further orders, the respondents are restrained to implement the guidelines issued under the Government order dated 21.05.2018 in the selection proceedings initiated in pursuance to the Government order dated 09.01.2018 and advertisement issued in pursuance thereto meaning thereby that the selection was to continue on the basis of the earlier guidelines dated 09.01.2018 whereby the eligibility marks had been prescribed to be 45 percent and 40 percent for the respective categories.

37. The aforesaid interim order dated 24.07.2018 was challenged before the Division Bench of this Court by certain candidates by filing Special Appeal in the case of **Avnish Kumar (supra)** and this Court vide judgment and order dated 24.09.2018 remanded the matter to the Hon'ble Single Judge to decide the same finally as early as possible. In the interregnum, the State Government had already issued the Government order dated 08.08.2018 resolving to comply with the interim order dated 24.07.2018 and granting permission to prepare and declare the result as per the guidelines dated 09.01.2018 and in pursuance thereof the result was also declared on 13.08.2018.

38. Even as the aforesaid petitions in the case of **Diwakar Singh (supra)** and others were pending, the Government issued the impugned order dated 20.02.2019, a copy of which is annexure 1 to the petition indicating that as in pursuance to the interim order dated 24.07.2018, a Government order dated 08.08.2018 had already been issued and in pursuance thereof the selection had proceeded and the result has also been declared, as such the Government order dated 21.05.2018 had become redundant and thus the same was withdrawn and the earlier Government order dated 09.01.2018 pertaining to the essential marks was directed to remain in force. Being aggrieved, the present petitions have been filed.

39. The facts of the case being now before this Court, the Court proceeds to consider the legality and validity of the action of the respondents.

40. The crux of the issue would be as to whether once the selection process which pertains to acquiring of eligibility prescribed for the post of Assistant Master and Assistant Mistress of Junior Basic Schools which had commenced with the

issue of Advertisement dated 08.05.2018 taking into consideration the guidelines issued through the Government order dated 09.01.2018 fixing the eligibility marks to be obtained by the candidates belonging to respective categories could be permitted to be changed after the last date fixed for receipt of applications i.e after 17.05.2018 ?

41. The issue is no longer *res integra* having been settled beyond doubt by various judgments of the Apex Court which are being culled below.

42. In a judgment rendered by three Judges of the Hon'ble Apex Court namely **T. Nadu Computer SC B.Ed. G.T. Welf. Society vs. Higher Sec. Scl. Computer Tech. Assn. and Ors** reported in **(2009) 14 SCC 517** which is a case squarely applicable in the facts of the present case, the Apex Court has held as under:-

"31. We have considered the aforesaid rival submissions of the counsel appearing for the parties in the light of the records placed before us. It is clearly established from the records that in order to give one time opportunity, a Special Recruitment Test was ordered to be held for selection and recruitment as also absorption of existing Computer Instructors. The said decision was taken on sympathetic consideration and with the intention of doing justice to those existing Computer Instructors, who were working in Government Schools for a very long time. Such a recruitment drive and test was held by laying down Rules of Recruitment thereby providing a level playing field for all concerned.

32. Prior to holding of the said Test guidelines were formulated through a policy decision laying down the criteria that the minimum qualifying marks in the said test would be at least 50%. The said guidelines of Recruitment as laid down through a policy decision was sacrosanct and was required to be followed for all practical purposes even if we accept that the Government could have filled up the said posts of Computer Instructors by holding a Special Recruitment Test of the aforesaid nature as one time exception.

33.We, however, cannot hold that the subsequent decision of the Government thereby changing qualifying norms by reducing the minimum qualifying marks from 50% to 35% after the holding the examination and at the time when the result of the examination was to be announced and thereby changing the said criteria at the verge of and towards the end of the game, as justified for we find the same as arbitrary and unjustified. This Court in Hemani Malhotra v. High Court of Delhi MANU/SC/1844/2008 : AIR2008SC2103 has held that in recruitment process changing rules of the game during selection process or when it is over are not permissible."

43. Likewise the Apex Court in the case of **State of Bihar and Ors. vs. Mithilesh Kumar** reported in **(2010) 13 SCC 467** has held as under:-

"19. Both the learned Single Judge as also the Division Bench rightly held that the change in the norms of recruitment could be applied prospectively and could not affect those who had been selected for being recommended for appointment after following the norms as were in place at the time when the selection process was commenced. The Respondent had been selected for

recommendation to be appointed as Assistant Instructor in accordance with the existing norms. Before he could be appointed or even considered for appointment, the norms of recruitment were altered to the prejudice of the Respondent. The question is whether those altered norms will apply to the Respondent.

20. The decisions which have been cited on behalf of the Respondent have clearly explained the law with regard to the applicability of the Rules which are amended and/or altered during the selection process. They all say in one voice that the norms or Rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect."

44. In the case of **Bhupinderpal Singh and Ors Vs. State of Punjab and Ors** reported in **(2000) 5 SCC 262** the Apex Court has held as under:-

"13. Placing reliance on the decisions of this Court in Ashok Kumar Sharma v. Chander Shekhar and Anr. MANU/SC/1130/1997 :

(1997)ILLJ1160SC ; A.P. Public Service Commission v. B. Sarat Chandra and Ors. MANU/SC/0447/1990 : (1990)IILLJ135SC ; TheDistt. Collector and Chairman, Vizianagaram (Social Welfare Residential School Society) Vizianagaram and Anr. v. M. Tripura Sundari Devi 1990 (4) SLR 237; Mrs. Rekha Chaturvedi v. University of Rajasthan and Ors. MANU/SC/0838/1993 : (1993)ILLJ617SC ; Dr. M.V. Nair v. Union of India and Ors. MANU/SC/0494/1993 : (1993)IILLJ347SC ; and UP. Public Service Commission, U.P., Allahabad and Anr. v. Alpana MANU/SC/0672/1994 : [1994]1SCR131" the High Court has held (i) that the cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut off date appointed by the rules then such date as may be appointed for the purpose in the advertisement calling for applications; ii) that if there be no such date appointed then the eligibility criteria shall be. applied by reference to the last date appointed by which the applications have to be received by the competent authority. The view taken by the High Court is supported by several decisions of this Court and is therefore well settled and hence cannot be found fault with. However, there are certain special features of this case which need to be taken care of and justice done by invoking the jurisdiction under Article 142 of the Constitution vested in this Court so as to advance the cause of justice."

45. In the case of **Ashok Kumar Sharma and Ors Vs. Chander Shekhar and Anr** reported in **(1997) 4 SCC 18**, the Apex Court has held as under:-

The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement of notification issued/published calling for application constitutes a representation to the public and the authority issuing it is

bound by such representation. It cannot act contrary to it.

46. The Apex Court in the case of **Bishnu Biswas and Ors. vs. Union of India (UOI) and Ors** reported in **(2014) 5 SCC 774** after considering the aforesaid judgment of T. Nadu Computer SC B.Ed. G.T. Welf. Society and Mithilesh Kumar (supra) has held as under:-

"8. This Court has considered the issue involved herein in great detail in Ramesh Kumar v. High Court of Delhi and Anr. MANU/SC/0079/2010 : AIR 2010 SC 3714, and held as under:

11. In Shri Durgacharan Misra v. State of Orissa and Ors. MANU/SC/0627/1987 : AIR 1987 SC 2267, this Court considered the Orissa Judicial Service Rules which did not provide for prescribing the minimum cut-off marks in interview for the purpose of selection. This Court held that in absence of the enabling provision for fixation of minimum marks in interview would amount to amending the Rules itself. While deciding the said case, the Court placed reliance upon its earlier judgments in B.S. Yadav and Ors. v. State of Haryana and Ors. MANU/SC/0409/1980 : AIR 1981 SC 561, P.K. Ramachandra Iyer and Ors. v. Union of India and Ors. MANU/SC/0395/1983 : AIR 1984 SC 541 and Umesh Chandra Shukla v. Union of India and Ors. MANU/SC/0050/1985 : AIR 1985 SC 1351 wherein it had been held that there was no "inherent jurisdiction" of the Selection Committee/Authority to lay down such norms for selection in addition to the procedure prescribed by the Rules. Selection is to be made giving strict adherence to the statutory provisions and if such power i.e. "inherent jurisdiction" is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the Rules is likely to cause irreparable and irreversible harm.

12. Similarly, in K. Manjusree v. State of A.P. MANU/SC/0925/2008 : AIR 2008 SC 1470, this Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible.

13. Thus, the law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce.

9. In Himani Malhotra v. High Court of Delhi MANU/SC/1844/2008 : AIR 2008 SC 2103, this Court has held that it was not permissible for the employer to change the criteria of selection in the midst of selection process. (See also: Tamil Nadu Computer Science B.ed. Graduate Teachers Welfare Society (1) v. Higher Secondary School Computer Teachers Association and Ors. MANU/SC/1158/2009 : (2009) 14 SCC 517; State of Bihar and Ors. v. Mithilesh Kumar MANU/SC/0630/2010 : (2010) 13

SCC 467; and Arunachal Pradesh Public Service Commission and Anr. v. Tage Habung and Ors. MANU/SC/0450/2013 : AIR 2013 SC 1601).

10. In P. Mohanan Pillai v. State of Kerala and Ors. MANU/SC/7165/2007 : AIR 2007 SC 2840, this Court has held as under:

It is now well-settled that ordinarily rules which were prevailing at the time, when the vacancies arose would be adhered to. The qualification must be fixed at that time. The eligibility criteria as also the procedures as was prevailing on the date of vacancy should ordinarily be followed."

47. From the aforesaid judgments of **T. Nadu Computer SC B.Ed. G.T. Welf. Society, Mithilesh Kumar, Bhupinderpal Singh, Ashok Kumar Sharma and Bishnu Biswas (supra)** what can be summarized is that once the selection/recruitment process starts no change can be made in the eligibility conditions after the last date fixed either in terms of the advertisement or in absence thereto, the last date fixed for receipt of applications. The rules which are prevailing at the time of issue of advertisement/guidelines would be considered and amendment in the rules subsequently would not result in change in the eligibility conditions or change in the advertisement.

48. Thus, when the action of the respondents in issuing the revised Government order datd 21.05.2018 is seen in the context of the aforesaid principle of law, it clearly comes out that the said Government order dated 21.05.2018 could not have been issued lowering the qualifying marks, as was also sought to be done by the Government in the case of **T. Nadu Computer SC B.Ed. G.T. Welf. Society (supra)** and thus it is apparent that the respondents erred in proceeding to issue the aforesaid Government order reducing the eligibility marks for the respective category and rule of the game could not have been changed after last date fixed for receipt of applications. No doubt the respondents have also fixed the date of 21.05.2018 for correction of application but the said correction in applications could only be done by those candidates who had applied in pursuance to the advertisement and the guidelines dated 09.01.2018 and thus for all practical purposes, the effective last date would be 17.05.2018 and the Government order dated 21.05.2018 reducing the eligibility marks having been issued subsequent thereto would be invalid.

49. No doubt the issue of change of rule of game has been referred to the larger Bench as is evident from the judgment in the case of **Tej Prakash Pathak (supra)** which referral is still pending but so long as it is not decided otherwise, this Court is bound by the legal authorities operating in the field and are presently law of the land.

50. Even otherwise, a perusal of the judgment of **Tej Prakash Pathak (supra)** would indicate that the Supreme Court was considering the matter that it is a salutary principle not to permit the State or its instrumentalities to tinker with the "rules of game" insofar as the prescription of eligibility criteria is concerned but whether such a principle should be applied in the context of the "rules of the game" stipulating the procedure for selection **more particularly when the change sought is to impose a more rigorous scrutiny for selection** has been referred for an authoritative pronouncement of a

larger bench meaning thereby that where the change is to be imposed is of more rigorous scrutiny for selection, in the view of the Apex Court, requires the authoritative pronouncement by a larger bench. In the present case,the issue involved is not that the State respondents while issuing the Government order dated 21.05.2018 have imposed a more rigorous scrutiny for selection rather a liberalized or reduced marks were sought to be introduced and thus the principles of law as enunciated by the Apex Court, and as referred to above, are being followed by this Court also.

51. Being armed with the aforesaid principles of law as crystallized by the Apex Court in a catena of judgments, the Court now proceeds with the other aspects of the matter.

52. Upon a challenge being raised to the Government order dated 21.05.2018 lowering the eligibility marks, once the last date had already lapsed, this Court through a detailed interim order dated 24.07.2018, after considering the Apex Court judgment in the case of **K. Manjushree and Gopal Krushna Rath (supra)** restrained the respondents from implementing the guidelines issued under the Government order dated 21.05.2018. The said interim order was not interfered with by the Division Bench in the special appeal filed by certain candidates against the said interim order. In the meanwhile, through the Government order dated 08.08.2018, the respondents resolved to comply with the interim order and granted permission to prepare and declare result as per the guidelines dated 09.01.2018 and in pursuance thereof the result was also declared on 13.08.2018 and even the process of issue of appointment letter to the selected candidates started w.e.f 05.09.2018. Considering the subsequent developments, the Government order dated 20.02.2019 was passed withdrawing the Government order dated 21.05.2018.

53. When the reasons contained in the Government order dated 20.02.2019 for withdrawing the Government order dated 21.05.2018 are tested on the touch stone of the aforesaid principles of law, as crystallized by the Apex Court, what the Court finds is that the respondents could not have validly issued the Government order dated 21.05.2018 particularly when the last date fixed for receipt of applications had lapsed on 17.05.2018 and thus the issue of the Government order dated 21.05.2018 revising and lowering the eligibility marks for the candidates was invalid. Once this Court in the case of **Diwakar Singh (supra)** restrained the respondents from implementing the guidelines issued under the Government order dated 21.05.2018 and the selection process was also completed taking into consideration the eligibility marks as prescribed in the guidelines dated 09.01.2018 and the process of issue of appointment letters to the selected candidates also started w.e.f 05.09.2018, consequently it cannot be said that there was any error or infirmity or illegality or arbitrariness or malafides in the Government proceeding to issue the impugned Government order dated 20.02.2019 withdrawing the Government order dated 21.05.2018. Seen in this context, the reasons indicated by the Government in the order dated 20.02.2019 while withdrawing the Government order dated 21.05.2018 cannot be said to be legally unsustainable in the eyes of law, as has been argued by the learned counsels for the petitioners. Even otherwise the

arguments raised on behalf of the petitioners are loaded with pregnant silence over this aspect of the matter that all the candidates including the petitioners had applied by the last date fixed i.e 17.05.2018 knowing fully well the eligibility marks fixed in the guidelines dated 09.01.2018 i.e 45 percent and 40 percent for the respective categories. The said marks were reduced subsequent to the last date fixed i.e 17.05.2018 to 33 percent and 30 percent respectively. Thus, no prejudice was caused to the petitioners and other candidates who had applied fully well knowing the marks as any such reduction subsequent to the last date fixed would obviously not govern the selection process which had already commenced. Thus, in this view of the matter also, it cannot be said that any prejudice was caused to the petitioners and other candidates with the withdrawal of the Government order dated 21.05.2018 reducing the lowered revised marks.

54. The grounds taken by the petitioners that no opportunity of hearing was afforded to them will not and cannot depart from the fact that once the selection process had commenced with the issue of the advertisement dated 08.05.2018 in terms of the guidelines dated 09.01.2018 and the last date fixed for receipt of applications had already come to an end on 17.05.2018 then merely because some Government order was issued revising and lowering the eligibility marks and the said Government order was subsequently withdrawn through the Government order dated 20.02.2019 then whether this Court while exercising powers under Article 226 of Constitution of India is bound to declare the Government order dated 20.02.2019 being in breach of principle of natural justice as void simply on the ground that no opportunity of hearing was afforded to the petitioners, is an issue which is also no longer *res integra* more particularly when the facts of the instant case do not justify exercise of discretion by this Court to interfere and because of the fact that no prejudice has been shown. In this regard, suffice would be to place reliance on the Apex Court judgment in the case of **M.C.Mehta (supra)** wherein the Apex Court has held as under:-

"12. On the above submissions, the following points arise for consideration:

(1) Whether this Court, in exercise of powers under Article 32 (or the High courts, generally under Article 226) is bound to declare an order of government passed in breach of principles of natural justice as void or whether the court can refuse to grant relief on the ground that the facts of the case do not justify exercise of discretion to interfere or because de facto prejudice has not been shown?

(2) Whether the court is not bound under Article 32 (or High Courts under Article 226) to quash an order of government on ground of breach of natural justice if such an action will result in the restoration of an earlier order of government which was also passed in breach of natural justice or which was otherwise illegal?"

15. It is true that, whenever there is a clear violation of principles of natural justice, the Courts can be approached for a declaration that the order is void or for setting aside the same. Here the parties have approached this Court because the orders of the department were consequential to orders of this Court. Question however is whether the Court in exercise of its discretion under Article 32

or Article 226 can refuse to exercise discretion on facts or on the ground that no de facto prejudice is established. On the facts of this case, can this Court not take into consideration the fact that any such declaration regarding the 10.3.1999 order will restore an earlier order dated 30.7.1997 in favour of Bharat Petroleum Corporation which has also been passed without notice to HPCL and that if the order dated 10.3.1999 is set aside as being in breach of natural justice, Bharat Petroleum will be getting two plots rather than one for which it has no right after the passing of the latter order of this Court dated 7.4.98?

16. Courts are not infrequently faced with a dilemma between breach of the rules of natural justice and the Court's discretion to refuse relief even though rules of natural justice have been breached, on the ground that no real prejudice is caused to the affected party.

17. We shall initially refer to two cases where discretion was exercised not to grant relief and the first one was a case where relief was refused even though there was breach of natural justice. The first one is Gadde Venkteswara Rao v. Government of Andhra Pradesh and Ors. MANU/SC/0020/1965 : [1966]2SCR172 . There the Panchayat Samithi, in exercise of its statutory powers passed a resolution on 25.8.1960 to locate a primary health center at Dharmajigudem. Later, it passed another resolution on 29.5.1961 to locate it at Lingapalem. On a representation by villagers of Dharmajigudem, government passed orders on 7.3.1962 setting aside the second resolution dated 29.5,1961 and thereby restoring the earlier resolution dated 25.8.1960. The result was that the health center would continue at Dharmajigudem. Before passing the orders dated 7.3.62, no notice was given to the Panchayat Samithi. This Court traced the said order of the government dated 7.3.1962 to Section 62 of the Act and if that were so, notice to the Samithi under Section 62(1) was mandatory. Later, upon a review petition being filed, government passed another order on 18.4.1963 cancelling its order dated 7.3.62 and accepting the shifting of the primary center to Lingapalem. This was passed without notice to the villagers of Dharmajigudem. This order of the government was challenged unsuccessfully by the villagers of Dharmajigudem in the High Court. On appeal by the said villagers to this Court, it was held that the latter order of the government dated 18.4.1963 suffered from two defects, it was issued by Government without prior show cause notice to the villagers of Dharmajigudem and government had no power of review in respect of government orders passed under Section 62(1). But that there were other facts which disentitled the quashing of the order dated 18.4.63 even though it was passed in breach of principles of natural justice. This Court noticed that the setting aside of the latter order dated. 18.4.63 would restore the earlier order of Government dated 7.3.62 which was also passed without notice to the affected party, namely, the Panchayat Samithi. It would also result in the setting aside of a valid resolution dated 29.5.61 passed by the Panchayat Samithi. This Court refused relief and agreed that the High Court was right in not interfering under Article 226 even if there was violation of natural justice. Subba Rao, J (as he then was) observed (p. 189) as follows:

Both the orders of the government, namely, the order dated March 7, 1962 and that dated April 18, 1963, were not legally passed : the former,

because it was made without giving notice to the Panchayat Samithi and the latter, because the Government had no power under Section 72 of the Act to review an Order made under Section 62 of the Act and also because it did not give notice to representatives of Dharmajigudem village.

His Lordship concluded as follows:

In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the government dated April 18, 1963? If the High Court had quashed the said order, it would have restored an illegal order it would have given the Health center to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case.

18. The above case is clear authority for the proposition that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of the natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of principles of natural justice or is otherwise not in accordance with law"

55. Even otherwise, it is settled proposition of law that if on admitted or indisputable factual position, only one conclusion is possible the Court need not issue a writ merely because there is violation of principle of natural justice **(See M.C.Mehta (supra).** In this regard, the Court may also consider the "Useless formality theory" as enunciated by the Apex Court wherein considering **M.C. Mehta (supra)** the Apex Court in the judgment of **Canara Bank (supra)** has held as under:-

"17. What is known as 'useless formality theory' has received consideration of this Court in M.C. Mehta v. Union of India MANU/SC/0982/1999 : [1999]3SCR1173. It was observed as under:

"Before we go into the final aspect of this contention, we would like to state that case relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed (See Malloch v. Aberdeen Corporation: (1971) 2 All ER 1278, HL) (per Lord Reid and Lord Wilberforce), Glynn v. Keele University: (1971) 2 All ER 89; Cinnamons v. British Airports Authority: (1980) 2 All ER 368, CA) and other cases where such a view has been held. The latest addition to this view is R v. Ealing Magistrates' Court, ex p. Fannaran (1996 (8) Admn. LR 351, 358) (See de Smith, Suppl. P.89 (1998) where Straughton, L.J. held that there must be 'demonstrable beyond doubt' that the result would have been different. Lord Woolf in Lloyd v. McMohan (1987 (1) All ER 1118, CA) has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in McCarthy v. Grant (1959 NZLR 1014) however goes halfway

when it says that (as in the case of bias), it is sufficient for the applicant to show that there is 'real likelihood-not certainty- of prejudice'. On the other hand, Garner Administrative Law (8th Edn. 1996. pp.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge v. Baldwin, Megarry, J. in John v. Rees (1969 (2) All ER 274) stating that there are always 'open and shut cases' and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J has said that the 'useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that 'convenience and justice are often not on speaking terms'. More recently, Lord Bingham has deprecated the 'useless formality theory' in R. v. Chief Constable of the Thames Valley Police Forces, ex p. Cotton (1990 IRLR 344) by giving six reasons (see also his article 'Should Public Law Remedies be Discretionary?" 1991 PL. p.64). A detailed and emphatic criticism of the 'useless formality theory' has been made much earlier in 'Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL.pp.27-63) contending that Malloch (supra) and Glynn (supra) were wrongly decided. Fouke's (Administrative Law, 8th Edn. 1996, p.323), Craig (Administrative Law, 3rd Edn. P.596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. De Smith (5th Edn. 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (Administrative Law, 5th Edn. 1994, pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in State Bank of Patiala v. S.K. Sharma MANU/SC/0438/1996 : (1996)IILLJ296SC, Rajendra Singh v. State of M.P. MANU/SC/0690/1996 : AIR1996SC2736 that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

We do not propose to express any opinion on the correctness or otherwise of the 'useless formality theory' and leave the matter for decision in an appropriate case, inasmuch as the case before us, 'admitted and indisputable' facts show that grant of a writ will be in vain as pointed by Chinnappa Reddy, J."

18. As was observed by this Court we need not to go into 'useless formality theory' in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel

for the appellant unless failure of justice is occasioned or that it would not be in public interest to do so in particular case, this Court may refuse to grant relief to the concerned employee, (see Gadde. Venkateswara Rao v. Govt. of A.P. and Ors. MANU/SC/0020/1965 : [1966]2SCR172. It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. (See Charan Lal Sahu v. Union of India etc. MANU/SC/0285/1990 : AIR1990SC1480

56. The first argument raised on behalf of the petitioners is that as the interim order dated 24.07.2018 in the case of **Diwakar Singh (supra)** was passed considering the judgment of the Apex Court in the case of **K. Manjushree (supra)** which has been held to be *per incuriam* in the subsequent judgment of Apex Court in the case of **Tej Prakash Pathak (supra)** as such, any action which has been taken by the respondents on the basis of the said Government order including the issue of the Government order dated 20.02.2019 would be vitiated in the eyes of law.

57. The said argument, though attractive on the face of it merits to be rejected out rightly inasmuch as firstly the interim order dated 24.07.2018 was not based only on the judgment of the Apex Court in the case of **K.Manjushree (supra)** rather was also passed taking into consideration the judgment of the Apex Court in the case of **Gopal Krushna Rath (supra)** and it is not the case of the petitioners that even **Gopal Krushna Rath (supra)** has been declared to be *per incuriam*. Even otherwise the facts of the case, as have been culled out above, lead to the irresistible conclusion that the subsequent Government order dated 21.05.2018 could not have been validly issued by the respondents and thus once the respondents, considering the interim order of this Court dated 24.07.2018, proceeded with the selection process, declared the result and even appointment orders were issued to the selected candidates, as such there cannot be said to be any infirmity or illegality in the order dated 20.02.2019 by which the earlier Government order dated 21.05.2018 was withdrawn or any illegality in the process which was adopted by the respondents subsequent to the interim order dated 24.07.2018.

58. The other argument on behalf of the petitioners that in terms of Rule 2 (x) the Government possessed the power to determine the minimum marks from time to time and thus even though the selection process had commenced with the issue of the Advertisement dated 08.05.2018 in terms of the guidelines dated 09.01.2018 and despite the last date for receipt of applications having expired on 17.05.2018, the Government order dated 21.05.2018 determining the eligibility marks and lowering them was validly issued in terms of Rule 2 (x) of the Rules 1981, is an argument which is patently fallacious and also merits to be rejected out rightly, the reason being that even though the Government was possessed of such power to determine from time to time the minimum marks yet there has to be cessation to the said powers when the selection process had commenced with the issue of the Advertisement dated

08.05.2018 in terms of the guidelines dated 09.01.2018 whereby the minimum marks had already been **determined** and the last date fixed for receipt of applications had already lapsed. What the petitioners are trying to argue is that the Government has unfettered power to determine the minimum marks from time to time, which if interpreted in the manner the petitioners have sought to argue, would lead to complete chaos as there would be no final determination of the marks at any time whatsoever. Thus, the said argument is also rejected.

59. Another argument on behalf of the petitioners is that the actual process of recruitment would only start after the result of qualifying examination i.e Recruitment, 2018 is declared and once no recruitment was involved, as such it could not be said that once the "Game" had begun, the rules of the game could not be changed. Again the Court is constrained to hold that the said argument is fallacious inasmuch as in terms of the Twentieth Amendment to the Rules, 1981 the Assistant Teacher Recruitment Examination has been brought in for the first time with Rule 2 (w), Rule 2 (x) and Rule 2 (y) being introduced and making passing of Assistant Teacher Recruitment Examination an academic qualification for being appointed on the post of Assistant Master and Assistant Mistress of Junior Basic Schools. Thus, the "Game" which had in fact begun with the issue of the Advertisement dated 08.05.2018 in terms of the guidelines dated 09.01.2018 was with respect to acquisition of the eligibility qualification so as to be declared fit for appointment as Assistant Master and Assistant Mistress of Junior Basic School. Thus, the said argument is also rejected.

60. As regards, the judgment of **Shree Chamundi Mopeds Ltd (supra)** that as this Court had only passed an interim order dated 24.07.2018 and the validity of the Government order dated 21.05.2018 was still to be tested, suffice to state that taking into consideration the factual position which has painstakingly been considered by this Court above, there was no justification for the issue of the Government order dated 21.05.2018 taking into consideration the settled proposition of law in this regard and as such, taking into consideration the "Useless formality theory", this Court does not find any infirmity in the Government order dated 20.02.2019 being issued to withdraw the Government order dated 21.05.2018..

61. The arguments on behalf of the petitioners that the reduced marks have resulted in large number of candidates having qualified and that the selection would not be compromised in terms of Rule 14 (1) (c) (3) (a) of the Twentieth Amendment in Rule, 1981 as in any view of the matter the candidate in the list prepared under Sub Rule (2) in accordance with Clause (a) of Sub Rule (1) of Rule 14 has to be arranged in accordance with the quality points and weightage, again the Court holds that the said argument is patently misconceived for the said large number of candidates could be said to have qualified only by following the Government order dated 21.05.2018 which was issued subsequent to the last date fixed for receipt of applications and taking into consideration the settled proposition of law in this regard, no such orders could have been issued changing the rules of the game after the game had begun considering the last date fixed for receipt of applications i.e 17.05.2018, thus even the said argument is patent fallacious
and is rejected.

62. As regards, the judgment of Apex Court in the case of **Yogesh Yadav**

(supra) that bench mark could be fixed even after examination has been held, suffice to state that in the case of **Yogesh Yadav (supra)** there was no stipulation with regard to fixation of bench mark in the advertisement which was fixed subsequently.

63. In the present case, as already indicated above, the eligibility marks had been prescribed in the Government order dated 09.01.2018 in pursuance to which the Advertisement dated 08.05.2018 had been issued and thus there could not be any change in the eligibility marks subsequent to "Game" having begun.

64. Another ground taken by the petitioners is that once this Court was seized of matter in the case of **Diwakar Singh (supra)** and other connected matters pertaining to the validity of order dated 21.05.2018 the same could not have been withdrawn and in this regard, reliance has been placed on the judgment of the Apex Court in the case of **R. Sathyamoorthy** and **Hemant Vimalnath Narichania and K.S.Bhoopathy (supra).** Suffice to state that once the Government order dated 21.05.2018 was issued lowering the marks which was against the settled principle of law as crystallized by the Apex Court **subsequent** to the Advertisement dated 08.05.2018 in terms of the guidelines dated 09.01.2018 fixing the eligibility marks for the said selection and acquisition of eligibility condition, there could not be any justification for the respondents to have issued the aforesaid Government order dated 21.05.2018. Also, considering the subsequent developments that transpired with the order dated 21.05.2018 being stayed by this Court and the respondents having proceeded with the selection on the basis of the eligibility marks as fixed in the Government order dated 09.01.2018 and having declared the result and having already commenced the process of issue of appointment orders to those persons who have acquired the eligibility of Recruitment, 2018, as such the respondents, taking into consideration the said subsequent developments, were well within their power of withdrawing the order dated 21.05.2018 through the Government order dated 20.02.2019. As such, the judgments of in the case of **R. Sathyamoorthy** and **Hemant Vimalnath Narichania and K.S.Bhoopathy (supra)** are thus distinguishable and would not be applicable in the facts of the present case.

65. As regards, the argument of legitimate expectation of the candidates consequent to lowering of the eligibility marks, the said argument though again attractive on the face of it yet merits to be rejected and is rejected, the reason being that whenever the question of legitimate expectation arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant **(See:- Food Corporation of India Vs. Kamdhenu Cattle Field Industry (1993) 1 SCC 71).** Likewise, however, earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence and that such expectation should be justifiably legitimate and protectable **(See:- Union of India Vs.**

Hindustan Development Corporation (1993) 3 SCC 499).

66. Thus, it is apparent that for a case to be made out on the principle of legitimate expectation, the legitimacy of expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure. In the present case, this Court has held that issue of the Government order dated 21.05.2018 lowering the eligibility marks would run against the settled proposition of law as laid down by the Apex Court and thus there cannot be said to be any sanction of law to the issue of the aforesaid Government order dated 21.05.2018 as also there is no custom by the Government to reduce the eligibility marks after the game had begun neither there is any established procedure followed in regular and natural sequence of the Government lowering the marks after the game had begun. Accordingly, when the arguments of legitimate expectation are tested on the touch stone of the aforesaid principle of law, it clearly comes out that the said argument is patently misconceived and merits to be rejected and is accordingly rejected.

67. A feeble argument raised on behalf of the petitioners is that there are approximately 27713 posts still lying vacant and it would be equitable for this Court to direct the respondents to fill in the remaining vacancies with the relaxed qualifying marks. However, it is settled proposition of law that no mandamus can be issued by the Courts of law to the Government to fill in unfilled vacancies and as such, even the said argument is rejected.

68. Another argument is that in the case of **Rajya Sabha Secretariat and Barot Vijaykumar Balakrishna (supra)** amended modified rules can be considered after the selection process has commenced. In the case of **Barot Vijaykumar Balakrishna (supra)** the cut off marks for viva voice were not specified in the advertisement and in this view of the matter the Apex Court held that there were only two courses open i.e to either carry on with the selection and to complete it without fixing any cut off marks for the viva voice which would be clearly wrong and the other course was to fix the cut off marks for the viva voice and to notify the candidates, which course was followed by the Commission and which did not cause prejudice to any of the candidates. However, in the instant case, the eligibility marks were already fixed at the time when the Recruitment, 2018 commenced and, as such, the said case is distinguishable and would not be applicable in the facts of the present case.

69. As regards the judgment of **Rajya Sabha Secretariat (supra)**, the same was a case in which there was splitting of marks in the interview which had not been communicated to the candidates in advance. The Apex Court held that the Rajya Sabha Secretariat had advertised that the certificates were desirable and the candidates were also required to bring the certificate at the time of the personal interview and that the credit for the same was to be given only if the certificate was accompanied by a declaration by the Institute concerned that the Course done by the candidate was recognized by AICTE or DOEACC. The Apex Court held that once the credit was to be given to those certificates as a part of interview, as such the candidates could not say that splitting of marks in the interview was not communicated to them in advance. Again, the said judgment is distinguishable as the guidelines dated

09.01.2018 clearly specified the eligibility marks for the Recruitment, 2018.

70. As regards the argument on behalf of the petitioners that no valid reasons are forthcoming in the order dated 20.02.2019 to make redundant the Government Order dated 21.05.2018, suffice to state that the order dated 20.02.2019 clearly spells out the reasons as to why the Government Order dated 21.05.2018 is being withdrawn. The Court finds the said reasons to be satisfactory and even otherwise once this Court has itself gone in painstaking details of the facts of the case and even if for the sake of argument it could be said that one or the other reason indicated in the impugned order dated 20.02.2019 is not satisfactory or valid even then considering the "Useless Formality Theory' enunciated by the Apex Court in the case of **M.C. Mehtra (supra)** as well as **Canara Bank (supra)**, there is no occasion for this Court to interfere with the impugned order dated 20.02.2019 taking into consideration the detailed reasons already set forth above.

71. Another argument on behalf of the petitioners that in terms of 22nd amendment in the Rules, 1981, the academic qualification as introduced in Rule 8 by 20th amendment of passing the Assistant Teacher Recruitment Examination was done away with and considering the judgment of the Apex Court in the case of **Anand Kumar Yadav (supra)** for adjustment of Shiksha Mitras by giving them suitable age relaxation and weight-age, the Government order dated 21.05.2018 reducing the eligibility marks was validly issued. Suffice to state that it is settled proposition of law that where a selection process starts on the basis of existing rules and an advertisement has been issued on the basis thereof, it is those rules which will govern the selection notwithstanding the amendment in the rules (See-**Mohd. Raisul Islam and others Vs. Gokul Mohan Hazarika and others (2010) 7 Supreme Court Cases 560**). Hence, the said argument is also rejected.

72. Accordingly, taking into consideration the aforesaid discussion, no case for interference is made out. All the writ petitions are dismissed.

(2020)1ILR 1763

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 6221 of 2019

U.P. Scheduled Caste Finance & Development Corporation Ltd. ...Petitioner
Versus
Surendra Pal Singh & Anr. ...Respondents

Counsel for the Petitioner:
Prakash Kumar Sinha, Akash Sinha

Counsel for the Respondents:
C.S.C., Pawan Kumar Singh, Sanjai Srivastava

A. Service – Disciplinary Enquiry – Model Conduct, Disciplinary and Appeal Rules for Public Undertakings: Rules 33 to 35; Principles of Natural Justice – Regular enquiry has to be conducted and principles of natural justice have to be followed in the disciplinary proceedings by the enquiry officer, which includes an opportunity to the employee to produce his witnesses, examine witnesses of department and an opportunity of being heard. The

punishment order should be reasoned and speaking and must be passed after considering entire material of record. (Para 49, 51 & 53)
It is settled principle that where the procedure for major penalty is initiated then even if disciplinary authority awards minor punishment the enquiry should be completed by adopting the procedure prescribed for major penalty. (Para 52 & 54)

Writ Petition dismissed. (E-4)

Precedent followed: -

1. State of U.P. Vs. Deepak Kumar, 2019(1) AWC 26 (LB) (Para 51 & 54)

Precedent distinguished: -

1. D.H.B.V.N.L. Vidyut Nagar, Hisar Vs. Yashvir Singh Gulia, (2013) 11 SCC 173 (Para 29 & 55)

Present petition challenges validity of order dated 24.09.2018, passed by U.P. State Public Services Tribunal.

(Delivered by Hon'ble Saurabh Lavania,J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. The present writ petition has been filed challenging the validity of the judgment and order dated 24.09.2018 passed by opposite party no.2/U.P. State Public Services Tribunal (in short "Tribunal") in Claim Petition No.1696 of 2016 filed by the Claimant-opposite party no.1, whereby the opposite party no.2 set aside the punishment order dated 05.12.2014 passed by the Managing Director of the petitioner corporation and the appellate order dated 20.06.2016, whereby the appeal of the opposite party no.1 was rejected by the appellate/competent authority.

3. Vide impugned order dated 24.09.2018, the opposite party no.2 has issued direction for payment of entire salary, allowances and consequential benefits in accordance with law from the date of dismissal i.e. 19.09.2000 to 07.01.2010, the date passing of the order 07.01.2010 in Writ Petition No.1582 of 2003, with a further direction to pay back the realized amount to the opposite party no.1 within, 3 months.

4. Vide order dated 05.12.2014 the opposite party no.1 was denied wages w.e.f. 19.09.2000 to 07.01.2010 on the principle of 'No Work, No Pay' and also issued a direction for recovery of Rs.59,800.00 i.e. half of the amount of Rs.1,19,600/- along with NSC interest as was payable on 01.04.1999.

5. Facts of the case, in brief, are that the opposite party no.1 was posted as Assistant Manager at Allahabad in petitioner corporation and for committing financial irregularities, he was served with charge sheet dated 25.08.1999. After serving of the charge sheet, the opposite party no.1 was suspended vide order dated 24.12.1999 and Sri D. Lal, Chief Finance & Accounts Officer was appointed as enquiry officer to conduct the enquiry against the opposite party no.1 with regard to charges, as mentioned in detail in the charge sheet dated 25.08.1999.

6. The enquiry officer conducted the enquiry and submitted its enquiry report on 11.05.2000. The enquiry officer held that the opposite party no.1 guilty of Charge Nos.1, 2, 3, 4, 5 & 6 of the charge sheet dated 25.08.1999 and charge nos. 7 and 8 were found not proved.

7. On 26.07.2000, the disciplinary authority issued show cause notice to the opposite party no.1 and in response to the

same the opposite party no.1 submitted his written representation dated 24.08.2000.

8. The Managing Director of the petitioner corporation after considering the reply of the opposite party no.1 to the show cause notice, enquiry report as well as other material, passed the punishment order dated 19.09.2000.

9. Vide punishment order dated 19.09.2000 the opposite party no.1 was dismissed from the service of petitioner corporation with further punishment of recovery of Rs. 2,54,100.00/- along with interest @ NSC interest.

10. Against the punishment order dated 19.09.2000, the opposite party no.1 filed an Appeal, which was dismissed by the Appellate Authority on 02.01.2003. The order dated 02.01.2003 was communicated to the petitioner vide letter dated 14.01.2003.

11. Feeling aggrieved by the punishment order dated 19.09.2000 and the appellate order dated 02.01.2003, as communicated vide letter dated 14.01.2003, the opposite party no.1 filed the Writ Petition No.1582 (S/S) of 2003. The main reliefs claimed in Writ Petition No.1582 of 2003 by the opposite party no.1 are being quoted hereinunder:-

"Issue a writ, order or direction in the nature of certiorari quashing the impugned judgment and order dated 24.09.2018 passed by O.P. No.2 in Claim Petition No. 1696 of 2016 as contained in Annexure No.1 to this writ petition.

Issue a writ, order or direction in the nature of mandamus restraining the respondents from implementing , executing and operating the impugned, executing and operating the impugned judgment and order dated 24.09.2018 passed by O.P. No.2 in Claim Petition No.1696 of 2016 as contained in Annexure No.1 to this writ petition. "

12. After exchange of pleadings, the Writ Petition No.1582 of 2003 filed by the Opposite Party No.1 was heard and allowed vide judgment and order dated 07.01.2010. Dismissal order dated 19.09.2000 and the Appellate order dated 02.01.2003 passed against the opposite party no.1 by the Managing Director and the Appellate Authority respectively, were quashed. This Court in judgment dated 07.01.2010 also provided that opposite party No.1 will be entitled for all consequential benefits. Further, this Court provided that it will be open to the respondents to proceed with enquiry against the petitioner in accordance with law.

13. Feeling aggrieved by the aforesaid judgment and order dated 07.1.2010, petitioner corporation filed the Special Appeal No.86 of 2010. The said Special Appeal was heard and partly allowed vide judgment and order dated 05.04.2010. The corporation was directed to reinstate the Opposite Party No.1 in services forthwith and pay salary from the date of passing of the judgment and order dated 07.01.2010 in Writ Petition No.1582 of 2003. The judgment dated 05.04.2010 passed in Special Appeal No.86 of 2010 also provides that arrears of salary from the date of passing of the order of dismissal till reinstatement of the respondent will be paid subject to the final outcome of the enquiry.

14. In compliance of the order dated 05.04.2010 passed in Special Appeal

No.86 of 2010 as mentioned hereinabove, the opposite party no.1 was reinstated vide order dated 27.07.2010 and he joined the services and by the same order, petitioner corporation appointed Sri Rakesh Kumar Verma, Chief Finance Accounts Officer as enquiry officer for inquiring the charges, as mentioned in the charge sheet dated 25.08.1999, in accordance with the rules provided by the Rules of the Corporation regarding disciplinary enquiry.

15. The enquiry officer submitted its report after holding the enquiry and found charges nos.1, 2 & 4 of the charge sheet dated 25.08.1999 as proved and charges nos. 3,5,6,7 and 8 were held to be not proved.

16. Vide letter dated 15.11.2011, opposite party no.1 was required to submit his written reply regarding the findings of the enquiry report up to 18.11.2011 and appear personally on 22.11.2011 for explaining and defending the allegations of the proved charges of the enquiry report. The opposite party no.1 sought 15 days time for filing his reply in compliance of the letter dated 15.11.2011 vide his letter dated 18.11.2011 and 15 days time was granted by the Managing Director of the petitioner corporation vide letter dated 24.11.2011. The opposite party no.1 failed to submit any reply to the letter dated 15.11.2011 up to 24.11.2011. However, opposite party no.1 submitted a reply enquiry report vide letter dated 18.12.2011.

17. Further vide letter dated 18.01.2012, the Managing Director required the opposite party no.1 to appear in person on 24.01.2012 for personal hearing. As the Managing Director was too much busy in other matter, the opposite party no.1 was required vide written letter to appear before him for hearing on 31.01.2012. The opposite party no.1 appeared before Managing Director on 31.01.2012 who heard the opposite party no.1.

18. Again on 28.08.2014, the Managing Director issued Show Cause Notice to the opposite party no.1. The Opposite party no1 did not appear before the Managing Director in pursuance of the Show Cause Notice dated 28.08.2014 rather he submitted a detailed written reply dated 01.10.2014.

19. After considering the written reply of the opposite party no.1 the Managing Directer, on 05.12.2014 passed the punishment order and denied the claim of the opposite party no.1 for pay w.e.f. 19.09.2000 to 07.01.2010 on the basis of 'No Work, No Pay' and imposed liability for recovery of Rs. 59,800/- i.e. half of the amount of Rs. 1,19,600/- along with NSC interest on 01.04.1999 to be recovered opposite party no.1.

20. Feeling aggrieved by the punishment order dated 05.12.2014, whereby the opposite party no.1 was denied his claim for pay w.e.f. 19.09.2000 to 07.01.2010 on the basis of principle of 'No Work, No Pay' and directed for recovery of Rs.59,800/- i.e. half of the amount of Rs.1,19,600/- along with NSC interest as on 01.04.1999 from him, the opposite party no.1 preferred appeal before the Appellate Authority on 02.03.2015. The Appellate Authority, on 20.06.2016 rejected the appeal of Opposite party no.1.

21. Feeling aggrieved by the punishment order dated 05.12.2014 and the Appellate Order dated 20.06.2016

passed by the Appellate Authority, the Opposite party no.1 filed the Claim Petition before the opposite party no.2.

22. The petitioner-corporation filed its written statement controverting the contents of the Claim Petition of opposite party no.1 on 07.02.2017.

23. The opposite party no.1 before the Tribunal filed the rejoinder affidavit reiterating the earlier plea taken by him in the claim petition.

24. After exchange of pleadings, the Tribunal heard the matter and allowed the Claim Petition vide impugned judgment and order dated 24.09.2018.

25. Challenging the judgment and order dated 24.09.2018 passed by Tribunal, the present writ petition has been filed.

26. Assailing the impugned order dated 24.09.2018 the learned counsel for the petitioner Sri P.K. Sinha submitted that the Tribunal has considered the case of opposite party no.1 in arbitrary and mechanical manner and interfered in the order before it without considering the facts that the minor punishment as provided under Rule 33 was imposed on the opposite party no.1, as such the regular enquiry was not required and accordingly the principle settled by this Court as well as by the Hon'ble Apex Court with regard to holding the regular enquiry by fixing date, time and place for proving the charges as well as documents relied upon in the enqiury proceeding would not apply and the Tribunal ignore this aspect of the case and after applying principle of holding regular enqiury interfered in the matter in issue.

27. Sri P.K.Sinha, learned counsel for the petitioner submitted that the charge sheet was given for imposing major punishment, but ultimately the minor punishment provided under Rule 33 of the Rules was given and as such the principles which have considered by the Tribunal, ought not to have been considered by the Tribunal in the instant case.

28. Sri P.K.Sinha, learned counsel for the petitioner while assailing the impugned judgment dated 24.09.2018 passed by the Tribunal mainly pressed the ground related to the enquiry procedure.

29. In support of his arguments Sri P.K. Sinha, learned counsel for the petitioner, placed the reliance on the judgment passed in the case of ***D.H.B.V.N.L. Vidyut Nagar, Hisar Vs. Yashvir Singh Gulia reported in (2013) 11 SCC 173.*** Prayer is to allow the writ petition.

30. Per contra, learned counsel for the opposite party no.1, Sri Sanjay Srivastava, vehementaly argued that the charge sheet dated 25.08.1999 for awarding major punishment was issued to the opposite party no.1 and thereafter he was dismissed on 19.09.2000 and thereafter the appeal filed against the order dated 19.09.2000 was also dismissed vide order dated 14.01.2003 passed by the appellate authority and both the orders were challenged before this Court in the Writ Petition No.1582 of 2003, which was allowed on 07.01.2010 the grounds to the effect that the orders were passed in violation of principles of natural justice and were non-speaking and therefore in the judgment dated 05.04.2010 passed by Division Bench of this Court in Special Appeal no.86 of 2010 the judgment passed

by the Single Judge of this Court was interfered only with regard to payment of back wages.

31. Further submitted that from the admitted facts of the case it is crystal clear that the proceedings vide charge sheet dated 25.08.1999 were initiated for awarding the major punishment and the major punishment can only be awarded as per the procedure prescribed for awarding major penalties under the Rule 35 of the Rules and as well as keeping in view the settled legal proposition on the issue of holding regular departmental enquiry and if the enquiry is conducted in violation of the same, it is liable to be interfered.

32. Further submitted that after holding regular enquiry, the competent authority for imposing the punishment can impose a minor punishment though the proceedings were initiated for awarding the major punishment but if the process has been initiated for holding the enquiry for awarding major punishment then it has to be followed as per the settled principles as well as the Rules 35 of the Rules applicable in the corporation and without following the procedure prescribed for holding the regular enquiry, if minor punishment is awarded then in that circumstances it is liable to be interfered, on the ground of not holding proper enquiry as per Rules.

33. It is stated that keeping in view the facts of the case as well as settled proposition of law with regard to issues involved in the present case the writ petition is liable to be dismissed.

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

35. The Claim Petition for challenging the order dated 05.12.2014 and appellate order dated 20.06.2016 was preferred on the grounds to the effect that the inquiry officer did not conduct the enquiry, as per the settled principles for holding regular enquiry and Rules applicable in the corporation for conducting the regular enquiry. In the inquiry proceedings no date, time and place was fixed by the enquiry officer for holding the regular enquiry nor any witness was examined for proving the charges. Imposing punishment of recovery of Rs.2,59,800/- is in violation of Article 14 of the Constitution of India as the District Manager was the competent authority with regard to disbursement of loan and the petitioner in fact was not the sanctioning authority of loan nor he was responsible in any manner as, he was entitled only for disbursement of loan. As per the judgment passed in Special Appeal No.86 of 2010 dated 05.04.2010, the period from the date of dismissal shall not be treated as break in service and shall be counted for the purpose of service benefits. Applying the principle of 'No Work, No Pay' in whimsical manner cannot be imposed upon employee. In the present case, the same is without following the proper procedure. Earlier dismissal order was quashed vide order judgment and order dated 19.09.2000 on account of illegal order. In the facts of the case, the principle of 'No Work, No Pay' will not be applicable.

36. It appears from para nos.12, 19, 21, and 22 that in the said paragraphs of the written Statement/Counter affidavit filed before the Tribunal, the petitioner Corporation has not specifically stated that the enquiry officer conducted the enquiry as per the Rules applicable in the

corporation and during the enquiry, the date, time and place was fixed for recording oral evidence in relation to proving of charges as well as documents relied upon for proving the charges against the opposite party no.1.

37. Admittedly, after passing the order dated 05.04.2010 in the Special Appeal No.86 of 2010 on the same charges i.e. charge sheet dated 25.08.1999 the enquiry was conducted by the enquiry officer, as mentioned in para 15 of the writ petition and thereafter the enquiry officer submitted the enquiry report dated 18.10.2011. The show cause notice was issued, to which opposite party no.1 submitted his reply dated 18.12.2011 and after considering the reply of the petitioner the non-speaking order of punishment dated 05.12.2014 was passed. After the order of punishment dated 05.12.2010, opposite party no.1 file the appeal, which was also dismissed vide order dated 20.06.2016.

38. After exchange of pleadings, the Tribunal heard the matter and allowed the Claim Petition vide impugned judgment and order dated 24.09.2018. The relevant portion of the impugned judgment and order dated 24.09.2018 is quoted below for ready reference.

"इस तरह उपरोक्त विवेचना के आधार पर यह स्पष्ट है कि प्रकरण में जांच की कार्यवाही उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 के प्राविधानों के अनुसार नहीं हुई है। जांच अधिकारी द्वारा याची को सुनवाई हेतु समय, स्थान व तिथि नियत नहीं किया गया और न ही किसी साक्षी का बयान लिया गया। इसके अतिरिक्त याची को मौखिक सुनवाई का अवसर भी प्रदान नहीं किया गया और केवल मौके पर जाकर पूछताछ करके यह निष्कर्ष निकाला कि याची द्वारा अनियमतता की गई जबकि जांच अधिकारी ने स्वयं स्वीकार किया है कि गलत लाभार्थीयों से वसूली की जा रही है। यह भी स्पष्ट है कि गैर अनुसूचित जाति के जिन लोगों ने फर्जी जाति प्रमाण पत्र दाखिल किया था उनके विरूद्ध प्रथम सूचना रिपोर्ट दर्ज की गई तथा वसूली की कार्यवाही चल रही है। जांच आख्या में इस बात का कोई साक्ष्य नहीं है कि याची ने जानबूझकर गैर अनुसूचित जाति के लोगों को ऋण दिया क्योंकि लाभार्थियों द्वारा जो जाति प्रमाण पत्र दाखिल किया गया उनको सही मानते हुए योजना के अन्तर्गत उन्हें लाभ दिया गया तथा यह पता चलने पर कि वह प्रमाण पत्र फर्जी है उनके विरूद्ध एफ0आई0आर0 दर्ज कराई गयी तथा अपराधिक वाद दाखिल किया गया। जांच अधिकारी ने उपरोक्त तथ्यों पर विचार नहीं किया और यह निष्कर्ष निकाला कि श्री एस0पी0सिंह अकेले उत्तरदायी नहीं है बल्कि तत्कालीन जिला प्रबंधक श्री श्रीनिवास त्रिवेदी भी संयुक्त रूप से उत्तरदायी हैं। मेरे विचार से जांच अधिकारी द्वारा की गई जांच कार्यवाही उत्तर प्रदेश सराकरी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 के प्राविधानों के अन्तर्गत नहीं है अतः जांच अधिकारी द्वारा की गई जांच माननीय उच्च न्यायालय द्वारा दिये गये निर्देशों के अनुसार न होने एवं नियम विरूद्ध होने के कारण पूर्णतः दूषित हो जाती है और दूषित जांच आख्या के आधार पर पारित दण्डादेश हमारे विचार से स्वतः निरस्त होने योग्य है।

इसके अतिरिक्त दण्डाधिकारी भी याची द्वारा दिये गये अभ्यावेदन पर कोई सम्यक विवेचन नहीं किया और केवल जांच अधिकारी द्वारा दी गई जांच आख्या को सही मानते हुए याची को रूपये 1,19,600–00 का 1/2 अर्थात रू0 59,800/– दुरूपयोग/व्यपहरण के लिए उत्तरदायी माना है। जबकि इस बात का कोई साक्ष्य नहीं है कि याची द्वारा कोई दुरूपयोग/व्यपहरण किया गया। याची ने यह स्पष्ट रूप से कहा है कि जिन लाभार्थियों ने गलत प्रमाण पत्र लगाकर लाभ पाया था उनसे वसूली कार्यवाही चल रही है। ऐसी दशा में मेरे विचार से प्रश्नगत आदेश तर्कसंगत नहीं हैं। याची को जिन तीन आरोपों के अन्तर्गत विभाग को क्षति पहुंचाने का दोषी पाया गया है वह जांच अधिकारी की रिपोर्ट से साबित नहीं होता है बल्कि जांच अधिकारी ने बिना किसी साक्ष्य के केवल संभावनाओं के आधार पर याची को विभाग को

क्षति पहुंचाने का दोषी पाया है और दण्डाधिकारी ने भी केवल जांच आख्या को सही मानते हुए याची के विरूद्ध आलोच्य आदेश पारित किया है जो मेरे विचार से तर्कसंगत व मुखरित व सकारण आदेश नहीं है। मुखरित व सकारण आदेश के संबंध में माननीय उच्चतम न्यायालय द्वारा राजकुमार मेहरोत्रा बनाम बिहार सरकार व अन्य 2006 सुप्रीम कोर्ट केसेज, एल0एण्ड0एस0, 679 में पारित निर्णय में दी गई व्यवस्था उल्लेखनीय है जिसमें निम्नलिखित सिद्धान्त प्रतिपादित किया है:–

"Without going into other issues raised, we are of the view that the impugned order of the respondent authority imposing punishment on the appellant can not be sustained. Even if we are assume that Rule 55-A which pertains to minor punishment was applicable and not Rule 55 which relates to major punishments nevertheless Rule 55-A requires that the punishment prescribed therein can not be passed unless representation made pursuant to the show-cause notice, has been taken into consideration before the order is passed. There is nothing in the impugned order which shows that any of the several issues raised by the appellant in his answer to the show-cause notice where, in fact, considered. No reasons has been given by the respondent authority for holding that the charges were proved except for the ipse dixit of the disciplinary authority. The order, therefore, can not be sustained and must be and is set aside.""

इस उपरोक्त विवचेना के आधार पर यह स्पष्ट है कि प्रश्नगत आदेश मु खरित व तर्कसंगत आदेश नहीं है तथा मा0 उच्च न्यायालय द्वारा पूर्व जांच के संबंध में विवेचित की गई त्रुटियों को दूर नहीं किया गया बल्कि बिना किसी नियम का पालन करते हुए जांच अधिकारी ने जांच आख्या प्रस्तुत की जो निरस्त होने योग्य है। याची चूंकि सेवा निवृत्त हो गया है इसलिए पुनः किसी जांच की आवश्यकता प्रतीत नहीं होती । इस तरह याची के विरूद्ध राजकीय क्षति हेतु जो वसूली आदेश पारित किया गया है वह निरस्त होने योग्य है।"

प्रश्नगत आदेश में याची को डिसमिसल आदेश दिनांक 19.09.2000 से मा0 न्यायालय द्वारा पारित आदेश दिनांक 07.01.2010 तक के वेतन एवं भत्ते आरोपों में दोषी पाये जाने पर "नो वर्क नो पे" के प्रतिपादित सिद्धांत के आधार पर देय न होने का भी आदेश पारित किया गया है। इस सम्बन्ध में यह उल्लेखनीय है कि याची के बर्खास्तगी आदेश को माननीय उच्च न्यायालय द्वारा निर्णय/आदेश दिनांकित 07.01.2010 द्वारा निरस्त करते हुए उसे समस्त पारिणामिक सेवा लाभ प्रदान करने का आदेश पारित किया। माननीय उच्च न्यायालय के उक्त निर्णय दिनांकित 07.01.2010 के विरूद्ध शासन द्वारा अपील दाखिल की गयी जिसे माननीय न्यायालय द्वारा आदेश दिनांकित 05.04.2010 द्वारा निस्तारित किया गया जिसमें याची को सेवा में तत्काल पुर्नस्थापित करने तथा उसे निर्णय दिनांकित 07.01.2010 से वेतन दिये जाने का आदेश दिया गया। माननीय उच्च न्यायालय ने यह भी आदेश दिया कि याची के सेवा से बर्खास्त किये जाने तथा उसे पुर्नस्थापित किये जाने के बीच की अवधि का वेतन उसके विरूद्ध जांच के आधार पर निर्णित होगा। उपरोक्त विवेचन से स्पष्ट को चुका है कि याची के विरूद्ध की गयी जांच की कार्यवाही प्राकृतिक न्याय के सिद्धांतों के विपरीत होने एवं उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 के प्राविधानों के अनुसार न होने के कारण पूर्णतः त्रुटिपूर्ण है। साथ ही केवल इस आधार पर कि याची को जांच कार्यवाही में दोषी पाया गया है विपक्षीगण ने "नो वर्क नो पे" के प्रतिपादित सिद्धांत के आधार पर उसे बर्खास्तगी आदेश दिनांक 19.09.2000 से मा0 न्यायालय द्वारा पारित आदेश दिनांक 07.01.2010 तक के वेतन एवं भत्ते न दिये जाने का आदेश पारित किया है जबकि माननीय उच्च न्यायालय के द्वारा पारित आदेश दिनांकित 05.04.2010 के आधार पर याची की इस अवधि की सेवा में निरन्तरता समस्त सेवा लाभ के लिये मानी जायेगी। जहां तक इस अवधि के वेतन भत्ते का सम्बन्ध है चूंकि याची लगाये गये आरोप के अन्तर्गत दोषी नहीं है एवं याची की सेवा में निरन्तरता समस्त सेवा लाभ के लिये मानी जायेगी इसलिए "नो वर्क नो पे" सिद्धांत वर्तमान मामले में विधि सम्मत नहीं है। अतः मेरे विचार से

याची डिसमिसल आदेश दिनांक 19.09.2000 से मा0 न्यायालय द्वारा पारित आदेश दिनांक 07.01. 2010 तक के वेतन एवं भत्ते पाने का अधिकारी है। इस सम्बन्ध में माननीय उच्चतम न्यायालय द्वारा "जंजम वि ज्ञमतंसं दक व्जीमते अेण म्ज्ञण्टींतंद च्पससंप ;2007द्ध6 "नचतमउम ब्वनतज बॅमे 524 में दी गयी व्यवस्था उल्लेखनीय है जो निम्नवत् हैः–

"Service Law-Back-Held, the principle of 'No work, No Pay' cannot be accepted as a rule of thumb- There are exceptions where courts have granted monetary benefits from back date also-Full back wages in certain circumstances may be justified."

इसी प्रकार माननीय उच्चतम न्यायालय द्वारा Deepali Gundu Serwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.E.D.) and others (2014)2 Supreme Court Cases (L& S) 184, (2013) 10 Supreme Court Cases 324 में यह कहा गया है "Single Judge committed grave error by interfering with Tribunal's order for payment of back wages, ignoring that charges levelled against appellant where frivolous and inquiry was held in gross violation of the rules of natural justice-Hence, order of single judge set aside-Tribunal's order, resorted-Supreme Court directing management to pay full back wages to appellant.

(e) Principles reiterated-reinstatement entitles such employee to claim full back wages-Denial of back wages would amount to indirectly punishing the employee and rewarding the employer by relieving him of the obligation to pay back wages-Where employer wants to deny back wages or contest the employee's entitlement to get consequential benefits, employer has to plead and prove that employee was gainfully employed during the intervening period.

उपरोक्त विधि व्यवस्था के प्रकाश में यह स्पष्ट है कि याची के विरूद्ध लगाये गये आरोप कि उसके द्वारा कोई अनुशासनहीनता की गयी अथवा जान बूझकर गलत लोगो को ऋण दिया गया जिससे राजकीय क्षति हुई, जांच के बाद साबित नही होते हैं। ऐसी दशा में जबकि माननीय उच्च न्यायालय द्वारा रिट याचिका में यह स्पष्ट रूप से निर्देश दिया गया है कि याची के सेवा से बाहर रहने की अवधि को ब्रेक इन सर्विस न माना जाय और उसकी सेवा की निरन्तरता सेवा लाभ के लिये मानी जायेगी याची समस्त सेवा लाभ की निरन्तरता सेवा लाभ के लिये मानी जायेगी याची समस्त सेवा लाभ पाने का अधिकारी है। जहां तक याची की सेवा से बर्खास्तगी व पुर्नस्थापन के बीच की अवधि के वेतन भत्ते का सम्बन्ध है माननीय उच्च न्यायालय ने स्पष्ट कहा है कि यह जांच के अंतिम परिणाम के आधार पर निर्णित किया जायेगा। परन्तु दण्डाधिकारी ने इस सम्बन्ध में कोई तर्क संगत आदेश पारित नहीं किया और यह भी स्पष्ट हो चुका है कि याची किसी आरोप के लिये दोषी नहीं है, इसलिये उसके विरूद्ध "नो वर्क नो पे" के सिद्धांत के आधार वेतन न दिये जाने सम्बन्धी पारित आदेश विधि सम्मत नहीं है क्योंकि याची इस बीच कार्य करने के लिये तत्पर था। यह सेवा योजक का दायित्व है कि वह सिद्ध करे कि इस अवधि में किसी गेनपूर्ण सेवा में रहा। इस सम्बन्ध मे लिखित विवेचन में कोई कथन नहीं किया गया है। ऐसी दशा में "नो वर्क नो पे" के सिद्धांत पर याची को वेतन न दिये जाने सम्बन्धी पारित आदेश निरस्त होने योग्य है और याची इस अवधि के समस्त सेवा लाभ व वेतन प्राप्त करने का अधिकारी है। तद्नुसार प्रश्नगत आदेश व अपीलीय आदेश निरस्त होने योग्य है तथा याचिका स्वीकार किये जाने योग्य है।"

39. On the issue of holding the proper regular enquiry/disciplinary proceedings, the Tribunal recorded specific finding that the enquiry officer has not taken note of reply submitted by the opposite party no.1 during the enquiry before him and has also recorded a finding that during the enquiry proceedings, no date, time and place was fixed for recording oral evidence. The Tribunal also taken note of the factual aspect of the case. Further, while allowing the claim petition the Tribunal also considered that the order

of punishment dated 5.12.2014, is not reasoned and speaking order.

40. The Tribunal after considering the age of the claimant-respondent (63 years), as well as the facts of the present case also given a finding that the matter should not be remanded back for holding enquiry afresh and the order of punishment is liable to be set aside. Thereafter Tribunal held that the punishment order is liable to be set aside.

41. On the aspect of applying the principle of 'No Work, No Pay' for the period w.e.f. 19.09.2000 till 07.01.2010, the Tribunal considering the facts to the effect that the earlier punishment order was challenged before this Court and on account of procedural regularity, the punishment order was interfered and also considered the judgment dated 07.01.2010 and 05.04.2010 and thereafter held that the period w.e.f. order of punishment dated 5.12.2000 till 07.01.2010, the date of order passed by this Court, shall not be treated as break in service but should be counted for the purpose of service benefits. On this aspect the Tribunal also considering the finding given by it in the impugned judgment to the effect that the enquiry proceedings were held in violation of principles of natural justice. The Tribunal also considering the principle settled by the Honb'le Apex Court on the issue of applying the principle of 'No Work, No Pay'. The Tribunal came to the conclusion that the principle of 'No Work, No Pay' was wrongly applied in this case and interfered in the order dated 05.12.2014 and the appellate order dated 20.08.2016.

42. Admittedly, the present litigation is second round of litigation. In earlier record of litigation, the enquiry proceedings initiated vide charge sheet dated 25.08.1999 the petitioner was dismissed from service of the corporation vide order dated 19.09.2000, which was challenged before the appellate authority and the same was also dismissed vide order dated 02.01.2003. Both the orders were challenged before this Court by the Writ Petition No.1582 of 2003 and this Court interfered in the orders vide judgment and order darted 07.01.2010. The interference was made on the grounds to the effect that the enquiry was conducted in violation of principle of natural justice. The judgment dated 07.01.2010 was challenged before the division bench of this Court in Special Appeal No.86 of 2010 and order of Single Judge was modified in relation to the payment of arrears and salary vide judgment dated 05.04.2010.

43. Pursuant to the orders passed by this Court in earlier record of litigation enquiry afresh was initiated. No fresh charge sheet was issued after the judgment dated 5.4.2010 passed in the Special Appeal no. 86 of 2010. In fact fresh enquiry proceedings were carried out on the basis of allegations/charges mentioned in the charge sheet dated 25.08.1999, which was issued for awarding major punishment and the same was awarded.

44. From the aforesaid, it is crystal clear that the enquiry proceedings were initiated by issuing the charge sheet dated 25.08.1999 for awarding the major punishment under Rule 35 of the Rules.

45. On the basis of the conclusion arrived by this Court that in fact the proceedings were initiated for awarding the punishment under Rule 35 of the Rules which relates to awarding the major

penalties, we would like to quote the relevant Rules i.e. Rule 33 to Rule 35 of Model Conduct, Disciplinary and Appeal Rules for Public Undertakings, which is part of Service Rules for Employers of U.P. Schedule Castes, Finance & Development Corporation Ltd. (in short "Model Conduct Rules"). It is for considering the findings of Tribunal on the issue of holding regular enquiry.

46. On the findings of the Tribunal which has been assailed by the petitioner, on the issues of holding the proper regular enquiry, we have considered the U.P. Government Servants (Discipline & Appeal) Rules, 1999 (in short "Rules 1999") and Model Conduct Rules. We find that Model Conduct Rules are applicable.

47. For the purposes of adjudication for present case, we would like to refer the relevant Rules of the Model Conduct Rules, the same on reproduction reads as under:-

Penalties:-

33. The following Penalties may, for good and sufficient reasons and as hereinafter provided, be imposed upon and employee.

Minor Penalties:-

(a) Censure;

(b) Withholding of increments of pay with or without cumulative effect;

(c) Withholding of promotion;

(d) Recovery from pay or such other amount as may be due to him of the whole or part of any pecuniary less caused to the Corporation/Company be negligence or breach or orders.

Major Penalties:-

(e) Reduction to lower grade or post, or to lower stage in a time scale;

(f) Removal from service which shall not be a disqualification for future employment;

(g) Dismissal;

The following shall not amount to a penalty within the meaning of this rule.

(1) Withholding of increment of an employee on account of his work being found unsatisfactory of not being of the required standard, of for failure to pass a prescribed or examination;

(2) Stoppage of an employee at the efficiency bar in a time scale. On the ground, of his unfitness to cross the bar;

(3) Non-promotion whether in an officiating capacity or otherwise, of an employee, to a higher post for which he may be eligible but for which he has found unsuitable after consideration of his case; Reversion to a lower grade or post, of an employee officiating in a higher grade or post, on the ground that he is considered, after trial, to be unsuitable for such higher grade or post, or on administrative grounds unconnected with his conduct;

(4) Reversion to his previous grade or post, of an employee appointed on probation to another grade or post during or at the end of the period of probation in accordance with the terms of his appointment;

(5) termination of service;

(a) of an employee appointed on probation, during or at the end of the period of probation, in accordance with the terms of his appointment;

(b) of an employee appointed in temporary capacity otherwise than under a contract or agreement, on the expiration of the period for which he was appointed, or earlier in accordance with the terms of his appointment.

(c) of an employee appointed under a contract of agreement, in

accordance with the terms of such contract or agreement; and

(d) of any employee on reduction of establishment.

Disciplinary Authority:-

34. The Disciplinary Authority, as specified in the schedule, or any authority empowered in this behalf by the board may impose any of the penalties specified in rule 33 on any employee.

Procedure imposing major penalties:-

"Rule/Clause 35 (1) No order imposing any of the major penalties specified in Clauses (e), (f) and (g) of Rule 33 shall be made except after an inquiry is held in accordance with this rule.

2. Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehavior against an employee, it may itself enquire into, or appoint any public servant (hereinafter called the inquiring authority) to inquire into the truth thereof.

3. Where it is proposed to hold an inquiry, disciplinary authority shall frame definite charges on the basis of the allegations against the employee. The charges, together with a statement of the allegations, on which they are based, a list of document by which and a list of witnesses by whom, the articles of charge are proposed to be sustained, shall be communicated in writing to the employee, who shall be required to submit within such time as may be specified by the Disciplinary Authority (not exceeding 15 days), a written statement whether he admits or denies any of or all the articles of charges.

Explanation--It will not be necessary to show the documents listed with the charge-sheet or any other document to the employee at this stage.

4. On receipt of the written statement of the employee, or if no such statement is received within the time specified, an enquiry may he held by the Disciplinary Authority itself, or by any other public servant appointed as an Inquiring Authority under Sub-clause (2) : Provided that it may not be necessary to hold an enquiry in respect of the charges admitted by the employee in his written statement. The disciplinary authority shall, however, record its findings on each such charge.

(5) Where the disciplinary authority itself inquires or appoints an inquiring authority for holding an inquiry, it may, by an order appoint a public servant to be known as the 'Presenting Officer' to present on its behalf the case in support of the articles of charge.

(6) The employee may take the assistance of any other public servant but may not engage a legal practitioner for the purpose.

(7) On the date fixed by the inquiring authority, the employee shall appear before the Inquiring Authority at the time, place and date specified in the notice. The Inquiring Authority shall ask the employee whether he pleads guilty to any of the articles of charge the inquiring authority shall record the plea, sign the record and obtain the signature of the employee concerned thereon. The inquiring Authority shall return a finding of guilt in respect of those articles of charge to which the employee concerned pleads guilty.

(8) If the employee does not plead guilty, the inquiring authority shall adjourn the case to a later date not in exceeding thirty days after recording an order that the employee may for the purpose of preparing his defence :-

(i) inspect the document listed with the charge-sheet

(ii) submit a list of additional documents and witnesses that he wants to examine ; and

(iii) be supplied with the copies of the statements of witnesses, if any listed the charge-sheet.

Note:-Relevancy of the additional documents and the witnesses referred to in sub-clause D (ii) above will have to be given by the employee concerned and the documents and the witnesses shall be summoned if the Inquiring Authority is satisfied about their relevance to the charges, under inquiry.

(9) The Inquiring Authority shall ask the authority in whose custody or possession the documents are kept, for the production of the documents on such date as may be specified.

(10) The authority in whose custody or possession the requisitioned documents are, shall arrange to produce the same before the inquiring authority on the date place and time specified in the requisition.

Provided that the authority having the custody or possession of the requisitioned documents may claim privilege if the production of such documents will be against the public interest or the interest of the Corporation/Company. In that event, it shall inform the inquiring authority accordingly.

(11) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer and may be cross-examined by or on behalf of the employee. The Presenting Officer shall be entitled to re- examine the witnesses on any points on which they have been cross-examined, but not on a new matter, without the leave of the Inquiring Authority. The Inquiring Authority may also put such questions to the witnesses as it thinks fit.

(12) Before the close of the prosecution case, the inquiring authority may, in its discretion, allow Presenting Officer to produce evidence not included in the charge-sheet or may itself call for new evidence or recall or re-examine any witness. In such case the employee shall be given opportunity to inspect the documentary evidence before it is taken on record ; or to cross-examine a witness, who has been so summoned.

(13) When the case for the disciplinary authority is closed, the employee may be required to state his defence, orally or in writing, as he may refer. If the defence is made orally, it shall be recorded and the employee shall be required to sign the record. In either case a copy of the statement of defence shall be given to the Presenting Officer, if any, appointed.

(14) The evidence on behalf of the employee shall then be produced. The employee may examine himself or take the assistance of another employee as given in rule 32 (6) to examine on his behalf if he so prefers.

The witnesses produced by the employee shall then be examined and shall be liable to cross-examination, re-examination and examination by the inquiring authority according to the provision applicable to the witnesses for the disciplinary authority.

(15) The Inquiring Authority may, after the employee closes his case, and shall, if the employee has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purposes of

enabling the employee to explain any circumstances appearing in the evidence against him.

(16) After the completion of the production of the evidence, the employee and the Presenting Officer may file written briefs of their respective cases within 15 days of the date of completion of the production of evidence.

(17) If the employee does not submit the written statement of defence referred to in sub-rule (3) or before the date specified for the purpose or does not appear in person, or through the assisting offer or otherwise fails or refuses to comply with any of the provisions of those rules, the inquiring authority may hold the enquiry expert.

(18) Whenever any inquiring authority, after having heard and recorded the whole or any part of the evidence in an inquiry ceases to exercise jurisdiction therein, and is succeeded by another inquiry authority which has and which exercise, such jurisdiction, the inquiring authority so succeeding may act on the evidence so recorded by its predecessor, or partly recorded by its predecessor and partly recorded by itself.

Provided that if the succeeding inquiring authority is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, it may recall, examine, cross-examine and re-examine and such witnesses as here in before provided.

(19) (i) After the conclusion of the enquiry, report shall be prepared and it shall contain -

(a) a gist of the articles of charge and the statement of the imputations of misconduct or misbehavior ;

(b) a gist of the defence of the employee in respect of each article of charge ;

(c) an assessment of the evidence in respect of each article of charge ;

(d) the findings of each article of charge and the reasons therefore.

Explanation :- If in the opinion of the inquiring authority the proceedings of the inquiry establish any article of charge different from the original articles of the charge, if any record its findings on such article of charge ;

Provided that the findings on such articles of charge shall not be recorded unless the employee has either admitted the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such article of charge.

(ii) The enquiring authority, where it is not itself the disciplinary authority, shall forward to the disciplinary authority the records of inquiry which shall include :-

(a) The report of the inquiry prepared by it under sub-clause (i) above ;

(b) The written statement of defence, if any submitted by the employee referred to in sub-rule (13) ;

(c) The oral and documentary evidence produced in the course of the inquiry ;

(d) Written briefs referred to in sub-rule (16), if any ; and

(e) The orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry."

48. On consideration of Rules, 1999 and above quoted Rules, we find that

provision of Rules of 1999 are similar to above quoted provisions.

49. The above quoted provisions speak that regular enquiry has to be conducted and principles of natural justice have to be followed in the disciplinary proceedings by the enquiry officer, which includes an opportunity to the employee to examine the witnesses of department, those are required to prove the charges and documents relied upon in the charge sheet, as also an opportunity to produce his witnesses in his defence and an opportunity of being heard in person.

50. In what manner the principles of natural justice have to be followed in the departmental/disciplinary proceedings has already explained by the Apex Court as well as by this Court.

51. The Division Bench of this Court, after considering the catena of judgments on the issue of holding the disciplinary enquiry i.e. a regular enquiry, in the judgment dated 28.11.2018 passed in Writ Petition No.34093 (S/B) of 2018 (State of U.P. v. Deepak Kumar) reported in 2019(1) AWC 26 (LB) has observed as under:-

"It is settled by the catena of judgments that it is the dutyof Enquiry Officer to hold "Regular Enquiry'. Regular enquiry means that after reply to the charge-sheet the Enquiry Officer must record oral evidence with an opportunity to the delinquent employee to cross-examine the witnesses and thereafter opportunity should be given to the delinquent employee to adduce his evidence in defence. The opportunity of personal hearing should also be given/awarded to the delinquent employee. Even if the charged employee does not participate/co-operate in the enquiry, it shall be incumbent upon the Enquiry Officer to proceed ex-parte by recording oral evidence. For regular enquiry, it is incumbent upon the Enquiry Officer to fix date, time and place for examination and cross-11S.A. No. 175 of 2005 examination of witnesses for the purposes of proving of charges and documents, relied upon and opportunity to delinquent employee should also be given to produce his witness by fixing date, time and place. After completion of enquiry the Enquiry Officer is required to submit its report,stating therein all the relevant facts, evidence and statement of findings on each charge and reasons thereof,and thereafter, prior to imposing any punishment, the copy of the report should be provided to charged officer for the purposes of submission of his reply on the same. The punishment order should be reasoned and speaking and must be passed after considering entire material on record.(vide: Jagdish Prasad Vs. State of U.P. 1990 (8) LCD 486;Avatar Singh Vs. State of U.P. 1998 (16) LCD 199; Town Area Committee, Jalalabad Vs. Jagdish Prasad 1979 Vol. ISCC 60; Managing Director, U.P. Welfare Housing Corporation Vs. Vijay Narain Bajpai 1980 Vol. 3 SCC459; State of U.P. Vs. Shatrughan Lal 1998 (6) SCC 651;Chandrama Tewari Vs. Union of India and others AIR1998 SC 117; Anil Kumar Vs. Presiding Officer and others AIR 1985 SC 1121; Radhey Kant Khare Vs. U.P. Co-operative Sugar Factories 2003 (21) LCD 610; Roop Singh Negi Vs. Punjab National Bank and others (2009) 2SCC 570; M.M. Siddiqui Vs. State of U.P. and others 2015(33) LCD 836; Moti Ram Vs. State of U.P. and others 2013(31) LCD 1319; Kaptan Singh Vs. State of U.P. and others2014 (4) ALJ 440."

52. Taking into account the relevant provision i.e. Rule 35 of Model Conduct Rules and principles settled on the issue of holding of departmental enquiry, we find from the record, particularly paras 4(n), 4(o), 4(p), 4(x), 4(2), 4(aa), 4(bb) and 4(cc) of claim petition and reply to the same given in paras 12, 19, 21 and 22 of the written statement of the petitioner filed before the Tribunal as well as as enquiry report on record, that Enquiry Officer failed to conduct the regular enquiry and thus enquiry report is vitiated and being so subsequent order based on the same are unsustainable. Thus, the findings on holding the regular enquiry given by Tribunal are perfectly valid.

53. In regard to the finding of the Tribunal to the effect that order dated 05.12.2014 is a non-speaking order, we have perused the order dated 05.12.2014 and we find that reasons for coming to the conclusion have not mentioned in the order dated 05.12.2014, order of punishment, and being so the finding of the Tribunal in this regard is perfectly valid. The relevant portion of order dated 05.12.2014 reads as under :-

"अतः श्री सिंह पर सिद्ध पाये गये आरोप सं0 1, 2 एवं 4 में दुरूपयोग हुई धनराशि रू. 1,19,600/– की वसूली एवं डिसमिसल आदेश दिनांक 19.09.2000 से मा0 न्यायालय द्वारा पारित आदेश दिनांक 07.01.2010 तक के वेतन के सम्बन्ध में निम्नानुसार आदेश पारित करते हुए विभागीय कार्यवाही एतद्द्वारा समाप्त की जाती है:–

1. श्री एस0पी0सिंह, सहायक प्रबन्धक को डिसमिसल ओदश दिनांक 19.09.2000 से मा0 न्यायालय द्वारा पारित आदेश दिनांक 07.01.2010 तक का वेतन श्री सिंह को आरोपो में दोषी पाये जाने पर "नो वर्क नो पे" के प्रतिपादित सिद्धान्त को दृष्टिगत रखते हुए श्री सिंह को कोई वेतन एवं भत्ते देय नहीं होंगे।

2. श्री एस0पी0, सहायक प्रबन्धक से रू.1,19,600 का 1/2 अर्थात रू.59,800/– दुरूपयोग/व्यपहरण के लिए उत्तरदायी पाये जाने पर उनसे एकमुश्त वसूली तथा दिनांक 01.01.1999 को राष्ट्रीय बचत पत्र पर अनुमन्य ब्याज दर पर वसूली की तिथि तक का ब्याज भी वसूल किया जाय।"

54. Now coming to the only issue rasied by the learned counsel for the petitioner-Sri P.K.Sinha, while assailing the order dated 24.09.2018 passed by the Tribunal, impugned in the present writ petition, that in fact the minor punishment as provided under Rule 33 was imposed on opposite party no.1 as such regular enquiry was not required, though the charge sheet was issued for imposing major punishment and the Tribunal ignore this aspect of this case and interfered in the orders before it. We are of the view that there is no force in the submissions made by learned counsel for the petitioner. It is in view of paras 10 and 11 of the judgment dated 28.11.2018 passed in Writ Petition No.34093 S/B of 2018, in the case of ***Deepak Kumar (supra)***, reported in 2019(1) AWC 26 (LB), the same is reads as under:-

"In view of the above, the first question which requires consideration in the case is that "what procedure should be adopted if charge-sheet is given for major punishment and ultimately minor punishment has been awarded".

Answer to the above is no more res-integra and it is settled principle that where the procedure for major penalty is initiated then even if disciplinary authority awards minor punishment they enquiry should be completed by adopting the procedure prescribed for major penalty. (vide: State Bank of India Vs. T.J. Pal 1999 SCC (L & S) 922; Union of India Vs. S.C. Parasar 2006 SCC (L & S) 496 and

Kamla Cheran Hair Vs. State of U.P. 2009 (27) L.C.D. 130)."

55. So far as the judgment passed by the Hon'ble Apex Court in ***Yashvir Singh Gulia (supra)***, relied upon by the learned counsel for the petitioner Sri P.K. Sinha is concerned, we are of the view that the same is not applicable in the present case as in the said case the enquiry proceedings were initiated by issuing charge sheet for imposing major punishment but subsequently the competent authority dispensed with departmental enquiry and after considering the reply submitted by the delinquent officer imposed the minor punishment keeping in view the peculiar facts of the case, the Hon'ble Apex Court interfered in the judgment passed by the District Judge as well as the High Court, whereas in the present case enquiry initiated against the petitioner was not dispensed with and the enquiry officer in relation to the charge sheet issued for awarding major punishment conducted the enquiry and thereafter submitted the enquiry report and on the basis of the enquiry report reply was submitted to the same by the Opposite party no.1 and the order of punishment was passed.

56. For the foregoing reasons, we are not inclined to interfere in the judgment and order dated 24.09.2018 passed by the Tribunal.

57. Accordingly, the writ petition for it, is ***dismissed***. No order as to costs.

(2020)1ILR 1779

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2019

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ-A No. 14179 of 2019
Connected With 17 Other Writ-A Cases

Nagesh Chandra Kesharwani & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Seemant Singh

Counsel for the Respondents:
C.S.C., Sri M.N. Singh

A. Service – Appointment/Recruitment – Eligibility criteria/conditions – Constitution of India: Article 14, 16, 315, 320, 335; Uttar Pradesh Government Department Statistical Service Rules, 2012: Rules 6, 7, 8, 9, 10, 11, 16, 17; Uttar Pradesh Public Service Commission (Regulation of Procedure) Act, 1985: Section 11(1); Uttar Pradesh Public Service Commission (Procedure and Conduct of Business) Rules, 2011: Rule 29, 33, 51, 73, 74; Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Examination Rules, 1986: Section 2(vi), 2(vii), 2(viii); Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994: Section 3.

The question for consideration before the Court is as to whether the Commission has any jurisdiction in the applicable statutory scheme to fix minimum marks/criteria at the stage of interview for adjudging the suitability of the candidate for appointment to the post in question. (Para 7)

The Commission, as a constitutional body is expected to follow a uniform rational criteria to determine fitness of a candidate for selection to a public office - The Commission has a positive obligation in the constitutional scheme (Art. 335) to ensure that only a suitable candidate is appointed to the service of State. The adjudging of suitability

consistent with maintenance of efficiency of administration has to be on a rational and objective criteria. Otherwise, the selection itself would not withstand the test of judicial scrutiny and would be open to challenge for violation of Article 14 and 16. In the absence of contrary stipulation in the rules, laying of criteria by the Commission of securing 40% minimum marks at written test and interview would, therefore, clearly be justified. (Para 19, 28, 30, 31, 32 & 40)

B. The decision of the Commission is otherwise not an independent decision but is based upon the direction of the State Government – In the light of GO dated 30th September, 1966, Commission took a decision on 24th December, 1966 to fix minimum standard of fitness consistent with maintenance of efficiency of administration, to be maintained for all candidates including reserved category candidates. This decision has otherwise been consistently followed for the last more than 50 years. The executive instructions of the State as also the fixing of minimum marks by the Commission, therefore, would clearly be just and legal. (Para 18, 20, 21, 32 & 40)

C. Suitability and eligibility are otherwise not interchangeable words. The mere fact that a candidate is eligible would not lead to an inference that such candidate is also suitable for appointment even if he has passed the screening test – In Rules of 2012, no criteria for adjudging suitability is provided and that the preliminary/screening examination is not for the purposes of adjudging suitability of a candidate for appointment but merely to screen out large number of applicants. It is equally settled that State can issue administrative instructions in the absence of any contrary provision in the statutory rules. The Commission's power to fix minimum marks for adjudging suitability of a candidate at the stage of interview could otherwise be sustained with reference to Rule 73 of the Rules of 2011 as the matter is not specifically provided for in the Rules of 2011 or the Service Rules of 2012. (Para 28, 33 & 41)

Writ Petitions dismissed. (E-4)

Precedent followed: -

1. Shrawan Kumar and 5 others Vs. Uttar Pradesh Public Service Commission, WP No. 13091 of 2019 (Para 3 & 4)

2. Dr. Ram Sukh Yadav Vs. State of U.P. and others, (1997) 1 UPLBEC 416 (Para 24)

3. Ram Shankar Roy and others Vs. State of U.P. and others, (2000) 3 UPLBEC 2289 (Para 24)

4. U.P. Public Service Commission Vs. Sangeeta & 81 others, 2019 (4) ADJ 650 (Para 24, 25 & 38)

5. Ashok Kumar Nayak Vs. State of U.P. and another, 2004 (1) AWC 129 (Para 24)

6. K. Manjusree Vs. State of U.P. and another, (2008) 3 SCC 512 (Para 24 & 35)

Precedent distinguished: -

1. Durgacharan Misra Vs. State of Orissa and others, (1987) 4 SCC 646 (Para 22, 34 & 38)

2. Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others, AIR 1996 SC 352 (Para 22, 36 & 37)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioners, in this bunch of writ petitions, are aggrieved by their non-selection for appointment to the post of Assistant Statistical Officer as they have failed to secure minimum marks in the interview. The jurisdiction of Public Service Commission to fix minimum marks for qualifying interview is primarily questioned in all the writ petitions. All the petitions have been heard together and are being decided by this common judgment. Writ Petition No.14179 of 2019 (Nagesh Chandra Kesharwani and 26 Others Vs. State of U.P. and 11 Others) is taken as the lead case.

2. Uttar Pradesh Public Service Commission (hereinafter referred to as "the Commission') issued advertisement No.4 of 2014-15 dated 17th March, 2015

initiating recruitment to large number of vacancies occurring in different departments of the State of Uttar Pradesh. Controversy in this bunch of petitions, however, is confined to 373 posts of Assistant Statistical Officer (general recruitment) in Economic and Statistic Division, State Planning Institution U.P. A total number of 7291 applications were received by the Commission against 373 advertised posts of Assistant Statistical Officer. The recruitment exercise consisted of a screening test followed by interview. 1261 candidates could qualify screening test and were accordingly called for interview. Out of those 1261 candidates only 1133 candidates could submit their educational and other eligibility documents to the Commission. A committee was constituted to examine eligibility of candidates who had cleared screening test. The committee found that only 340 candidates were eligible for being called to face interview. 302 candidates out of those 340 actually appeared to face interview.

3. The determination of eligibility by the Committee constituted for the purpose came to be questioned before this Court in Writ Petition No.13091 of 2019 (Shrawan Kumar And 5 Others Vs. Uttar Pradesh Public Service Commission). This Court while dismissing the writ petitions vide judgment dated 21.8.2019 clarified that eligibility of the candidate would have to be restricted to the recruitment rules and the advertisement. The Commission also undertook to scrupulously comply with the provisions of the applicable rules and the advertisement while determining eligibility of candidates. Para 13 and 14 of the judgment in Shrawan Kumar (supra) is relevant and is reproduced hereinafter:-

"13. The thrust of the submission on behalf of the petitioners is that the process of scrutinising the application was undertaken on the basis of the three member committee report and that persons who do not qualify in terms of second essential qualification or are otherwise not eligible in view of the stand taken by the Commission have infact been allowed to participate. This contention raised on behalf of the petitioners need not cause any difficulty inasmuch as having taken a categorical stand before this Court that the Commission shall restrict consideration to candidature of those persons who have either obtained 'O' level diploma in computer awarded by the DOEACC Society or atleast one year diploma in Computer Science from any recognised University/ Institution established by law, the consideration would have to be limited to that category of applicants alone. The Commission is expected to scrutinise this aspect and to ensure that only such candidates are allowed to take part in the interview who possess requisite qualification in accordance with the advertisement and the applicable service Rules of 2012. The apprehension expressed on behalf of the petitioners, therefore, would not justify any interference by this Court in exercise of writ jurisdiction.

14. In view of the discussions made above and in light of the stand taken by the Commission, as also the statement of their senior counsel that Commission shall scrupulously comply with it, this writ petition is consigned to records."

4. The Commission, accordingly, revisited the issue of eligibility in light of the observations made by this Court in the case of Shrawan Kumar (supra). Upon a careful examination the Commission found only 198 candidates to be eligible for appointment. The Commission

accordingly subjected only 198 eligible candidates to face interview. Only 142 out of those 198 eligible candidates were found suitable by the Commission for appointment. The suitability for appointment has been judged on the basis of 40% minimum marks secured at the interview for unreserved and OBC candidates, while 35% marks for Scheduled Castes/Scheduled Tribes candidates. Selection has been made of 142 suitable candidates alone. Petitioners are essentially aggrieved by this decision of the Commission. According to petitioners all candidates who have qualified the screening test and are found eligible are liable to be selected, inasmuch as the Commission lacks any power/jurisdiction to fix minimum marks in interview for adjudging suitability of candidate concerned. According to petitioners the applicable service rules do not confer any jurisdiction upon the Commission to fix minimum marks at the interview for adjudging suitability of candidate for selection to the post in question.

5. Petitioners' contention in that regard is countered by the State, as also the Commission, by relying upon Article 320 and 335 of the Constitution of India as also the applicable service rules, and the procedure rules that regulates the functioning of the Commission. Submission is that suitability of a candidate for selection to the post is required to be determined by the Commission and power to fix the minimum norms for the purpose is clearly implicit in the applicable scheme for recruitment. Various provisions and Government Orders in that regard have been relied upon, which shall be dealt with, later. It is in this context that the issue arises for consideration before this Court.

6. I have heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Aishwarya Pratap Singh and Sri Seemant Singh for the petitioners; Sri G.K. Singh, learned Senior Counsel assisted by Sri F.A. Ansari for the Commission, and Dr. A.N. Singh, learned Standing Counsel for the State, and have perused the materials brought on record.

7. The short question that arises for consideration, in the facts of the present case, is as to whether the Commission has any jurisdiction in the applicable statutory scheme to fix minimum marks/criteria at the stage of interview for adjudging suitability of the candidate for appointment to the post in question?

8. Before proceeding any further it would be relevant to notice the scheme for recruitment to the post in question. Appointment to the post of Assistant Statistical Officer is an appointment to an office under the State and would have to be in consonance with Article 16 of the Constitution of India, which provides for equality of opportunity in matters of public employment. The recruitment to the post in question is regulated by the provisions of the Uttar Pradesh Government Department Statistical Service Rules, 2012 (hereinafter referred to as "the Rules of 2012'). The post in question forms part of the cadre of service specified in Rule 6 of the Rules of 2012. Rule 7 provides that appointment to various category of posts in the service shall be made in the manner specified. Rule 7(1) of the Rules of 2012, in that regard, is reproduced hereinafter:-

"7."Recruitment to the various categories of posts in the service shall be made from the following sources:

(1) Assistant Statistical Officer/Assistant Research Officer

(Statistics) - By direct recruitment through the Commission."

9. Rule 8 of the Rules of 2012 provides for reservation to the specified category of candidates and is reproduced hereinafter:-

"8. Reservation for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories shall be in accordance with the Act, and the Uttar Pradesh Public Services (Reservation For Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, as amended from time to time, and the orders of the Government in force at the time of the recruitment."

10. Qualification of the candidate for direct recruitment is specified in Rule 9 of the Rules of 2012. Age of candidate is specified in Rule 10, while academic qualification for direct recruitment is specified in Rule 11 thereof, which is reproduced hereinafter:-

"11. A candidate for direct recruitment to the various posts in the service must possess the following qualifications:-

(i) Post-graduate degree in Assistant Research Office Mathematics or Mathematical Statistics or Commerce or Economics or Statistics from a University established by law in India or a qualification recognised by the Government as equivalent thereto.

(ii) 'O' level Diploma in Computer awarded by DOEACC Society or at least one year Diploma in Computer Science from any recognised University/ Institution.

(iii) Knowledge of Hindi in Devnagri Script.

2. (i) Post-graduate degree in Mathematics or Mathematical Statistics Or Commerce or Economics or Statistics with at least fifty five percent marks from a University established by law in India or a qualification recognized by the Government as equivalent thereto. Or

Two years Post-graduate diploma in Statistics from an Institute recognized by the Government.

(ii) Knowledge of Hindi in Devnagri Script."

11. Procedure for recruitment is contained in Part-V of the Rules of 2012. Rules 16 provides for determination of vacancies while Rule 17 regulates the procedure for direct recruitment. Rule 16 and 17 of the Rules of 2012 are also relevant and are reproduced hereinafter:-

"16. The appointing authority shall determine the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under rule 8. The vacancies to be filled through the Commission shall be intimated to them.

17.(1) Application for being considered for selection shall be called by the Commission in the form published in the advertisement issued by the Commission.

(2) The Commission shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with rule 8, call for interview such number of candidates, who fulfil the requisite qualifications, as they consider proper.

(3) The Commission shall prepare a list of candidates in order of their

proficiency as disclosed by the marks obtained by each candidate in the interview. If two or more candidates obtain equal marks, the names of the candidates shall be arranged in accordance with the general policy of the Commission. The Commission shall forward the list to the appointing authority."

12. By virtue of Rule 17(1) of the Rules of 2012, the recruitment to the post in question has to be made by direct recruitment through the Commission. The Commission is established under Article 315 of the Constitution of India. Its functions are specified in Article 320 of the Constitution of India. Clause (1) of Article 320, as also Sub-clause (b) of Clause (3) of Article 320 of the Constitution of India, are relevant for the present purposes, and are therefore reproduced hereinafter:-

"320.(1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

320.(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted--

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;"

13. The State Legislature has enacted the Uttar Pradesh Public Service Commission (Regulation of Procedure) Act, 1985 (hereinafter referred to as "the Act of 1985') to regulate the procedure of the Commission in discharge of its functions. In exercise of powers under Section 11(1) of the Act of 1985, statutory rules have been framed, known as The Uttar Pradesh Public Service Commission (Procedure & Conduct of Business) Rules, 2011 (hereinafter referred to as "the Rules of 2011'). Rule 29 thereof regulates conduct of examination in cases where direct selection is through interview only. If the proportion of candidates applying to the number of posts is high, the Commission may, after examining relevant aspects, decide to hold preliminary examination/screening test of the candidates. Rule 29(iii) of the Rules of 2011 is extracted hereinafter:-

"29.(iii) In cases of direct selection through interview only, if the proportion of candidates to the number of posts is high, the Commission may, after having considered feasibility ,expediency and other aspects to hold examination, decide to hold preliminary examination/ screening test of the candidates."

14. Rule 33 of the Rules of 2011 regulates conduct of preliminary examination in the manner prescribed by the Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Examination Rule, 1986, as amended from time to time. Rule 33 of the Rules of 2011 throws light on the purpose of holding preliminary examination and is reproduced hereinafter:-

"33.(i) Notwithstanding anything to the contrary contained in relevant service rules or Government Orders regarding recruitment, the Commission may hold preliminary examination/screening test for finding out

suitable candidates for admission to main examination or interview, as the case may be;

(ii) Preliminary examination shall mean screening test to be conducted by the Commission with the purpose of finding out suitable candidates in required proportion as fixed by the Commission in each category, reserved and unreserved, for admission to the main examination or interview, as the case may be;

(iii) Preliminary examination shall be conducted in the manner prescribed by the Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Examination Rule, 1986 as amended from time to time. The marks obtained by the candidates in the preliminary examination/screening test shall not be counted for determining final order of merit.

(iv) The Commission shall fix the place, dates and time of examination which includes preliminary examination/screening test and main examination, as the case may be.

(v) The centres of examination shall be fixed with prior approval of the Chairman/Examination Committee.

(vi) All arrangements for such examinations shall be made by the Controller of Examination in consultation with the Secretary and in accordance with such directions as may be issued by the Commission in that behalf."

15. Rule 51 of the Rules of 2011 contemplates selection by direct recruitment and is also reproduced hereinafter:-

"51. The advertisement for selection to various posts by direct recruitment shall be issued and application form from eligible candidates be invited by the Commission in accordance with the requisition received in that behalf as per provisions of service rules or adhoc principles agreed by the Commission where there are no service rules."

16. Rule 73 of the Rules of 2011 deals with residuary matters while Rule 74 thereof provides for procedure to resolve doubts that may arise in interpretation of rules. Rule 73 and 74 of the Rules of 2011 reads as under:-

"73. The Commission may deal in such manner as they deem fit with any matter not specifically provided for in these rules.

74. If any doubt arises as to the interpretation of these rule, the interpretation made by the Commission shall be final."

17. The Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Examination Rules, 1986, referred to in Rule 33 of the Rules of 2011, defines preliminary examination in Section 2(vi), which is reproduced hereinafter:-

"2.(vi)*"Preliminary Examination"* means screening test to be conducted by the Commission with the purpose of finding out suitable candidates for admission to the main examination or interview;"

Section 2(vii) of the Rules of 1986 defines direct recruitment while Section 2(viii) defines suitable candidates and the same are reproduced hereinafter:-

"2.(vii) *"Direct Recruitment"* means recruitment directly made through the Commission either by competitive

examination or by selection other than by Competitive Examination as may be prescribed in Service Rules and Government orders;

2.(viii) *"Suitable candidates"* means candidate securing minimum number of marks as may be fixed by Commission in its discretion at Preliminary Examination thereby enabling him to appear in the main examination or interview as the case may be;"

18. It is not in issue that no written test has been held and after the candidates have been screened in the preliminary test, their suitability for appointment has been adjudged in the Interview. The Commission in order to justify the allocation of minimum marks for adjudging suitability of a candidate for appointment to the post in question has referred to a communication issued by the State Government on 30th September, 1966, which is extracted hereinafter:-

"I am directed to say that in this Department circular G.O. no.O-3140/II-B-26-1949, dated October 29, 1949, on the subject noted above, it was indicated that a lower standard of test should be applied in the selection of candidates of Scheduled Castes and even if it was found that the candidates belonging to the Scheduled Castes with the minimum qualifications were below others in merit, they should, to the extent of their quota, be selected for appointment. These orders were reiterated in subsequent G.O. no.13SC/II-B-311-64, dated March 10, 1964. Further, in G.O. no.556-SC/II-B-467-1964, dated February 15, 1966, it was provided that in all recruitments, whether by competitive examination or selection, a minimum standard of fitness consistent with the maintenance of efficiency of administration, should be fixed for the candidates of the Scheduled Castes, and if such a candidate comes up to that standard, he should be selected for appointment irrespective of the marks obtained by the last general candidate so selected.

2. The question whether the aforesaid orders infringed the constitutional guarantee relating to equality of opportunity in matters of public employment came up for consideration recently, and Government have been advised that the minimum standard of fitness consistent with the maintenance of efficiency of administration should be the same for all candidates and that it cannot be different for Scheduled Castes as compared to other candidates. Therefore, in suppression of the orders contained in the three G.Os. cited above, it has been decided that with a view to enabling the Scheduled Castes to secure their due quota in services, a minimum standard of fitness consistent with the maintenance of efficiency in administration should be laid down for all candidates and subject to the said minimum standard of fitness, the selection of candidates belonging to Scheduled Castes should be made separately to the extent of the seats reserved for them, even though their absolute performance may be inferior to that of the last general candidate selected against the non-reserved seats.

3. These orders may please be brought to the notice of all concerned for their information and guidance."

19. The requirement to fix minimum standard of fitness consistent with the maintenance of efficiency of administration appears to have arisen on account of a specific provision contained in Article 335 of the Constitution of India, which is reproduced hereinafter:-

"335. The claims of the members of the Scheduled Castes and the Scheduled

Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

20. In light of the aforesaid communication of the State, a decision has been taken by the Commission on 24th December, 1966 to fix minimum standard of fitness consistent with maintenance of efficiency of administration for a candidate for appointment, which is reproduced hereinafter:-

"Extracts of the order from file no.281/47-48 of communal representation in Service- Govt. orders regarding.

DISCUSSED on Dec. 23.

The Commission agreed to the observations of the Government that a minimum standard of efficiency must be insisted upon from the Scheduled Caste candidates, which minimum standard should not be different for the general candidates. The Commission, therefore, decided to adopt this principle for future recruitment. The Commission also decided that the minimum limit may be different for different posts and that generally speaking it should not be less than 40% of marks that may be secured in the aggregate of marks secured at the interview and/or in written papers."

Undisputedly, the aforesaid decision of the Commission is being consistently followed in all subsequent selections for the unreserved and OBC candidates.

21. By a subsequent decision the Commission has modified the minimum standard of efficiency for the Scheduled Castes candidates by lowering it to 30%. The decision in that regard has again been revised and the minimum standard for efficiency in respect of Scheduled Castes and Scheduled Tribes candidates has been revised to 35% vide decision of the Secretary dated 25th July, 2019. It is on this yardstick that 142 candidates have been adjudged suitable for appointment by the Commission.

22. Sri Ashok Khare, learned Senior Counsel for the petitioners submits that Recruitment Rules of 2012, as also the Procedure & Conduct of Business Rules of 2011, do not vest jurisdiction in the Commission to fix minimum marks at the stage of interview for a candidate to be selected for appointment. Sri Khare has placed reliance upon a judgment of the Apex Court in the case of Durgacharan Misra Vs. State of Orissa and others, (1987) 4 SCC 646, to submit that in the absence of express power conferred in the rules the Commission cannot fix any minimum marks to be secured at interview. Reliance is also placed upon a judgment of the Apex Court in Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others, AIR 1996 SC 352. With reference to para 35 to 38, it is firmly contended that the Commission at its own level was denuded of any jurisdiction to lay down standards for adjudging suitability when the rules framed under proviso to Article 309 of the Constitution of India do not contemplate so.

23. Sri Seemant Singh, also appearing for the petitioners, while adopting the argument of Sri Khare further submits that once suitability of a candidate has been examined in the preliminary examination it was not open thereafter for the Commission to lay down criteria of minimum marks at the stage of interview. It is urged that suitability of a candidate for appointment had already been examined by the Commission in the preliminary examination, and that in the absence of any specific power the Commission could only determine the inter-se merit of candidates for recruitment to the post in question, by virtue of Rule 17(3) of the Rules of 2012. Sri Singh, therefore, submits that all candidates, who are adjudged suitable at the screening test are liable to be included in the select list, after it was found that they do possess requisite eligibility. Submission is that elimination of candidates, at the stage of interview, is wholly arbitrary and unsustainable.

24. Submission advanced on behalf of petitioners is countered by Sri G.K. Singh, learned Senior Counsel assisted by Sri F.A. Ansari for the Commission. Reliance is placed by Sri Singh upon Division Bench judgments of this Court in the case of Dr. Ram Sukh Yadav Vs. State of U.P. and others, (1997) 1 UPLBEC 416; Ram Shanker Roy and others Vs. State of U.P. and others, (2000) 3 UPLBEC 2289, and U.P. Public Service Commission Vs. Sangeeta & 81 Others, 2019 (4) ADJ 650. It is stated that fixing of qualifying marks as 40% for General and OBC candidates has been specifically affirmed in the abovenoted three Division Bench judgments. Reliance is also placed upon a judgment of this Court in the case of Ashok Kumar Nayak Vs. State of U.P. and Another, 2004(1) AWC 129. Learned Senior Counsel has also referred to the judgment of Apex Court in K. Manjusree Vs. State of U.P. and Another, (2008) 3 SCC 512.

25. Learned Senior Counsel for the Commission submits that the Division Bench of this Court in U.P. Public Service Commission Vs. Sangeeta & 81 Others (supra) has specifically endorsed the fixing of cut off marks by the Commission to determine fitness of a candidate for selection, which stands affirmed by the Apex Court with dismissal of Special Leave Petition (Civil) Diary No.17510 of 2019 (Sangeeta and others Vs. U.P. Public Service Commission).

26. In reply to the aforesaid argument, Sri Ashok Khare, learned Senior Counsel submits that the service rules framed under proviso to Article 309 of the Constitution of India were distinct before the Division Bench in U.P. Public Service Commission Vs. Sangeeta & 81 Others (supra). Emphasis is laid upon Rule 15(4) of the Uttar Pradesh Subordinate Nursing (Non-Gazetted) Service (Fourth Amendment) Rules, 2016 (hereinafter referred to as "the Rules of 2016') to submit that only those candidates could be recommended for appointment, who were found fit for appointment, while in the applicable rules in the present case no such power is vested with the Commission.

27. Direct recruitment to the post of Assistant Statistical Officer is to be made through the Commission. The Commission is a body established under Article 315 of the Constitution of India. Its functions are specified in Article 320. Sub-Article 1 of Article 320 casts a duty upon the Union and the State Public Service Commission

to conduct examinations for appointment to the services of the Union and the services of State, respectively. Sub-Article (b) of Article 320(3) provides that the Commission shall be consulted on the principles to be followed in making appointment to civil post and on the suitability of candidate for such appointment etc. The Commission, therefore, is required to be consulted on the suitability of candidate for appointment to the post in question. The selection by direct recruitment in the present case is by the Commission itself. The judging of a candidate's suitability for appointment to a post has to be on some rational and objective criteria. The Service Rules of 2012 only provides that direct appointment is to be made through the Commission. What would, however, be the yardstick to judge suitability of a candidate for appointment is not specified in the applicable service rules. Sub-rule 3 of Rule 17 of the Rules of 2012 mandates the Commission to prepare a list of candidates in order of their proficiency, as disclosed by the marks obtained by each candidate in interview. It also provides that where two or more candidates obtain equal marks the name of candidates shall be arranged in accordance with the general policy of the Commission. The criteria/yardstick to adjudge suitability of a candidate for selection is clearly missing in the applicable service rules.

28. The Commission, as a constitutional body is expected to follow a uniform rational criteria to determine fitness of a candidate for selection to a public office. Prior to interview, no written test is contemplated in the Service Rules of 2012. Only a screening test is contemplated for screening out candidates for interview since large number of candidates have applied otherwise and only thrice the number could be called for interview. The object of screening test is merely to screen out large number of applicants and the suitability at that stage is examined only for admitting the candidates for the main written examination or the interview, as the case may be. The Act of 1986, as also the Conduct of Procedure Rules of 2011 makes it explicit that marks obtained in the screening test would not be added for determining the merit of candidate concerned. This clearly conveys that suitability for appointment to the post in question is not determined at the stage of preliminary/screening examination.

29. In case petitioners' contention is accepted that all eligible persons are liable to be selected for appointment who have cleared the screening test and have appeared in interview, since purpose of interview is only to determine the inter-se merit of candidates, then the primary responsibility cast upon the Commission to examine suitability of a candidate for appointment to the public office would not be discharged.

30. The suitability of a candidate for appointment has to be examined in respect of all category of candidates including those belonging to Scheduled Castes/Scheduled Tribes. Article 335 of the Constitution of India would come into play, as per which claim for appointment to a public office of a Scheduled Caste/Scheduled Tribe candidate is required to be examined consistently with the maintenance of efficiency of administration. The constitutional mandate contained in Article 335 can be accomplished only when the Commission fixes a uniform criteria consistent with the

maintenance of efficiency of administration and subjects the candidate to it for ascertaining their suitability. It transpires that fixing of minimum marks for qualifying written test/interview for the purpose of determining suitability of a candidate for appointment is to ensure maintenance of efficiency of administration and has been consistently followed by the Commission for the last more than five decades.

31. Sri G.K. Singh has also placed reliance upon Section 3 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as "the Act of 1994'), which refers to selection of a suitable reserve category candidate or else the vacancy would remain unfilled and carried forward to the next recruitment. It is urged that suitability of candidate consistent with maintenance of efficiency of administration in the making of appointment to service and post in connection with the affairs of the State would, therefore, be the responsibility of the Commission, and that in the absence of any objective criteria fixed for adjudging suitability consistent with the maintenance of efficiency of administration, the recruitment itself would become inconsistent with the constitutional scheme.

32. The argument advanced by Sri G.K. Singh appears to have force, inasmuch as the suitability of a candidate for selection has to be on a rational and objective criteria consistent with the maintenance of efficiency of administration or else the selection itself would be open to challenge on the ground of violation of Article 14 and 16 of the Constitution of India. It is in this context that correspondence appears to have taken place way back in 1966 between the State of Uttar Pradesh and the Commission. The State Government vide its Government Order dated 30th September, 1966 has clarified that a minimum standard of fitness consistent with maintenance of efficiency of administration has to be maintained for all candidates including reserved category candidates. A direction, consequently, has been issued to the Commission to fix minimum standard of fitness consistent with the maintenance of efficiency of administration for all candidates and accordingly determine suitability of candidates for selection. The adherence to the criteria of minimum standard of fitness consistent with the maintenance of efficiency of administration is also in respect of Scheduled Caste/Scheduled Tribe candidates to the extent of seats reserved for them, even though they may be inferior to that of the last general candidate selected against the non-reserved seats. It is in this context and for fulfilling the constitutional mandate that the Commission has fixed 40% minimum marks to be secured at interview and/or in the written papers. The decision of the Commission is otherwise not an independent decision but is based upon the direction of the State Government. The minimum marks fixed for adjudging suitability, otherwise, is not shown to be arbitrary and is clearly consistent with the constitutional mandate imposed upon the Commission to select suitable candidate for appointment.

33. It is already noticed that the Service Rules of 2012 otherwise do not specify any objective criteria to determine suitability of a candidate for appointment.

It is equally settled that in the absence of any contrary provision in the statutory rules it is always open for the State to regulate the field by issuing administrative instructions. The Commission's power to fix minimum marks for adjudging suitability of a candidate at the stage of interview could otherwise be sustained with reference to Rule 73 of the Rules of 2011 as the matter is not specifically provided for in the Rules of 2011 or the Service Rules of 2012.

34. In Durgacharan Misra (supra), the appointment to subordinate judicial services was governed by Orissa Judicial Service Rules, 1964. The selection was to be held on the basis of written test which carried 200 marks. In the written test 30% of the total marks in all papers was specified as minimum qualifying marks in the written test and only such candidates, who passed the written test were to be called for viva voce. No minimum marks were specified for the interview. It was in that context that the Apex Court held that securing of minimum marks for interview cannot be introduced at the level of the Commission when rules do not contemplate so. In Durgacharan Misra (supra) a rational objective criteria was already provided for determining suitability of candidate i.e. obtaining of minimum 30% marks at the written test. The Apex Court, therefore, disapproved the laying of additional criteria at the stage of interview when such a provision was otherwise not contemplated in the applicable rules. The Apex Court judgment in Durgacharan Misra (supra) will clearly be distinguishable in the facts of the present case inasmuch as a specific objective criteria of securing 30% minimum marks at the stage of written test had been fixed under the applicable rules while the Service Rules of 2012, applicable in the present case, provides for no such objective criteria.

35. In K. Manjusree (supra) the Apex Court while examining the judgment in Durgacharan Misra (supra) clearly observed that where rules do not prescribe any procedure, the selection committee may prescribe minimum marks for selection in the written examination/interview. Para 29 of the Apex Court judgment in K. Manjusree (supra) is reproduced hereinafter:-

"29. The resolution dated 30.11.2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee want to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the selection committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an

additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."
(emphasis supplied by me)

36. The judgment of the Apex Court in Dr. Krushna Chandra Sahu (supra) also dealt with an entirely distinct exigency. In that case the candidates had already been appointed after following the laid down criteria for selection and for their further selection applicable rules did not lay down any guidelines for adjudging suitability of candidate but the selection committee, at its own level, proceeded to lay down criteria for the purpose. It was in that context that the Apex Court observed as under in para 40 of the judgment:-

"40. A candidate in order to be suitable for appointment on a teaching post must have at least three qualities; he should have thorough knowledge of the subject concerned; he should be organised in his thoughts and he should possess the art of presentation of his thoughts to the students. These qualities cannot possibly be indicated or reflected in the confidential character rolls relating to another service, namely, the service in the Health Department as Homoeopathic Medical Officers where the character rolls would only reflect their integrity, their punctuality, their industry and their evaluation by the Reporting or the Accepting officer recorded in the annual entries. True it is that the candidates being already serving officers, their character rolls have to be looked into before inducting them in the new service but this can be done only for the limited purpose of assessing their integrity etc. These character rolls, however, cannot form the SOLE basis for determination of their suitability for the posts of. junior teachers in the Medical Colleges. Then, what formula or method should be adopted to assess these qualities is the question which next arises. this Court in Liladhar v. State of Rajasthan,: (1981)IILLJ297SC , pointed out:-

"The object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartiality and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services."

37. The selection to public service as also adjudging of suitability for direct recruitment was not the subject matter of consideration before the Apex Court in the case of Dr. Krushna Chandra Sahu (supra). Petitioners, therefore, cannot draw any benefit from the observation made in the aforesaid judgment.

38. The judgment of the Apex Court in the case of Durgacharan Misra (supra) has also been distinguished, on facts, by the Division Bench of this Court in the case of U.P. Public Service Commission Vs. Sangeeta & 81 Others (supra). The aspect relating to fitness of a candidate has been examined extensively by the Division Bench. I am in respectful agreement with the view taken by the Division Bench in U.P. Public Service Commission Vs. Sangeeta & 81 Others (supra), as is contained in para 42 to 51 of the judgment, which are extracted hereinafter:-

"42. On the contrary in K.H. Siraj Vs. High Court of Kerala and Others, (2006) 6 SCC 395, the word 'suitable' used in Rule 7 of Kerala Judicial Services Rules, 1991 (hereinafter referred to as the 'Rules') invited an interpretation. Rule 7 of the Rules required the High Court of Kerala to hold examination (written and oral), and to prepare a list of candidates considered 'suitable' for appointment. For ready reference Rule 7 of the Kerala Judicial Services Rules, 1991 (as extracted in the report) is quoted below:

"7. Preparation of lists of approved candidates and reservation of appointments.--(1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up and prepare a list of candidates considered suitable for appointment to Category 2. The list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in Rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958.

(2) The list consisting of not more than double the number of probable vacancies notified shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of two years or until a fresh approved list is prepared, whichever is earlier."

43. Though the Rule was silent, the High Court of Kerala evolved a procedure prescribing pass marks (in the examination conducted by it), as a criteria to adjudge the 'suitability' for grant of appointment. The same had been challenged as violative of the statute. The Supreme Court in paragraph nos. 49 and 50 held as below:

"49. .....The very use of the word "suitable" gives the nature and extent of the power conferred upon the High Court and the duty that it has to perform in the matter of selection of candidates. The High Court alone knows what are the requirements of the subordinate judiciary, what qualities the judicial officer should possess both on the judicial side and on the administrative side since the performance of duties as a Munsif or in the higher categories of Subordinate Judge, Chief Judicial Magistrate or District Judge to which the candidates may get promoted require administrative abilities as well. Since the High Court is the best judge of what should be the proper mode of selection, Rule 7 has left it to the High Court to follow such procedure as it deems fit. The High Court has to exercise its powers in the light of the constitutional scheme so that the best available talent, suitable for manning the judiciary may get selected.

50. .....The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc.) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26-3-2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the

High Court to evolve its own procedure as it is the best judge in the matter. It will not be proper in any other authority to confine the High Court within any limits and it is, therefore, that the evolution of the procedure has been left to the High Court itself. When a high-powered constitutional authority is left with such power and it has evolved the procedure which is germane and best suited to achieve the object, it is not proper to scuttle the same as beyond its powers. Reference in this connection may be made to the decision of this Court in Union of India v. Kali Dass Batish [(2006) 1 SCC 779 : 2006 SCC (L&S) 225] wherein an action of the Chief Justice of India was sought to be questioned before the High Court and it was held to be improper."
(emphasis supplied)

44. A question therefore arises as to the legality of the basis adopted by the appellant-Commission while making that recommendation. Even in that regard, Rule 15(4) offered a clear guiding principle to the appellant-Commission to make its recommendations based on merit. As a fact, the appellant-Commission had considered only the absolute merit of individual candidates in aggregate marks obtained by them out of a maximum of 100 marks (being 85 marks in the written examination and 15 marks for work experience). Therefore, in view of the stipulation contained in Rule 15(4) of the Rules requiring the appellant-Commission to recommend those considered fit for appointment, it was wholly competent for the appellant-Commission to set a bench mark based on the same stipulation of merit determined on aggregate marks scored in the selection process.

45. The appellant-Commission also did not examine any other or further material. The test of merit as contained in Rule 15(4) of the Rules itself, was applied. It was was wholly objective and in no part subjective. The appellant-Commission adopted an objective, reasonable, fair and transparent bench-mark. It neither chose to give weightage to marks obtained in the written examination nor it, preferred the marks obtained on the basis of work experience, to judge fitness or preference for grant of appointment. The appellant-Commission chose a wholly neutral, reasonable, fair and objective criteria of 40 marks (for general category candidates) and 30 marks (for reserved category candidates) of aggregate of marks awarded in the written examination and for work experience.

46. Therefore, in our opinion, there is no warrant to infer that an additional condition had been introduced by the appellant-Commission in adopting a merit based bench mark to make it's recommendation for appointment. There is no illegality in the same. There is no conflict in the action of the appellant-Commission and the Rules in that regard..

47. What therefore remains for consideration is the reasonableness or otherwise of the decisions of the Commission dated 24.12.1966, 05.02.2011 and 01.09.2018 i.e. whether they provide a reasonable and fair bench mark or guiding principle for the purpose of preparation of the list of candidates considered 'fit' for appointment. First, it is clear, those decisions/resolution/notification did not deprive or vary the absolute or relative merit position of any of the petitioner-respondents or any eligible candidate from his merit position, to which he may claim entitled. Second, since the list of candidates recommended for appointment was required to be prepared on the basis of merit based on aggregate marks alone, the measure adopted by the appellant

Commission to consider only such candidates as fit for appointment who may have attained a minimum of 40% and 30% marks as a general category or reserved category candidate as the case may be, is wholly consistent with that stipulation contained in Rule 15(4) of the Rules.

48. As noted above, by creating the bench mark or cut-off at 40 percent of the aggregate marks, to determine the fitness for selection, the appellant-Commission also acted consistent with the well accepted norm in academics. It did not seek to put the bar any higher than the commonly accepted pass percentage. To accept anything lower than the pass percentage by way of a test of fitness may have called for a deeper scrutiny as to its reasonabilty. A person who may not have 'passed' an examination may not be generally considered fit or suitable for further progress either in academics (at any level) or for appointment.

49. Any examination, in the first place seeks to test the retention, understanding and application of studies or knowledge that may have been imparted or acquired by those taking that examination. The proficiency that the appellate-Commission was obliged to test to make its recommendation as to fitness for appointment, had to be amongst those meeting some minimum standards. If that minimum requirement were to be ignored, the criteria of fitness would remain largely untested or meaningless. Any candidate who may who may have been asked to secure a minimum 40 percent marks in such examination to establish his fitness for appointment cannot be heard to complain of any unreasonableness in selection of that bench mark or cut-off mark.

50. To put it in other words, a candidate who may have failed in an examination may never claim to be considered for further promotion in any academic course. So also, a candidate seeking selection to a post who may have failed to obtain a certain minimum pass marks may never be heard to complain that he had not been found fit for selection or recommendation for appointment. In short, the bench mark or the cut-off mark of 40 percent and 30 percent as chosen by the appellant-Commission, and which was duly notified and applied across the board to all candidates, cannot be doubted or questioned as arbitrary or unreasonable.

51. Seen in that light, irrespective of the fact that the decision of the appellant Commission dated 24.12.1966 or 05.02.2011 may never have been adapted by it after the enforcement of the Rules, the same did not fell foul with the Rules inasmuch as they never sought to lay a new or different eligibility condition contrary to the Rules. In fact, the notification dated 01.09.2018 is plainly consistent and it complements the Rules."

39. The attempt on part of the petitioners to distinguish the Division Bench judgment in the case of U.P. Public Service Commission Vs. Sangeeta & 81 Others (supra), with reference to the language of Rule 15 of the Rules of 2016 is also required to be dealt with, at this stage. Rule 15 of the Rules of 2016 provides as under:-

"**Procedure for direct recruitment** - 15. (1) Applications for permission to appear in the Competitive Examination shall be invited by the Commission in the form published in the advertisement issued by the Commission.

(2) No Candidate shall be admitted to the Examination unless he

holds a certificate of admission issued by the Commission.

(3) Selection shall carry one hundred marks. The merit list of the candidates shall be prepared in the following manner:-

(a) Written Examination shall carry eighty five marks.

(b) Marks to a person who is working as Staff Nurse on contract basis in the Medical and Health Services Department, Uttar Pradesh shall be awarded in the following manner subject to the maximum of fifteen marks:-

(i) For the first completed year of service on contract basis ---------- Three marks.

(ii) For the next and every completed year of service on contract basis ---- Three marks for each year.

(c) The marks obtained by each candidate under clause (a) shall, where applicable, be added to the marks obtained under clause (b).

(4) The Commission shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with rule 6, prepare a list of candidates in order of their proficiency as disclosed by the marks obtained by them under clause (c) of sub-rule (3) and recommend such number of candidates as they consider fit for appointment. If two or more candidates obtain equal marks, the name of the candidate senior in age shall be placed higher in the list. The Commission shall forward the list to the appointing authority."

40. It is submitted on behalf of petitioners that Rule 15(4) of the Rules of 2016 permitted the Commission to consider fitness of a candidate for appointment, whereas no such contemplation exists in the Rules of 2012. It is sought to be urged that in the absence of any such stipulation in the applicable rule, the Commission would have no jurisdiction to fix any minimum mark to be secured by a candidate for appointment to the post. The argument raised in that regard is absolutely fallacious. The Commission has a positive obligation in the constitutional scheme to ensure that only a suitable candidate is appointed to the service of State. The suitability has to be consistent with the fitness of a candidate required for maintenance of efficiency of administration to the public office. The adjudging of suitability consistent with maintenance of efficiency of administration has to be on a rational and objective criteria. Unless such a criteria is determined and applied, the selection itself would not withstand the test of judicial scrutiny. In the absence of contrary stipulation in the rules, laying of criteria by the Commission of securing 40% minimum marks at written test and interview would, therefore, clearly be justified. The decision in that regard has otherwise been consistently followed for the last more than 50 years. The decision of the Commission is also in response to a specific direction of the State Government. The executive instructions of the State as also the fixing of minimum marks by the Commission, therefore, would clearly be just and legal.

41. Suitability and eligibility are otherwise not interchangeable words. The mere fact that a candidate is eligible would not lead to an inference that such candidate is also suitable for appointment even if he has passed the screening test. It has already been observed that in the Rules of 2012 no criteria for adjudging

suitability is provided and that the preliminary/screening examination is not for the purposes of adjudging suitability of a candidate for appointment. The petitioners, therefore, would not be justified in contending that merely on account of their eligibility and passing of screening test, they are liable to be adjudged suitable for appointment. The Commission, therefore, is justified in fixing 40% minimum marks at the stage of interview for adjudging suitability in order to ensure that fitness of a candidate is consistent with maintenance of efficiency of administration. In light of the aforesaid discussions, the arguments advanced on behalf of petitioners fail.

42. All the writ petitions, accordingly, are dismissed. Parties to bear their own cost.

(2020)1ILR 1797

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ-A No. 15502 of 2019

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

Counsel for the Petitioner:
Sri Omkar Nath Rai

Counsel for the Respondents:
C.S.C.

A. Seeking Mandamus-to conduct a fresh medical test-for the post of Police Constable-found to be suffering from disabilities-Court-to be cautious-in supplanting process of recruitment-should have filed review-before the medical board-based on-private medical report-no mandatory directives –can be issued-such requests by candidates-would derail-recruitment process.

Writ Petition dismissed. (E-8)

List of cases cited: -

1. State of U.P & 2 Ors vs. Rahul (Special Appeal Defective No. 70 of 2016)

(Delivered by Hon'ble J.J. Munir,J.)

1. This petition has been filed under Article 226 of the Constitution asking this Court to issue a Mandamus to the respondent-Authorities to conduct a fresh medical test of the petitioner by a Medical Board for the post of Police Constable in relation to Advertisement No. PRPB-ONE 1 (112)/2017. A further Mandamus has been sought directing the Authority to declare the petitioner selected and send him for necessary training relating to Police Constables and Constables in the PAC Recruitment Examination, 2018. The case of the petitioner is that he was declared medically unfit during the medical examination. This medical examination was held at the 34th Battalion, PAC, Bhullanpur, Varanasi where he was declared unfit with a remark that 'you are unfit by knock-knee and vision impairment'. Thereafter the petitioner appeared for a re-medical test on 19.08.2019 at Police Lines, Varanasi. There also, he was declared unfit with a remark 'you are unfit by knock-knee and vision impairment'.

2. The petitioner has asserted that he does not suffer from any of these medical impairments and is absolutely fit on medical parameters. It is asserted in paragraph 13 of the writ petition that after

the petitioner failed in the medical examination and the review which is contemplated under the advertisement, the petitioner submitted himself privately to the medical examination of the Additional Director/Chief Superintendent, SSPG, Mandaleeya Zila Chikitsalay, Varanasi on 20.09.2019. There, he was found not to be suffering from the disabilities which the medical test and the review examination had found.

3. In this connection, learned counsel for the petitioner, Sri Omkar Nath Rai has invited the attention of the Court to the certificate issued by Mandaleeya Apar Nideshak/ Pramukh Adheekshak, S.S.P.G. Mandaleeya Zila Chikitsalay, Varanasi dated 20.09.2019, a copy of which is appended at page 24 of the paper book to show that there is 'nil bodily infirmity'. In the last paragraph of this certificate, it is mentioned by the Mandaleeya Apar Nideshak/ Pramukh Adheekshak, S.S.P.G. Mandaleeya Zila Chikitsalay, Varanasi that 'I do not consider this a disqualification for employment in the U.P. Polytechnic'. It appears that the petitioner submitted himself voluntarily to the medical examination of the Mandaleeya Apar Nideshak/ Pramukh Adheekshak, S.S.P.G. Mandaleeya Zila Chikitsalay, Varanasi representing to the said Authority that he was applying for some job in U.P. Polytechnics and on that basis got himself medially examined on parameters that would be relevant for a job in the U.P. Polytechnics. The certificate does not indicate that the Mandaleeya Apar Nideshak/ Pramukh Adheekshak, S.S.P.G. Mandaleeya Zila Chikitsalay, Varanasi examined the petitioner on health fitness parameters required for a Constable in the Civil Police or the PAC.

4. Dr. Amarnath Singh, learned Standing Counsel appearing for the State has opposed the motion to admit this petition to hearing. He submits that the process medical examination at the time of recruitment is specified in the advertisement. It is a complete process and has to be accepted for whatever result it reaches. He points out that the petitioner has undergone both original examination and a review, and has been found to be medically unfit with the problem of a knock-knee and vision impairment.

5. It is argued that the petitioner cannot rely on a privately requested medical examination, even by a high ranking Government medical facility, to displace or question the correctness of the medical examination which is an integral part of the recruitment process

6. This Court has keenly considered the matter. It is true that the recruitment process is a complete process which prescribes various stages from the written examination to physical fitness test and medical examination, followed by character verification. In the advertisement, it is clearly indicated that the medical examination is to be done in the prescribed manner and if there is any objection to the outcome, there is a review permissible. The petitioner has opted for the permissible review and has failed there. It is true that there could be cases where there is an absolutely absurd finding given during the medical examination which is demonstrably so outrageous that it would be a travesty of justice to uphold it. It would be in those limited cases that this Court in exercise of its jurisdiction under Article 226 may order the constitution of a special medical board, to wit, order a third medical test. In this case, there is no *prima facie* evidence placed on record to show that there is any flaw in the findings of the medical board or their

finding on a review. The medical certificate from the Mandaleeya Apar Nideshak/ Pramukh Adheekshak, S.S.P.G. Mandaleeya Zila Chikitsalay, Varanasi dated 20.09.2019 that the petitioner has filed on record, is apparently one which the petitioner has secured on a request made to the aforesaid medical establishment indicating that he needed it as a medical fitness certification for employment under the U.P. Polytechnics. The parameters for employment in the services of U.P. Polytechnics would be grossly different from what it is for the U.P. Police and the PAC. Also, no representative of the Police Recruitment Promotion Board was present during this Medical examination undertaken before the Mandaleeya Apar Nideshak/ Pramukh Adheekshak, S.S.P.G. Mandaleeya Zila Chikitsalay, Varanasi on 20.09.2019 on account of which, it would have no binding effect on the respondents.

7. In this connection reference may be made to a decision of this Court in **Special Appeal Defective No. 70 of 2016, State of U.P. and 2 Ors. vs. Rahul**, where a Division Bench of this Court considered the question of a separate medical examination that may be ordered by this Court under Article 226 of the Constitution. After a review of authority on the subject, it was held by their Lordships of the Division Bench in **State of U.P. and 2 Ors. vs. Rahul** *(supra)* as under:

"This Court in previous decisions has emphasized the need to preserve the sanctity of the recruitment process and of the care and circumspection which has to be exercised before the findings of an expert medical Board constituted by the authorities are interfered with in writ proceedings. Undoubtedly, the powers of the Court under Article 226 of the Constitution are wide enough to issue such a direction in an appropriate case. However, such directions cannot be issued merely on the basis of a request made in that behalf before the Court.

In a recent judgment of this Court in Union of India through Ministry of Railways vs. Parul Punia2, this Court has emphasized the need for caution when candidates seek to question the correctness of the findings of a medical Board constituted under the recruitment process adopted by the authorities of the State, on the basis of a report obtained by the candidates. The Division Bench observed as follows:

"...In a number of such cases, candidates who have been invalidated on medical grounds produce expert opinions of their own to cast doubt on the credibility of the official medical report constituted by the recruiting body. In such cases, the Court may not have any means of verifying the actual identity of the person who was examined in the course of the medical examination by the Doctor whose report is relied upon by the candidate. Hence, even though the authority whose medical report was produced by the candidate may be an expert, the basic issue as to whether the identity of the candidate who was examined, matches the identity of the person who has applied for the post is a serious issue which cannot be ignored..."

Dealing with the parameters of the writ jurisdiction in such cases, the Division Bench observed thus:

"...Undoubtedly, in a suitable case, the powers of the Court under Article 226 are wide enough to comprehend the issuance of appropriate directions but

such powers have to be wielded with caution and circumspection. Matters relating to the medical evaluation of candidates in the recruitment process involve expert determination. The Court should be cautious in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated medical evaluation. In the present case the proper course would have been to permit an evaluation of the medical fitness of the respondent by a review medical board provided by the appellants. Otherwise, the recruitment process can be derailed if such requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those which are envisaged by the recruiting authority are allowed. This would ordinarily be impermissible."

In the present case, we find absolutely no reasonable basis for the respondent to have invoked the jurisdiction under Article 226 for constituting a separate medical Board under the authority of the Principal of Motilal Nehru Medical College, Allahabad. In the interim order of the learned Single Judge, there was no safeguard to the effect that the medical examination would take place in the presence of a representative of the State to at least ensure that the issue of identity did not arise. But that apart, more fundamentally, the objection to the entire procedure which has been followed is that without any reasonable basis or justification, the recruitment process and the procedures which have been laid down have been supplanted under a judicial direction. This, in our view, would be impermissible.

We may also note that in an earlier judgment of a Division Bench of this Court in State of U.P. vs. Deepak Kumar3 it observed as follows:

"Once such is the factual situation that there is self contained procedure, that has been provided for, being declared medically fit and there is a provision of review also in case an incumbent is declared medically unfit and here on two occasions respondent petitioner has failed to prove himself to be medically fit, then based on the report of a private medical practitioner no such mandatory directives could have been issued. That is totally outside the scope of scheme that has been provided for, in view of this, the order passed by the learned Single Judge cannot be subscribed by us. Candidate concerned, at no point of time, has imputed any motive to members of Medical Board that they have wrongly for extraneous consideration prepared wrong report."

We may also note that in the report of the Motilal Nehru Medical College, Allahabad which has been referred to in the impugned order of the learned Single Judge, it has been found that "there is mild collapse of medial arch leading to Grade-1 Flat foot". However, on a medical examination, the bio-mechanical function of foot was found to be intact. The report advised that the case 'can be considered fit as per the medical parameters set by a particular service for which the candidate opts for'. Thus even the report of the independent Board did not support the case of the respondent."

8. The reasoning that weighed with their Lordships in **State of U.P. and 2 Ors. vs. Rahul** *(supra)* squarely applies to the present case. No case for grant of relief is made out.

9. In the result, this petition fails and is **dismissed**. There shall be no order as to costs.

(2020)1ILR 1801

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 18253 of 2019

Rakesh Kumar ...Petitioner
Versus
Principal, Government Inter College, Prayagraj & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh, Sri Adarsh Singh

Counsel for the Respondents:
C.S.C., Sri Girish Vishwakarma

A. Service matter-petitioner challenged the unauthorizedly over staying of employees/officers in a government accommodation even after their retirement or transfer- grievance of the petitioner is that more than one year has passed and yet the respondent no. 5 has not yet vacated the residential accommodation of the institution allotted to the petitioner due to which the petitioner is suffering-no action taken by the state government against such authorities-directions given in accordance with the judgement of Apex Court in this regard.

Writ Petition disposed of. (E-6)

List of cases cited: -

1. Jag Pal Singh Bhatt Vs. St. of U. P. 2002(2) AWC 988

2. S.D. Bandi Vs. Divisional Traffic Officer, Karnataka State Road Transport Corporation & Ors, (2013) 12 SCC 631

3. Satish Chandra Yadav Vs. St. Of U.P. And 7 Ors. 2016 (2) ADJ 395

4. Union of India Vs. Vimal Bhai, (2014) 13 SCC 766 Para 5

5. Lok Prahari Vs. St. of U.P. (2016) 8 SCC 389 Paras41, 46

(Delivered by Hon'ble Surya Prakash Kesarwani,J.)

1. Heard Sri Adarsh Singh, learned counsel for the petitioner and Sri Girish Vishwakarma, learned standing counsel for the respondent nos. 1 to 4.

2. On 25.11.2019, this Court passed the following order:-

"The petitioner is posted as Assistant Teacher in the institution of respondent no. 1. He has been allotted an accommodation by the respondent no. 1 by order dated 24.9.2018 which has not yet been vacated by the earlier Assistant Teacher, namely Sri Chhote Lal Yadav who was promoted and transferred on 3.8.2018.

The grievance of the petitioner is that more than one year has passed and yet the respondent no. 5 has not yet vacated the residential accommodation of the institution allotted to the petitioner due to which the petitioner is suffering.

In view of the facts briefly noted above, learned standing counsel is directed to obtain instructions from respondent nos. 1, 2 & 3 who shall also show cause that if the allotment order dated 24.9.2019 is still operating in favour of the petitioner, then why the accommodation has not been got vacated from the respondent no. 5 and what action has been taken against the respondent no. 5 due to alleged illegal occupation of the Government accommodation.

Put up on 28.11.2019 in the additional cause list for further hearing."

3. Today, learned standing counsel has produced instruction dated 27.11.2019, given by the respondent no.1 in which it is mentioned that after the order of this Court dated 25.11.2019, the premises has been got vacated from the respondent no.5 and it has been given to the petitioner which was allotted to him by order dated 24.09.2018. The aforesaid instruction is kept on record.

4. Perusal of this instruction *prima facie* shows that the respondent no.5 is indulged in not only illegally and unauthorisedly occupying the Government accommodation but also indulged in encroaching upon the Government land and damaged boundary wall etc. which is Government property. No action whatsoever has been taken by the respondent authorities except that after this court passed the above quoted order, the payment of salary of the respondent no.5 was requested to be stopped. Such type of instances are serious particularly when there is inaction on the part of the respondent authorities.

5. A Division Bench in **Jag Pal Singh Bhatt Vs. State of Uttar Pradesh 2002(2) AWC 988** has laid down the law in the matter of a State Government Employee that *he cannot continue to occupy the official accommodation since he has been transferred from there.*

6. Hon'ble Supreme Court in the case of **S.D. Bandi v. Divisional Traffic Officer, Karnataka State Road Transport Corporation and others, (2013) 12 SCC 631**, has laid down the law that an employee should not overstay after his retirement or transfer. The Court has noticed that the States of Uttar Pradesh and Orissa have amended Section 441 of the Penal Code, 1860 (in short "IPC"). The Supreme Court has observed that the Government in two States are in a position to file criminal proceedings in the case of unauthorised occupation of government accommodation. Section 441 as amended in Uttar Pradesh as quoted in **S.D. Bandi (supra)** reads as under:

'441. ... or, having entered into or upon such property, whether before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961, with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property or its possession or use, when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice, is said to commit "criminal trespass".' (Uttar Pradesh).

7. After considering the response from all the States, Hon'ble Supreme Court has made certain suggestions in Para-33 of the S.D. **Bandi's case (supra),** as under:-

"Suggestions:

33. The following suggestions would precisely address the grievances of the Centre and the State governments in regard to the unauthorized occupants:

33.1 As a precautionary measure, a notice should be sent to the allottee/officer/employee concerned under Section 4 of the PP Act three months prior to the date of his/her retirement giving advance intimation to vacate the premises.

33.2 The Department concerned from where the government servant is going to retire must be made liable for fulfilling the above-mentioned formalities as well as follow up actions so that rest of

the provisions of the Act can be effectively utilized.

33.3 The principles of natural justice have to be followed while serving the notice.

33.4 After following the procedure as mentioned in SR 317-B-11(2) and 317-B-22 proviso 1 and 2, within 7 working days, send a show cause notice to the person concerned in view of the advance intimation sent three months before the retirement.

33.5 Date of appearance before the Estate Officer or for personal hearing as mentioned in the Act after show cause notice should not be more than 7 working days.

33.6 Order of eviction should be passed as expeditiously as possible preferably within a period of 15 days.

33.7 If, as per the Estate Officer, the occupant's case is genuine in terms of Section 5 of the Act then, in the first instance, an extension of not more than 30 days should be granted.

33.8 The responsibility for issuance of the genuineness certificate should be on the Department concerned from where the government servant has retired for the occupation of the premises for next 15 days and further. Giving additional responsibility to the department concerned will help in speedy vacation of such premises. Baseless or frivolous applications for extensions have to be rejected within seven days.

33.9 If as per the Estate Officer the occupant's case is not genuine, not more than 15 days' time should be granted and thereafter, reasonable force as per Section 5(2) of the Act may be used.

33.10 There must be a time frame within how much time the Estate Officer has to decide about the quantum of rent to be paid.

33.11 The same procedure must be followed for damages.

33.12 The arrears/damages should be collected as arrears of land revenue as mentioned in Section 14 of the Act.

33.13 There must be a provision for compound interest, instead of simple interest as per Section 7.

33.14 To make it more stringent, there must be some provision for stoppage or reduction in the monthly pension till the date of vacation of the premises.

33.15 Under Section 9 (2), an appeal shall lie from an order of eviction and of rent/damages within 12 days from the day of publication or on which the order is communicated respectively.

33.16 Under Section 9(4), disposal of the appeals must be preferably within a period of 30 days in order to eliminate unnecessary delay in disposal of such cases.

33.17 The liberty of the appellate officer to condone the delay in filing the appeal under Section 9 of the Act should be exercised very reluctantly and it should be an exceptional practice and not a general rule.

33.18 Since allotment of government accommodation is a privilege given to the Ministers and Members of Parliament, the matter of unauthorized retention should be intimated to the Speaker/Chairman of the House and action should be initiated by the House Committee for the breach of the privileges which a Member/Minister enjoys and the appropriate Committee should recommend to the Speaker/Chairman for taking appropriate action/eviction within a time bound period.

33.19The Judges of any forum shall vacate the official residence within a period of one month from the date of

superannuation/retirement. However, after recording sufficient reason(s), the time may be extended by another one month.

33.20 Henceforth, no memorials should be allowed in future in any Government houses earmarked for residential accommodation. "

8. Hon'ble Supreme Court further held that the same procedure must be followed for damages also; the arrears/damages should be collected as arrears of land revenue; to make it more stringent, there must be some provision for stoppage or reduction in the monthly pension till the date of vacation of the premises.

9. The State of Uttar Pradesh has informed the Supreme Court that in the State of Uttar Pradesh, there is already a provision in respect of arrears of rent and damages and the rules enable the State to recover the same as arrears of land revenue. The Supreme Court was also informed by the State of Uttar Pradesh that the stringent provision viz. Section 11 of the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 is in force.

10. The aforesaid judgment of Hon'ble Supreme Court in **S.D. Bandi (supra)** has been followed by a Bench of this Court in **Satish Chandra Yadav Vs. State Of U.P. And 7 Ors. 2016 (2) ADJ 395** and a direction has been issued as under:-

"Therefore, the authority concerned shall adopt an uniform policy for granting extension to retain the government accommodation beyond prescribed limit. The State functionaries would follow the law laid down by the Supreme Court in the case of S.D. Bandi (supra) in letter and spirit."

11. In **Union of India vs. Vimal Bhai, (2014) 13 SCC 766 (Para-5) Hon'ble Supreme Court directed** to get the Government accommodation vacated from those who are unauthorisedly occupying the same and **action must be taken strictly in accordance with para 33 of the judgment in S.D. Bandi case (supra).**

12. In **Lok Prahari vs. State of U.P. (2016) 8 SCC 389 (Paras-41, 46),** Hon'ble Supreme Court held as under:

"41. This Court, in the case of "SD Bandi v. Karnataka SRTC, (2013) 12 SCC 631, in relation to occupation of government bungalows, beyond the period for which the same were allotted, observed that (SCC p.649, para 34)

"34. It is unfortunate that the employees, officers, representatives of people and other high dignitaries continue to stay in the residential accommodation provided by the Government of India though they are no longer entitled to such accommodation. Many of such persons continue to occupy residential accommodation commensurate with the office(s) held by them earlier and which are beyond their present entitlement. The unauthorized occupants must recollect that rights and duties are correlative as the rights of one person entail the duties of another person similarly the duty of one person entails the rights of another person. Observing this, the unauthorized occupants must appreciate that their act of overstaying in the premise infringes the right of another. *No law or directions can entirely control this act of disobedience but for the*

self realization among the unauthorized occupants".

46. So far as allotment of bungalow to private trusts or societies are concerned, it is not in dispute that all those bungalows were allotted to the societies/trusts/organizations at the time when there was no provision with regard to allotment of government bungalows to them and therefore, in our opinion, the said allotment cannot be held to be justified. One should remember here that public property cannot be disposed of in favour of any one without adequate consideration. Allotment of government property to someone without adequate market rent, in absence of any special statutory provision, would also be bad in law because the State has no right to fritter away government property in favour of private persons or bodies without adequate consideration and therefore, all such allotments, which have been made in absence of any statutory provision cannot be upheld. If any allotment was not made in accordance with a statutory provision at the relevant time, it must be discontinued and must be treated as cancelled and the State shall take possession of such premises as soon as possible and at the same time, the State should also recover appropriate rent in respect of such premises which had been allotted without any statutory provision." (Emphasis supplied by me)

13. From the facts as briefly noted above, it appears that despite a clear direction of Hon'ble Supreme Court and of this Court and despite the provisions of Section 11 of the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972, the State authorities have neither adopted a uniform policy nor have made any effort to enforce the provisions of Section 11 of the Act 1972 nor enforced the clear direction given by this Court in the case of **Satish Chandra Yadav (supra)** and by Hon'ble Supreme Court in the case of **S.D. Bandi (supra)** which has binding force under Article 141 of the Constitution of India.

14. In the present case, since the accommodation has now been got vacated from the respondent No.5 and the allottee has been given possession of the allotted Government Accommodation, therefore, this writ petition is disposed of and the following directions are issued which shall be strictly complied with by the State Government:-

(i) The State Government shall ensure compliance of the directions of Hon'ble Supreme Court in the case of **S.D. Bandi (supra)** and take immediate action against all such employees/ officers who are unauthorisedly over staying in a Government Accommodation after their retirement or transfer.

(ii) Necessary action shall be taken by competent authorities in the State of Uttar Pradesh against such Employees/Officers who are unauthorisidely over staying in Government allotted accommodation after their retirement or transfer (as suggested by Hon'ble Supreme Court in the case of **S.D. Bandi's** case and directed to be implemented in **Vimal Bhai** case).

(iii) The State Government shall frame and adopt a uniform policy within two months from today, if not framed so far, for granting extension to retain the Government accommodation beyond prescribed limit and shall strictly adhere to it.

(iv) The State Government shall call for information from all the District

Authorities in the State of Uttar Pradesh within two months from today about the Officers and Employees who are unauthorisedly over staying or retaining the Government accommodation beyond prescribed limit, after their retirement or transfer. Within next one month, the State Government shall ensure that all such Government accommodation being illegally or unauthorisedly occupied by retired/transferred Employees and Officers are vacated immediately. In the event, any inaction is shown by any authority, the State Government shall ensure that necessary action is also taken against such authorities.

15. With the aforesaid directions this writ petition is **disposed of.**

16. Let a copy of this judgment be sent by the Registrar General of this Court to the Chief Secretary, Government of Uttar Pradesh for necessary action and compliance.

(2020)1ILR 1806
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 18336 of 2019

Dr. Vijay Kumar Srivastava & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anoop Kumar, Sri Vivek Saran

Counsel for the Respondents:
C.S.C., Sri Bhupendra Nath Singh

A. Service – Pension - Qualifying period/service – Uttar Pradesh Higher Education Services Commission Act, 1980: Section 12, 13, 31, 31-E;

Rule of Estoppel - A person cannot say at one time that a transaction is valid to obtain some advantage and at the same time say that it is void for the purpose of securing some other advantage – Petitioners' appointment is based on doctrine of election which is the Rule of estoppel or a Rule of equity. They cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Petitioners have knowingly, willfully accepted the benefits of their appointment by absorption under GOs dated 6.6.2014 and 2.5.2016 as an exception to the normal rule of public employment and Ss 12 and 13 of the Act, 1980 resulting in a contract of service. Therefore, they cannot question the validity or binding effect of the aforesaid Government Orders. (Para 21 to 30, 40(iii), 41(iv))

B. Rules of Absorption - It is settled law that a person cannot challenge the very source i.e. Statute, Rules or the Government Orders under which he was appointed - The GO dated 6.6.2014 and amended S. 31-E of the Act, 1980 is a one-time measure for absorption. Absorption in public employment is not a right but, an exception to the normal rule and subject to conditions. Once the petitioners have exercised the option for their absorption in public employment, they cannot say that condition no. 4 is arbitrary. Past service as part time teacher on honorarium prior to absorption cannot be added in their length of service in the absence of any constitutional or legal right. (Para 31 to 40, 41(ii), 41(v))

C. U.G.C. Regulation 2010: Clause 10.1(f) – The said clause is applicable only to adhoc and temporary appointees which fall under a different class than the persons / petitioners who were engaged by the management on honorarium basis per lecture as permitted by GO dated 7.4.1998. These engagements were made without recommendation of any duly constituted

Selection Committee under the Act, 1980. (Para 41(i))

Writ Petition dismissed. (E-4)

Precedent followed: -

1. University of Rajasthan and another Vs. Prem Lata Agrawal, (2013) 3 SCC 705 (Para 19)

2. Union of India and others Vs. K.G. Radhakrishna Panickar and others, (1998) 5 SCC 111 (Para 20)

3. Halsbury's Laws of England, 4th Edition, Vol. 16, Para 1508 (Para 23)

4. Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others Vs. Director General of Civil Aviation and others, (2001) 5 SCC 435 (Para 24)

5. Babu Ram alias Durga Prasad Vs. Indra Pal Singh, 1998(6) SCC 358 (Para 24)

6. P.R. Deshpande Vs. Maruti Balaram Haibatti, 1998(6) SCC 507 (Para 24)

7. Mumbai International Airport Private Ltd. Vs. Golden Chariot Airport and another, 2010 (10) SCC 422 (Para 24)

8. Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International Company Limited), (2011) 10 SCC 420 (Para 25, 26 & 27)

9. Ammal Vs. B. Shama Rao, AIR 1956 SC 593 (Para 25)

10. CIT Vs. V. MR.P. Firm Muar, AIR 1965 SC 1216 (Para 25)

11. NTPC Ltd. Vs. Reshmi constructions, Builders & Contractors, (2004) 2 SCC 663 (Para 25)

12. Ramesh Chandra Sankla Vs. Vikram Cement, (2008)14 SCC 58 (Para 25)

13. Pradeep Oil Corpn. Vs. MCD, (2011) 5 SCC 270 (Para 25)

14. V. Chandrasekaran and another Vs. Administrative Officer and others, (2012) 12 SCC 133 (Para 26)

15. Rajasthan State Industrial Development and Investment Corporation and another Vs. Diamond & Gem Development Corporation Limited and another, (2013) 5 SCC 470 (Para 27)

16. State of Punjab and others Vs. Dhanjit Singh Sandhu, (2014) 15 SCC 144 (Para 28)

17. CIT Vs. MR. P. Firm Muar, AIR 1965 SC 1216 (Para 28)

18. Maharashtra SRTC Vs. Balwant Regular Motor Service, AIR 1969 SC 329 (Para 28)

19. R.N. Gosain Vs. Yashpal Dhir, (1992) 4 SCC 683 (Para 28)

20. P.R. Deshpande Vs. Maruti Balaram Haibatti, (1998) 6 SCC 507 (Para 28)

21. Zila Dastavej Lekhak Association & another Vs. State of U.P. and others, AIR 1996 2107 (Para 29)

22. Secretary, State of Karnataka Vs. Uma Devi (2006) 4 SCC 1 (Para 31)

23. Pratap Kishore Panda and others Vs. Agni Charan Das and others, (2015) 17 SCC 789 (Para 32)

23. State of U.P. Vs. Anand Kumar Yadav, (2018) 13 SCC 560 (Para 33)

24. Brij Mohan Lal Vs. Union of India and others, (2012) 6 SCC 502 (Para 34)

25. Indu Shekhar Singh and others Vs. State of U.P. and others, (2006) 8 SCC 129 (Para 35)

26. R.N. Gosain Vs. Yashpal Dhir, (1992) (4) SCC 683 (Para 35)

27. Ramankutti Guptan Vs. Avara, (1994) 2 SCC 642 (Para 35)

28. Bank of India and others Vs. O.P. Swarnakar and others, (2003) 2 SCC 721 (Para 35)

29. Mrigank Johari & others Vs. Union of India, (2017) 8 SCC 256 (Para 36)

30. Union of India Vs. Onkar Chand, (1988) 9 SCC 298 (Para 37)

31. Union of India and others Vs. K Savitri and others, (1998) 4 SCC 358 (Para 38)

Precedent cited: -

1. Zila Dastavej Lekhak Association and another Vs. State of U.P. and others, (1996) 8 SCC 441 (Para 5)

2. Suresh Chandra Vs. State of U.P. and others, (2014) 7 ADJ 721 (Para 5)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Whether **(i)** period spent in engagement on **honorarium** by the petitioners prior to their appointment by absorption under the Government Orders dated 6.6.2014 and 2.5.2016, is liable to be counted in their length of service for all consequential benefits including promotion?, and **(ii)** the condition no. 4 of the Government Order dated 6.6.2014 under which petitioners got appointment is liable to be quashed?

2. Heard Sri Vivek Saran, learned counsel for the petitioners and Sri Manish Goyal, learned Additional Advocate General assisted by Sri Anil Pandey, learned standing counsel for the respondents.

Facts

3. The petitioners who have been appointed by absorption under the Government Order dated 6.6.2014 as an exception to the normal rule of appointments have filed, this writ petition praying for the following **reliefs**:-

"1. Issue any other writ, order or direction in the nature of certiorari ***quashing the condition no. 4 of the Government Order dated 6.6.2014 and condition no. 4 of the Government Order dated 2.5.2016*** *(Annexure Nos. 3 & 4).*

2. Issue any other writ, order or direction in the nature of ***mandamus commanding the respondent no. 2 to count the past service rendered by the petitioners on ad-hoc/honorarium basis*** *and grant all consequential benefits including promotion and monetary, as and when they falls due."*

(emphasis supplied)

Submissions

4. Learned counsel for the petitioners submits that the condition no. 4 is arbitrary, and therefore, it deserves to be struck off.

5. Learned Additional Advocate General submits that the petitioners got their absorption under the aforesaid Government Orders. They cannot be permitted to accept the aforesaid Government Orders for absorption and at the same time pray to struck off its condition no. 4. He further submits that the absorption is subject to the condition mentioned in the aforesaid Government Orders dated 6.6.2014 and 2.5.2016. It is not permissible for the petitioners to accept some of the conditions which he find favourable to them and to pray for striking off the other condition which he feels unfavourable to him. In support of his submissions, he relied upon the judgment of Hon'ble Supreme Court in ***Zila Dastavej Lekhak Association & another Vs. State of U.P. & others (1996) 8 SCC 441 (paras 3 & 4)*** and judgment of this Court in ***Suresh Chandra Vs. State of***

U.P. & others (2014) 7 ADJ 721 (paras 54, 55 & 56).

Discussing & Finding

6. I have carefully considered the submissions of learned counsel for the parties.

7. Briefly stated facts of the present case are that according to the **petitioners**, they **were engaged** in non-government aided degree colleges **under Government Order dated 07.04.1998 on honorarium of Rs. 100/- per lecture subject to maximum of Rs.5000/- in a month.** Section 31-E of The Uttar Pradesh Higher Education Services Commission Act, 1980(herein after referred to as the Act, 1980) was amended by U.P. Act No.22 of 2014 w.e.f. 26.05.2014 which enabled the management at the instance of the Director to offer appointments as teachers to persons engaged on honorarium basis subject to the provisions of Sections 12 and 13 of the Act, 1980, if there is substantive vacancy. Sub-section (4) of Section 31-E provides that teachers so appointed shall be entitled to get his salary as teachers, from the date, he joins the post in pursuance of such letter of appointment. In view of the aforesaid amended Section 31-E, the State Government issued Government Order dated 6.6.2014 for absorption subject to certain conditions. The petitioners accepted the conditions and obtained appointment as teachers subject to final decision in Writ Petition Petition No. 22349 of 2016 pending in High Court and some matters of absorption pending in Supreme Court. Their appointment letters provide for one year probation period.

8. After appointments on the post of teacher on accepting the conditions of absorption under the aforesaid Government Order dated 6.6.2014, the petitioners have now challenged one of the condition of their absorption i.e. **the condition no. 4** which **provides that the services of the teachers / petitioners shall be counted from the date of absorption and period of earlier engagement on honorarium basis shall not be counted in length of service for computation of post retiral benefits.**

9. **The Government Order dated 6.6.2014 and 2.5.2016 for absorption are reproduced below:-**

(a) **Government Order dated 6.6.2014**:-

''उच्च शिक्षा अनुभाग–2
लखनऊः दिनांकः 06 जून, 2014
महोदय,

उपयुक्त विषय के संबंध में अवगत कराना है कि शासनादेश संख्या–467/सत्तर–2–98–3(19)/93 टीसी, दिनांक 7.4.1998 में विहित शर्तो एवं प्रतिबन्धो के अधीन अशासकीय सहायता प्राप्त स्नातक एव स्नातकोत्तर महाविद्यालयों में शिक्षको के रिक्त पदो पर निश्चित मानदेय के आधार पर शिक्षको की रखे जाने की व्यवस्था की गई थी। ***उक्त शासनादेश के अधीन नियुक्त मानदेय शिक्षको के आमेलन हेतु उ0प्र0 उच्चतर शिक्षा सेवा आयोग अधिनियम, 1980 यथासंशोधित (तृतीय संशोधन) अधिनियम 2006 में धारा–31 ई जोड़ी गई, जिसमें कतिपय शर्तो एवं प्रतिबन्धो के अधीन आमेलन की व्यवस्था की गई है।*** *आमेलन के लिए पदो की उपलब्धता सुनिश्चित करने हेतु उ0प्र0 उच्चतर शिक्षा सेवा आयोग (संशोधन) अध्यादेश, 2014 प्रख्यापित किया गया, जिसके द्वारा उक्त अधिनियम 2006 की धारा 31 ई के प्रस्तर–1 में शब्द ''भरा नही जा सकता है'' के स्थान पर शब्द ''भरा नही जा सका'' किया गया है।*

2– अतएव मानदेय शिक्षको के आमेलन विषयक उ0प्र0 उच्चतर शिक्षा सेवा आयोग अधिनियम, 1980 यथासंशोधित (तृतीय संशोधन)

अधिनियम 2006 तथा उ0प्र0 उच्चतर शिक्षा सेवा आयोग (संशोधन) 2014 (उ0प्र0 अध्यादेश संख्या–3 सन् 2014) की छाया प्रति संलग्न कर प्रेषित करते हुए मुझे यह कहने का निर्देश हुआ है कि कृपया अधिनियम एवं अध्यदेश में विद्यमान व्यवस्थानुसार ***मानदेय शिक्षको के आमेलन*** *के संबंध में आवश्यक कार्यवाही शीर्ष प्राथमिकता पर* ***निम्नांकित शर्तों एवं प्रतिबन्धो*** *के अधीन कराने का कष्ट करेः–*

(1) उन्ही मानदेय शिक्षको का आमलेन किया जायेगा, जिनका चयन उपलब्ध रिक्ति एवं अनुमोदित पद पर विधि अनुरूप किया गया हो।

(2) मानदेय शिक्षक यू0जी0सी0 द्वारा निर्धारित अर्हतायें पूर्ण करते हो।

(3) ***आमेलन, आदेश निर्गत होने की तिथि से प्रभावी होगी*** *तथा आमेलन पर उच्चतर शिक्षा सेवा आयोग की संस्तुति भी प्राप्त की जायेगी।*

(4) ***इन शिक्षको की अधिकारी सेवा आमेलन की तिथि से आंकी जायेगी, पूर्व सेवा, जो मानदेय के आधार पर है, को सेवानिवृत्तिक लाभों के लिए अर्हकारी नही माना जायेगा।***

(5) भविष्य में किसी प्रकार की मानदेय/तदर्थ नियुक्ति नही की जायेगी।

(6) कृपया उक्तानुसार आवश्यक कार्यवाही कराते हुए कृत कार्यवाही से तत्काल शासन को अवगत कराने का कष्ट करे।''

(b) **Government Order dated 2.5.2016:-**

संख्या–8/2016/274/सत्तर–2–2016–3(19)/1993 टी.सी.।।

विषय–अशासकीय सहायता प्राप्त स्नातक एवं स्नातकोत्तर महाविद्यालयों में शिक्षकों के रिक्त पदों पर निश्चित मानदेय के आधार पर कार्य कर रहे मानदेय शिक्षकों का आमेलन।

महोदय,

उपर्युक्त विषयक अपने पत्र संख्या डिग्री अर्थ–1 (वि0नि0) /03 / 2016–17, दिनांक 13.04.2016 का कृपया संदर्भ ग्रहण करने का कष्ट करें, जिसमें यह अवगत कराया गया है कि रिट याचिका संख्या–33652/2014 डा0 जितेन्द्र कुमार व 09 अन्य बनाम उ0प्र0 सरकार व 02 अन्य मामले में मा0 उच्च न्यायालय, इलाहाबाद द्वारा दिनांक 06.04.2016 को निम्नवत् आदेश पारित किये गये हैः–

The attention of the Court has been drawn to the fact that by a gazette notification dated 26 December 2014, publised on 26 December 2014, the Uttar Pradesh Higher Education Services Commission (Amendment) Act, 2014 was notified and was deemed to have come into force on 26 May 2014. By and as a result of Section 3(1), the the Uttar Pradesh Higher Education Services Commission (Amendment) ordinance, 2014 has been repealed.

Since the relief which has been sought in the petition is to challenge the Uttar Pradesh Higher Education Services Commission (Amendment) ordinance,2014 which has since been repealed.

The petition has been rendered infructuous. The challenge to the order of the Special Secretary dated 6 June 2014 will not survive since that is only for implementation of the Ordinance, 2014 which has since been repealed.

The petition is, accordingly, dismissed. Interim order shall, in consequence, stand vacated. There shall be no order as to costs.

2– इस संबध में मुझे यह कहने का निदेश हुआ है कि उ0प्र0 उच्चतर शिक्षा सेवा आयोग अधिनियम,1980 (यथासंशोधित) अधिनियम, 2006 की धारा–31–ई एवं उ0प्र0 उच्चतर शिक्षा सेवा आयोग (संशोधन) अधिनियम, 2014 (उ0प्र0 अधिनियम संख्या– 22 सन् 2014 अधिसूचना दिनांक 26.12.2014) में विद्यमान व्यवस्थानुसार ***मानदेय शिक्षकों के आमेलन*** *के संबंध में आवश्यक कार्यवाही शीर्ष प्राथमिकता पर* ***निम्नांकित शर्तों एवं प्रतिबन्धों के अधीन*** *कराने का कष्ट करें:–*

(1) उन्हीं मानदेय शिक्षकों का आमेलन किया जायेगा, जिनका चयन उपलब्ध रिक्ति एवं अनुमोदित पद पर विधि अनुरूप किया गया हो।

(2) मानदेय शिक्षक यू0जी0सी0 द्वारा निर्धारित अर्हतायें पूर्ण करते हो।

(3) ***आमेलन, आदेश निर्गत होने होने की तिथि से प्रभावी होगा*** *तथा आमेलन पर उच्चतर शिक्षा सेवा आयोग की संस्तुति भी प्राप्त की जायेगी।*

(4) ***इन शिक्षकों की अर्हकारी सेवा आमेलन की तिथि से आंकी जायेगी, पूर्व सेवा, जो मानदेय के आधार पर है, को सेवानिवृत्तिक लाभों के लिए अर्हकारी नहीं माना जायेगा।***

(5) भविष्य में किसी प्रकार की मानदेय/तदर्थ नियुक्ति नहीं की जायेगी।''

10. Section 31-E of the Act, 1980 as amended by the U.P. Act No. 22 of 2014 w.e.f. 26.5.2014 is the enabling provision for absorption which is reproduced below:-

"31-E. Absorption of teacher on honorarium. (1) Subject to the provisions contained in Sections 12 and 13, *if any vacancy exists, which could not be filled under the provisions of said sections, a teacher on honorarium shall be absorbed in the manner prescribed under sub section (2) , who is working in grant-in-aid college, possessing educational qualifications determined by the State Government, receiving honorarium, thereby working for a minimum period of three academic sessions and has been working till the date of commencement of the Uttar Pradesh Higher Education Services Commission (Third Amendment) Act 2006*

(2) Where any substantive vacancy in the post of a teacher in a grant-in-aid college is to be filled by direct recruitment, ***such post shall, at the instance of the Director, be offered by the management to teacher on honorarium referred to in sub-section (1).***

(3) Where any teacher on honorarium who has been offered appointment in accordance with the provisions of sub-section (2) fails to join the post within the time allowed, which shall not be less than fifteen days, his further claim shall cease automatically.

Explanation.- For the purposes of this section -

"teacher on honorarium" means a person working in grant-in-aid college and is engaged in teaching a course of study and receiving payment from the Funds of State aid on a fixed honorarium appointed on a contractual basis with the prior approval of the Director.

(4) Where the Management fails to offer any post to a teacher on honorarium in accordance with the provisions of sub-section (2) within the time specified by the Director, the Director, may himself issue the letter of appointment to such teacher on honorarium and the ***teacher on honorarium concerned shall be entitled to get his salary as teacher, from the date, he joins the post in pursuance of such letter of appointment."***

(emphasis supplied)

11. In terms of the provisions of Section 31-E of the Act, 1980 and Government Order dated 6.6.2014, **the Director (Higher Education), U.P., Allahabad issued orders recommending the respective degree colleges to offer appointment to petitioners.** One such letter of the Director **dated 18.5.2017** is reproduced below:-

''प्रेषक,

शिक्षा निदेशक (उच्च शिक्षा) उ0प्र0,

शिक्षा डिग्री अर्थ–1 (विनियमितीकरण)

इलाहाबाद।

सेवा में,

प्रबन्धक/प्राचार्य

महाराजा बलवन्त सिंह पी0जी0 कालेज,

गंगापुर, वाराणसी।

पत्रांक डिग्री अर्थ–1(विनि)/ /2017–2018 दनांक 18–05–2017

विषयः– उ0प्र0 अध्यादेश संख्या–42 सन् 2006 दिनांक 28 दिसम्बर, 2006 द्वारा उ0प्र0 उच्चतर शिक्षा सेवा आयोग अधिनियम 1980 की धारा 31ङ के स्थान पर प्रतिपादित धाराएं 31ङ(1), (2), (3) एंव (4) तथा तत्सम्बन्धी संशोधित अधिनियम–2014 के अन्तर्गत अशासकीय सहायता प्राप्त स्नातक एंव स्नातकोत्तर महाविद्यालयों में शिक्षकों के रिक्त पदों पर निश्चित मानदेय के आधार पर कार्य कर रहे मानदेय शिक्षकों कें आमेलन के सम्बनध में।

महोदय,

उ0प्र अध्यादेश संख्या–42 सन् 2006 दिनांक 28 दिसम्बर, 2006 द्वारा उ0प्र0 उच्चतर शिक्षा सेवा आयोग अधिनियम 1980 में प्रतिपादित धारा 31ङ (1), (2), (3) तथा (4) तथा तत्सम्बन्धी संशोधित अधिनियम–2014 के अधीन आपके महाविद्यालय में शासनादेश दिनांक 07.04. 1998 में निर्धारित न्यूनतम शैक्षिक अर्हता एंव वर्णित व्यवस्था के अन्तर्गत नियुक्त निश्चित मानदेय के आधार पर कार्य कर रहे मानदेय शिक्षक को आमेलन करने हेतु संस्तुत करने के प्रकरणों पर महाविद्यालय एंव क्षेत्रीय उच्च शिक्षा अधिकारी द्वारा प्रस्तुत एंव अग्रसारित किये गये प्रमाणिक अभिलेख के आधार पर ***उपरोक्त अध्यादेश के क्रम में निर्गत शासनादेश संख्या 331/ सत्तर–2– 2014–3 (19)/1993 टीसी–ष दिनांक 06.06.2014,*** *एंव शासनादेश संख्य–8/2016 / 274/ सत्तर–2– 2016–3(19) 1993 टीसी–ष दिनांक 02 मई, 2016 में उल्लिखित 05 शर्तों/प्रतिबन्धों के दृष्टिगत तथा तत्सम्बन्धी शासनादेश संख्या–14/2016/547/सत्तर–2–2016–3(19) /93 टीसी–ष दिनांक 30 अगस्त, 2016 एंव शासनादेश संख्या–वी0आ0पी0–86/ सत्तर–2–2016–3(19)/93 टीसी दिनांक 05 दिसम्बर, 2016 के दृष्टिगत विचार किया गया।*

2– उपलब्ध अभिलेखों के आधार पर आपके महाविद्यालय में डॉ0 विजय कुमार, मानदेय प्रवक्ता–इतिहास, जगतपुर पी0जी0 कालेज, वाराणसी को प्रस्तर 03 में उल्लिखित पद के प्रति अध्यादेश में निर्दिष्ट प्रतिबन्धों के अधीन तात्कालिक प्रभाव से आमेलन हेतु संस्तुति की जाती है।

3– डॉ0 गोविन्द देव मिश्र के सेवानिवृत्ति से हुई रिक्ति।

4– ***आमेलन की यह संस्तुति मा0 उच्च न्यायालय, इलाहाबाद द्वारा रिट याचिका संख्या–22349/2016 में पारित आदेश दिनांक 27–05–2016 के अनुपालन में की जा रही है*** *तथा मानदेय शिक्षक का आमेलन मा0 उच्च न्यायलय द्वारा उक्त याचिका में पारित अन्तिम निर्णय के अधीन होगा।*

6– ***मानदेय शिक्षकों की अर्हकारी सेवा आमेलन की तिथि से मानी जायेगी।***

7– इस सम्बन्ध में यह भी स्पष्ट किया जाता है कि मानदेय शिक्षक के आमेलन की यह संस्तुति अभ्यर्थी, प्राचार्य एंव प्रबन्धक तथा क्षेत्रीय उच्च शिक्षा अधिकारी द्वारा उच्च शिक्षा निदेशालय को प्रस्तुत अभिलेखों के आधार पर की गयी है। अतः यदि किसी स्तर पर अभिलेखों में त्रुटि पायी जाती है अथवा कोई घोषणा असत्य होती है तो उसका उत्तरदायित्व यथास्थिति तत्सम्बन्धी अभ्यर्थी/प्राचार्य/प्रबन्धक की होगी तथा आमेलन को अभिशून्य कर दिया जायेगा।

8– आमेलित होने वाले शिक्षक शसानादेश दिनांक 07–04–1998 में दी गयी शैक्षणिक अर्हता एंव अन्य शर्तों को पूर्ण करता हो यह सुनिश्चित कर लिया जाए। आमेलित शिक्षक के वेतन का आहरण तब तक न किया जाए जबतक कि उनके शैक्षिक अभिलेखों का सम्बन्धित शैक्षिक संस्थाओं से सत्यापन प्राप्त न हो जाए।

9– यदि आमेलित प्रवक्ता नियुक्ति पत्र निर्गत होने के 15 दिनों के अन्दर कार्यभार ग्रहण नहीं करता है तो उनका आमेलन निरस्त माना जाएगा।

नोटः– *मानदेय शिक्षकों का यह आमेलन आदेश याचिका संख्या–22349/2016 (डॉ0 दीनानाथ व 07 अन्य बनाम उत्तर प्रदेश राज्य व अन्य) एंव मानदेय आमेलन से सम्बन्धित मा0*

सर्वोच्च न्यायालय/मा0 उच्च न्यायालय में लम्बित अन्य याचिकाओं के अधीन होगा। मा0 न्यायालय के किसी अन्यथा आदेश पर यह आमेलन स्वतः अभिशून्य हो जायेगा।

भवदीय
डॉ0 (आर0पी0 सिंह)
शिक्षा निदेशक(उ0शि0) उ0प्र0,
इलाहाबाद''

12. Thereafter the management offered appointment to petitioners under the Government Orders dated 6.6.2014 and 2.5.2016 which the petitioners voluntarily accepted. Consequently, they were appointed by absorption subject to conditions as provided in the aforequoted Government Orders dated 6.6.2014 and 2.5.2016. Now, by the present writ petition, they are challenging condition no. 4 of the aforequoted Government Orders dated 6.6.2014 and 2.5.2016 under which they came to be appointed.

13. In brief, normal procedure for recruitment under Sections 12 & 13 of the Act, 1980, is that management shall intimate vacancies to the Director in the manner prescribed, who shall notify it to the Commission in the prescribed manner. The Commission shall hold written examination and interview of the candidates and thereafter send a list to the Director recommending such candidates found most suitable in each subject in order of merit. Thereafter, the Director shall intimate to the management the name of candidate from the list for appointment in such vacancy by the management. Procedure for selection of teachers has been prescribed in the Uttar Pradesh Higher Education Services Commissions (Procedure for Selection of Teachers) Regulations, 2014 framed under Section 31 of the Act, 1980.

14 The aforequoted recommendation for absorption of the petitioners was made by the Director pursuant to the order dated 26.5.2016 in Writ-C No. 22349 of 2016 (Dr. Deena Nath Yadav & 7 others Vs. State of U.P. & 2 others) passed by the Division Bench in which the judgment dated 4.4.2008 in Writ-A No. 5210 of 2007 (Anurag Tripathi & another Vs. State of U.P. & others) was referred and it was held that the petitioners are part time teachers. The operative portion of the order dated 27.5.2016 in Dr. Deena Nath Yadav's case (supra) is reproduced below:-

"Considering the facts that this Court, while questioning the vires of the Ordinance had granted an interim order and, in order to balance the equity, we direct the respondents that they may proceed with the absorption of part time teachers on such vacancies, which have not been notified and advertised by the Commission upto the date of issuance of the Amending Act, 2014."

(emphasis supplied)

15. The operative portion of the order of the Division Bench in Anurag Tripathi's case (supra) is reproduced below:-

"All the writ petitions are accordingly disposed of with the following directions :

(a) **Part-time teachers appointed under the Government Order dated 17.04.1998** would continue to function as such till regularly selected candidates recommended by the commission joins, or in terms of the final judgement of the Hon'ble Supreme Court in Special Leave Petition (Civil) No. 84 of 2004 whichever is earlier.

(b) **Such Part-time teachers shall be entitled to the payment at the rate provided for under the**

Government Order on per lecture basis subject to the maximum prescribed, they were not entitled to salary at par with regular Lectures.

(c) Absorption under Section 31-E of the Commission's Act shall not be effected in favour of any part -time teacher till the Hon'ble Supreme Court considers and decide the Special Leave Petition (Civil) No.84 of 2004.

(d) **Absorption,if any, of part-time teachers under Section 31-E of the Act** subsequent to the judgement of the Hon'ble Supreme court (if it is decided in favour of part-time teachers) would be considered against such substantive vacancies which had not been advertised by the commission till the enforcement of the Act No.46 of 2006.

(e) The director of Higher Education shall ensure that all existing vacancies are requisitioned by the Management /Principal of the recognized affiliated and aided Degree College within the time specified above and the commission in turn shall ensure that regular selection are made against the said vacancies within one year from the date the requisition is received after following the procedure prescribed. The Director shall direct placement of the selected candidates immediately thereafter. There should be no complaint to this court that selections could not be made by the commission because of absence of Chairman/other member/other facilities being not made available by the state."*(emphasis supplied)*

16. Thus, it has always been the case of the absorbed honorarium persons that they were part time teachers on honorarium.

17. In para 38 of the writ petition, the petitioners have alleged to have moved a representation dated 25.9.2018 before the respondent no. 1, a copy of which has been filed as Annexure No. 21 in which, they have now alleged that their period of engagement on honorarium is to be counted in their length of service in terms of ***Clause 10.1(f) of the U.G.C. Regulation 2010*** which is reproduced below:-

"(f) ***The previous appointment was not as guest lecturer for any duration,*** *or an adhoc or in a leave vacancy of less than one year duration. Adhoc or temporary service of more than one year duration can be counted provided that:*

(i) the period of service was of more than one year duration;

(ii) ***the incumbent was appointed on the recommendation of duly constituted Selection Committee; and***

(iii) ***the incumbent was selected to the permanent post*** *in continuation to the adhoc or temporary service, without any break."* (emphasis supplied)

18. Perusal of the aforesaid clause shows that it is applicable only to adhoc and temporary appointees which fall under a different class than the persons / petitioners who were engaged by the management on honorarium basis per lecture as permitted by Government Order dated 7.4.1998. **These engagements were made without recommendation of any duly constituted Selection Committee under the Act, 1980** as also evident from clauses 6, 7 & 8 of the Government Order dated 7.4.1998. **Their engagement was not as whole timer but as part timer on honorarium per lecture @ Rs. 100/- subject to maximum honorarium of Rs. 5,000/- in a month.**

19. In ***University of Rajasthan & another Vs. Prem Lata Agrawal (2013) 3***

SCC 705 (paras 1, 9, 10, 11, 30, 31 & 44) considered the question of qualifying length of service for pension to the teacher engaged on honorarium who under orders of the Court started getting salary equivalent to minimum pay scale of regularly appointed Lecturers, and held as under:-

"1. Leave granted in all the special leave petitions. The controversy that arises for consideration in this batch of appeals is ***whether the respondents, who were appointed to the teaching post, namely,*** *Assistant Professors/Lecturers in different subjects and continued as such for more than two decades,* ***would be entitled to get the benefit of pension under the University Pension Regulations, 1990*** *(for short "the Regulations") framed by the University of Rajasthan which came into force with effect from 1.1.1990, regard being had to the language employed in Regulation 2 that deals with the scope and application of the Regulations read with Regulations 22 and 23 that stipulates the conditions of qualifying service and the period that is to be counted towards pension in addition to the fact that the University had accepted the contribution to the Pension Fund as defined in Regulation 3(5), despite the stand and stance put forth by the University that the respondents were not regularly appointed to the posts in question in accordance with the provisions contained in Section 3(3) of the Rajasthan Universities' Teachers and Officers (Selection for Appointment) Act, 1974 (for brevity "the Act") and, hence, are not entitled to the benefit provided under the Regulations.*

9. The learned Single Judge referred to the regulations and took note of the fact that she had continued in service for a period of 20 years and her option for grant of pension was accepted by the university and pursuant to such acceptance they deposited their contribution and, hence, the university was estopped to take a somersault the stand that she was not entitled to receive pension under the Regulations of 1990. That apart, the learned single Judge opined that the nature of her appointment could not be treated as ad hoc and temporary, regard being had to the length of service. Being of this view, he allowed the writ petition and directed the pensionary benefits be extended to her within a period of three months after completing the formalities.

10. Being grieved by the aforesaid order, the university preferred Special Appeal (Writ) No. 292 of 2011. The Division Bench, after adverting to the facts and referring to various regulations and the provisions of the Act, came to hold that the action of the university was wholly unjustified and arbitrary. The said conclusion of the Division Bench was founded on the base that there was default on the part of the university in not appointing even a single person in the service of the universities of Rajasthan in a regular manner for a long period; that the university had invited the teachers to give their option and they deposited their contribution in the C.P.F. in the pension scheme; that the appointments of the teachers were not in contravention of the provisions of the Act; and that they were deemed to be confirmed in view of the provisions contained in Regulation 23 of the Regulations.

11. After arriving at the said conclusions, ***the Division Bench*** *adverted to the issue whether the teachers were entitled for the pensionary benefits in terms of the regulations and eventually, interpreting the regulations and placing*

reliance on the authorities In ***S.B. Patwardhan Vs. State of Maharashtra (1977) 3 SCC 399*** *and* ***D.S. Nakara Vs. Union of India (1983) 1 SCC 305*** *and paragraph 53 of the pronouncement in* ***State of Karnataka Vs. Umadevi (2006) 4 SCC 1****,* ***came to hold that the appointments were made following due procedure of law and further the teachers, having been appointed in the cadre of substantive posts, could not be denied the pensionary benefits under the regulations.*** *Being grieved, the University is in appeal by way of Special Leave Petitions.*

30. In ***Anuradha Mukherjee (Smt.) & others Vs. Union of India & others (1996) 9 SCC 59****, this Court, while dealing with the issue of seniority, opined that when an employee is appointed de hors the Rules, he cannot get seniority from the date of his initial appointment but from the date on which he is actually selected and appointed in accordance with the Rules.*

31. In ***State of Haryana Vs. Haryana Veterinary & AHTS Association and another (2000) 8 SCC 4*** *while dealing with the issue of regular service under the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970, a three-Judge Bench observed that under the Scheme of the said Rules, the service rendered on ad hoc basis or stop-gap arrangement could not be held to be regular service for grant of revised scale of pay.*

Consequently, the appeals are allowed and the orders passed by the High Court are set aside. *However, if any amount has been paid on any count to any of the respondents in the appeals pursuant to the orders passed by the High Court, the same shall not be recovered on any count. There shall be no order as to costs." (emphasis supplied)*

20. In ***Union of India & others Vs. K.G. Radhakrishna Panickar & others (1998) 5 SCC 111 (paras 2, 12 & 13)***, Hon'ble Supreme Court considered similar question and held as under:-

"2. These appeals raise the question ***whether employees who were initially engaged as Project Casual Labour by the Railway Administration and were subsequently absorbed on a regular temporary/permanent post are entitled to have the services rendered as Project Casual Labour prior to 1.1.1981 counted as part of qualifying service for the purpose of pension and other retiral benefits.***

12. In its judgment dated 8-2-1991 the Tribunal had held that exclusion of period of service rendered as Project Casual Labour before they were regularly absorbed prior to 1.1.1981 results in such employees being discriminated as compared to Project Casual Labour who were employed subsequently and whose service as Project Casual Labour prior to absorption is counted for the purpose of qualifying service. The said finding of the Tribunal is based on the decision of this Court in D.S. Nakara. In this regard, it may be stated that the Tribunal was in error in invoking the principle laid down in D.S. Nakara in the present case. The decision in D.S. Nakara has been considered by this court in subsequent decisions and it has been laid down that the principle laid down in D.S. Nakara can have application only in those cases where there is discrimination in the matter of existing benefit between similar set of employees and the said principle has no application where a new benefit is being conferred with effect form a particular

date. In such a case the conferment of the benefit with effect from a particular dated cannot be held to be violative of Article 14 of the Constitution on the basis that such a benefit has been conferred of certain categories of employees on the basis of particular date. [See: Krishena Kumar Vs. Union of India & others (1990) 4 SCC 207, State of W.B. Vs. Ratan Behari Dey (1993) 4 SCC 62 and State of Rajasthan Vs. Sevanivatra Karamchari Hitkari Samiti (1995) 2 SCC 117.] In the present case, the benefit of counting of service prior to regular empowerment as qualifying service was not available to casual labour. The said benefit was granted to Open Line Casual Labour for the first time under order dated October 14, 1980 since Open Line Casual Labour could be treated as temporary on completion of six months' period of continuous service which period was subsequently reduced to 120 days under Para 2501

(b) (i) of the Manual. As regards Project Casual Labour this benefit of being treated as temporary became available only with effect from 1.1.1981 under the scheme which was accepted by this court in Inder Pal Yadav. Before the acceptance of that scheme the benefit of temporary status was not available to project Casual Labour. It was thus a new benefit which was conferred on Project Casual Labour under the scheme as approved by this court in Inder Pal Yadav and on the basis of this new benefit project casual Labour became entitled to count half of the Service rendered as Project Casual Labour on the basis of the order dated October 14, 1980 after being treated as temporary on the basis of the scheme as accepted in Inder Pal Yadav. ***We are, therefore, unable to uphold the judgment of the Tribunal dated February 8, 1991 when it holds that service rendered as Project Casual Labour by employees who were absorbed on regular permanent/temporary posts prior to 1.1.1981 should be counted for the purpose of retiral benefits and the said judgment*** **as well as the judgment in which the said judgment** *has been followed have to be set aside. The judgements in which the Tribunal has taken a contrary view have to be affirmed.*

13. ***In the result, the appeals filed by the Railway Administration are allowed*** *and the judgments of the Tribunal impugned in these appeals are set aside. The Appeals arising out of Special Leave Petitions (C) Nos. 26790 of 1995 and 3423 of 1997 filed by the employees are dismissed. No order as to costs."*

Estoppel:

21. It is settled law that a person cannot challenge the very source i.e. Statute, Rules or the Government Orders under which he was appointed. That apart, the appointment of the petitioner by absorption is an exception to the normal Rule of Appointment in Government service which includes reservation also. Therefore, they cannot be allowed to challenge that condition of their appointment by absorption which they find unfavourable to them while retaining the favourable part. The very source under which they came to be appointed, either survives or perishes.

22. The petitioners have elected to accept their appointments by absorption under the aforequoted Government Orders dated 6.6.2014 and 2.5.2016. Their appointment is based on the doctrine of election which is Rule of estoppel which postulates that no party can accept and

reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say that it is void for the purpose of securing some other advantage.'

23. *As per* ***Halsbury's Laws of England (4th Edition) Vol. 16 (Paragraph 1508),*** *after taking an advantage under an order a party may be precluded from saying that it is invalid and asking to set it aside.*

24. In the case of **Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others v. Director General of Civil Aviation and others, (2001) 5 SCC 435 (Paragraph-12)**, Hon'ble Supreme Court referred to its earlier judgments in the case of **Babu Ram alias Durga Prasad v. Indra Pal Singh, 1998(6) SCC 358, P.R. Deshpande v. Maruti Balaram Haibatti, 1998(6) SCC 507 and Mumbai International Airport Private Limited v. Golden Chariot Airport and another, 2010 (10) SCC 422** and held that the doctrine of election is based on the rule of estoppel. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

25. In the case of **Cauvery Coffee Traders, Mangalore v. Hornor Resources (International Company Limited), (2011) 10 SCC 420 (Paragraph 34), Hon'ble Supreme Court referred to its decision in the case of Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593, CIT v. V. MR.P. Firm Muar AIR 1965 SC 1216, NTPC Ltd. v. Reshmi constructions, Builders & Contractors, (2004) 2 SCC 663, Ramesh Chandra Sankla v. Vikram Cement (2008)14 SCC 58 and Pradeep Oil Corpn. v. MCD (2011) 5 SCC 270** and held that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". **Where one knowingly accepts the benefits of a contract or conveyance or an order, he is estopped to deny the validity or binding effect on him of such contract or conveyance or order.** This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

26. In the case of **V. Chandrasekaran and another v. Administrative Officer and others, (2012) 12 SCC 133,** Hon'ble Supreme Court followed the law laid down in the case of Cauvery Coffee Traders, Mangalore (supra).

27. In the case of **Rajasthan State Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another (2013) 5 SCC 470**, Hon'ble Supeme Court again reiterated the law laid down in the case of Cauvery Coffee Traders, Mangalore (supra) and held in paragraph 23 as under :

"A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract.

Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and ***it is not permissible for the court to make a new contract,*** *however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely". (emphasis supplied)*

28. In the case of **State of Punjab and others v. Dhanjit Singh Sandhu (2014) 15 SCC 144 (Paragraph Nos. 21, 22, 23, 24, 25 and 26)** Hon'ble Supreme Court reiterated the law laid down in its earlier decisions in the case of **CIT v. MR. P. Firm Muar, AIR 1965 SC 1216, Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329; R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683 (Paragraph 10) ; P.R. Deshpande v. Maruti Balaram Haibatti, (1998) 6 SCC 507** and held that defaulting allottees cannot be allowed to approbate and reprobate by first agreeing to abide by the terms and conditions of allotment and later seeking to deny their liability as per the agreed terms. The doctrine of "approbate and reprobate" is only a species of estoppel. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and he derived the benefit out of it, he cannot challenge it on any ground.

29. In ***Zila Dastavej Lekhak Association & another Vs. State of U.P. & others (1996) AIR 2107 (paragraph 3)***, the Hon'ble Supreme Court held that the petitioners who obtained license under the Rules, cannot challenge the Rules under which they came to operate. The very source under which they came to operate either survives or perishes under the Rules. They cannot challenge that part of Rules which is unfavourable to them while at the same time, respecting the favorable part thereof since they have no independent right to de-hors the Rules.

30. The petitioners have voluntarily elected to accept the offer their appointment as teacher by absorption under Section 31-E(2) read with the aforequoted Government Order dated 6.6.2014 as an exception to the normal rule of appointment provided in Sections 12 and 13 of the Act, 1980. Therefore, cannot be permitted to challenge condition no. 4 of the Government Order. Their appointment is based on doctrine of election which is the Rule of estoppel or a Rule of equity. They cannot be permitted to *"blow hot and cold", "fast and loose"* or *"approbate and reprobate"*. They have knowingly, willfully and with open eyes accepted the benefits of their appointment by absorption under the aforequoted Government Orders dated 6.6.2014 and 2.5.2016 as an exception to the normal rule of public employment and Sections 12 and 13 of the Act, 1980 resulting in a contract of service. Therefore, they cannot question the validity or binding effect of the aforesaid Government Orders.

Rules of Absorption

31. In **Secretary, *State of Karnataka Vs. Uma Devi (2006) 4 SCC 1*** (paras 3 & 4), the Constitution Bench of Hon'ble Supreme Court laid down the law that regular appointment must be the rule. But

sometimes this process is not adhered and the constitutional scheme of public employment is by-passed. A class of employment which can only be called *"litigious employment"*, has risen like a phoenix seriously impairing the constitutional scheme. Whether the wide power under Article 226 of the Constitution of India is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over. It is time, that the Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. In paragraphs 5 & 6 of the aforesaid judgment in the case of ***Umadevi*** (supra), Hon'ble Supreme Court has held as under:-

"5. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

6. ***The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (See Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States.*** *That Article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article309 of the Constitution, then the Government can make appointments only in accordance with the rules.* ***The State is meant to be a model employer.*** *The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure.* ***Normally, statutory rules are framed under the authority of law governing***

employment. *It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the Constitutional scheme. It may even amount to negating the accepted service jurisprudence.* ***Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.****" (emphasis supplied)*

32. In ***Pratap Kishore Panda & others Vs. Agni Charan Das & others (2015) 17 SCC 789 (para 17)***, Hon'ble Supreme Court referred to the law laid down by the Constitution Bench in ***Umadevi*** (supra) and held that the doctrine is that if employment of persons is contrary to or de-hors the statutory provisions and / or Rules and Regulations, then equities will not have any play even if such persons have been rendering services for service years. ***The most that can be done for such employees is for the State Government to devise a scheme, as a one time measure, for their absorption so long as the Governing Statute or the Rules and Regulations are not infringed.***

33. In ***State of U.P. Vs. Anand Kumar Yadav (2018) 13 SCC 560***, the Hon'ble Supreme Court summarised the principles of rule of equity in public employment and Articles 14 & 16 of the Constitution of India.

34. In ***Brij Mohan Lal Vs. Union of India & others (2012) 6 SCC 502 (paras 172 & 173)***, the Hon'ble Supreme Court held that ***absorption in service is not a right.***

35. In ***Indu Shekhar Singh & others Vs. State of U.P. & others (2006) 8 SCC 129 (para 26)***, the Hon'ble Supreme Court referred to its earlier judgment in ***R.N. Gosain Vs. Yashpal Dhir (1992) (4) SCC 683, Ramankutti Guptan Vs. Avara (1994) 2 SCC 642*** and ***Bank of India & others Vs. O.P. Swarnakar & others (2003) 2 SCC 721*** and held that ***once person exercises his right of option and obtain entry in service on the basis of election, he cannot be allowed to turn round that the conditions are illegal.*** *Further more, there is no fundamental right in regard to counting of the services rendered in an autonomous body.* ***The past services can be taken into consideration only when the Rules permit the same*** *or where a special situation exits, which would entitle the employee to obtain such benefit of past service.* The aforesaid judgment in the case of ***Indu Shekhar Singh*** *(supra)* involved the controversy with regard to availability of benefit of past service rendered prior to absorption of deputitionist.

36. In the case of ***Mrigank Johari & others Vs. Union of India (2017) 8 SCC 256 (para 33)***, the Hon'ble Supreme Court has held that ***since the appellants accepted the terms and conditions of the absorption, they could not plead otherwise.***

37. In ***Union of India Vs Onkar Chand (1988) 9 SCC 298 (para 12)***, the Hon'ble Supreme Court while considering the benefit of length of service on deputation before absorption and held that ***opting permanent absorption, a person***

cannot claim benefits of absorption as well as the service put in time in the deputation quota.

38. In ***Union of India & others Vs. K Savitri & others (1998) 4 SCC 358 (paragraph 9)***, the Hon'ble Supreme Court held as under:-

"The service conditions of the redeployed employees under the Rules being governed by the provisions in the rules as well as the instructions issued from the Government of India from time to time and in view of the clear unambiguous language in para 11.1 of the instructions referred to above the conclusion is irresistible that the past services of the redeployed staff cannot be counted for seniority in the new organisation. The Tribunal, therefore, committed serious error in directing that the past services would counted for the seniority of the employees in the All India Radio." (emphasis supplied)

39. Principles of law on public employment as discussed in paras 31 to 38 above leaves no manner of doubt that regular employment must be a rule. The power of the State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitation. But some times, this process is not adhered and constitutional scheme of public employment is by-passed as happened in the present case. Such employment is called *"litigious employment"*. Brief history of litigation of the part time teachers on honorarium / petitioners have been briefly noted by the Division Bench in the order dated 27.5.2016 in the case of Dr. Deena Nath Yadav & 7 others (supra). The Government Order dated 6.6.2014 and amended Section 31-E of the Act, 1980 is a one time measure for absorption. Absorption in public employment is not a right. It is an exception to the normal rule of public employment. It is subject to conditions of absorption. Once the petitioners have knowingly and with open eyes exercised the option for their absorption in public employment, they cannot turn round and say that condition no. 4 is arbitrary. Past service as part time teacher on honorarium prior to absorption cannot be added in their length of service in the absence of any constitutional or legal right.

40. Discussion made above, leaves no manner of doubt that petitioners engagement was neither adhoc nor temporary. They were part timer. They have been recruited not under normal rule of recruitment but as an exception to it in terms of Government Order dated 6.6.2014 subject to conditions specified therein. Thus, petitioners have no constitutional or statutory right for inclusion in their length service the period spent on engagement on honorarium basis per lecture, prior to entering in government service by appointment under the Government Orders dated 6.6.2014 and 2.5.2016. **Thus in the absence of any legally protected or judicially enforceable subsisting right the petitioners are not entitled for mandamus.** Their challenge to condition no. 4 of the Government Orders dated 6.6.2014 and 2.5.2016 is not only totally merit-less but also not permissible. It is also hit by principles of approbate and reprobate. The condition no. 4 of the Government Orders dated 6.6.2014 and 2.5.2016 is neither invalid nor it is permissible for the petitioners to challenge it.

Conclusion:

41. **The conclusions reached above are briefly summarised as under**:-

(i) Clause 10.1(f) of the U.G.C. Regulation 2010 is applicable only to adhoc and temporary appointees which fall under a different class than the persons / petitioners who were engaged by the management on honorarium basis per lecture as permitted by Government Order dated 7.4.1998. **These engagements were made without recommendation of any duly constituted Selection Committee under the Act, 1980** as also evident from clauses 6, 7 & 8 of the Government Order dated 7.4.1998. Their engagement was not as whole timer but as part timer on honorarium but per lecture @ Rs. 100/- subject to maximum honorarium of Rs. 5,000/- in a month.

(ii) It is settled law that a person cannot challenge the very source i.e. Statute, Rules or the Government Orders under which he was appointed. That apart, the appointment of the petitioner by absorption is an exception to the general Rule of Appointment in Government service which includes reservation also. Therefore, they cannot be allowed to challenge that condition of their appointment by absorption which they find unfavourable to them while retaining the favourable part. The very source under which they came to be appointed, either survives or perishes.

(iii) The petitioners have elected to accept their appointments by absorption under the aforequoted Government Orders dated 6.6.2014 and 2.5.2016. Their appointment is based on the doctrine of election which is Rule of estoppel which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say that it is void for the purpose of securing some other advantage.'

(iv) The petitioners have voluntarily elected to accept the offer their appointment as teacher by absorption under Section 31-E(2) read with the aforequoted Government Order dated 6.6.2014 as an exception to the normal rule of appointment provided in Sections 12 and 13 of the Act, 1980. Therefore, cannot be permitted to challenge condition no. 4 of the Government Order. Their appointment is based on doctrine of election which is the Rule of estoppel or a Rule of equity. They cannot be permitted to *"blow hot and cold", "fast and loose"* or *"approbate and reprobate"*. They have knowingly, willfully and with open eyes accepted the benefits of their appointment by absorption under the aforequoted Government Orders dated 6.6.2014 and 2.5.2016 as an exception to the normal rule of public employment and Sections 12 and 13 of the Act, 1980 resulting in a contract of service. Therefore, they cannot question the validity or binding effect of the aforesaid Government Orders.

(v) Petitioners' engagement was neither adhoc nor temporary. They were part timer. They have been recruited not under normal rule of recruitment but as an exception to it in terms of Government Order dated 6.6.2014 subject to conditions specified therein. Thus, petitioners have no constitutional or statutory right for inclusion in their length service the period spent on engagement on honorarium basis per lecture, prior to entering in government service by appointment under the Government Orders dated 6.6.2014

and 2.5.2016. **In the absence of any legally protected or judicially enforceable subsisting right the petitioners are not entitled for mandamus.** Their challenge to condition no. 4 of the Government Orders dated 6.6.2014 and 2.5.2016 is not only totally merit-less but also not permissible. It is also hit by principles of approbate and reprobate. The condition no. 4 of the Government Orders dated 6.6.2014 and 2.5.2016 is neither invalid nor it is permissible for the petitioners to challenge it.

(vi) Principles of law on public employment as discussed in paras 31 to 38 above leaves no manner of doubt that regular employment must be a rule. The power of the State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitation. But some times, this process is not adhered and constitutional scheme of public employment is by-passed as happened in the present case. Such employment is called *"litigious employment"*. Brief history of litigation of the part time teachers on honorarium / petitioners have been briefly noted by the Division Bench in the order dated 27.5.2016 in the case of Dr. Deena Nath Yadav & 7 others (supra). The Government Order dated 6.6.2014 and amended Section 31-E of the Act, 1980 is a one time measure for absorption. Absorption in public employment is not a right. It is an exception to the normal rule of public employment. It is subject to conditions of absorption. Once the petitioners have knowingly and with open eyes exercised the option for their absorption in public employment, they cannot turn round and say that condition no. 4 is arbitrary. Past service as part time teacher on honorarium prior to absorption cannot be added in their length of service in the absence of any constitutional or legal right.

42. For all the reasons aforestated, I do not find any merit in this writ petition. The petitioners are not entitled to any relief. Therefore, the writ petition fails and is hereby dismissed.

(2020)1ILR 1824

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2019

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ-A No. 20816 of 2017

Srikant Srivastava & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vishnu Sahai, Sri Bhupeshwar Dayal, Sri Ramesh Chandra Upadhyay, Sri Ramesh Upadhyay, Sri Rajan Upadhyay

Counsel for the Respondents:
C.S.C.

A. Service – Payment of salary - Uttar Pradesh Advocate General and Law Officers' Establishment Service Rules, 2009; The United Provinces Legal Remembrancer's and Law Officers Establishment Rules, 1942

The issue involved is with regards to the procedure for fixation of salary to the incumbents holding the post of Personal Assistant, when the status of the post of Personal Assistant along with certain other posts of the office of State Law Officers, Allahabad/Lucknow itself has been upgraded by giving higher Grade Pay. (Para 11)

According to respondents, petitioners were not in the employment of the State Government at the relevant date i.e. 01.01.2006 and thereafter, the pay of the petitioners was not to be revised according to the GO dated

08.12.2008. The fixation of their pay was to be made as per the procedure laid down in Para 11 of the GO dated 08.12.2008, wherein specific provision has been made by the State Government for fixation of the pay of those employees, who had been given promotion in the revised pay structure i.e., after the relevant cut-off date 01.01.2006. (Para 18, 19)

The Court held - The petitioners joined the post in question after 01.01.2006, whereas similarly situated employees of the establishment of this Court were engaged in the year 2008. They were accorded promotion as Review Officer and they had been extended the said benefit. All the employees working the State Government or establishment of this Court are getting the same pay scale as is admissible to the corresponding posts of the Central Government and the said decision was taken with effect from 01.01.1986 according to the report of Equivalence Committee, U.P. The State Government failed to take into consideration the aforesaid policy decision of the State Government and to provide same scale to the petitioners as is admissible to their counterparts working in the establishment of this Court as well as the State Government. There has been complete non-application of mind in not adhering the aforesaid policy decision as well as to the Division Bench judgment of this Court dated 29.07.1998, in the case of ***Private Secretaries Brotherhood, High Court Allahabad and another Vs. State of U.P. & Others, CMWP No. 17885 of 1996,*** which has since been affirmed by the Hon'ble Supreme Court and the judgement passed in Writ A No. 40762 of 1996. (Para 30)

Writ petition allowed.

Present petition is against order dated 25.10.2016, passed by Principal Secretary (Law), U.P. Government, Lucknow.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Ramesh Upadhyay, learned Senior Advocate assisted by Sri Rajan Upadhyay, Advocate appearing for the petitioners and Shri Sanjay Kumar Singh, learned Additional Chief Standing Counsel alongwith Shri Devesh Vikram, learned Standing Counsel for the State respondents.

2. Srikant Srivastava and 6 others have approached this Court interalia for following reliefs:-

"(i) issue a writ, order or direction in the nature of certiorari calling for the records of the case and quashing the impugned order dated 25.10.2016 (Annexure No.38 to the present writ petition) passed by the respondent no.1, served on the petitioner no.1, on 31.3.2017 through letter dated 22.03.2017 (Annexure No.37-B to the present writ petition);

(ii) issue a writ, order or direction in the nature of mandamus commanding the respondents to fix and pay the salary of the petitioners in accordance with the fitment chart issued by the State Government by means of the Government Order dated 16.9.2010 (Annexure No.13 to the present writ petition) with effect from the date of promotion of the petitioners on the post of Personal Assistant;

(iii) issue a writ, order or direction in the nature of mandamus commanding the respondents to pay the salary of the petitioners in accordance with the payment of the salary as made to the employees of the High Court, Allahabad in pursuance of the Government Order dated 29.4.2019 (Annexure No.12 to the present writ petition)

(iv) issue a writ, order or direction in the nature of mandamus commanding the respondents to pay the arrears of difference of amount with effect from the date of promotion of the

petitioners on the post of the Personal Assistant alongwith the interest at the rate of 18% per annum."

3. In order to appreciate the controversy in the present writ petition, it is essential to notice salient facts of the case.

4. The petitioners were initially appointed on the post of Stenographer in the pay scale of Rs.4500-125-7000/- in the office of U.P. State Law Officers, High Court, Allahabad/Lucknow on 03.01.2006 and in pursuance of the appointment letters, they joined on the said post on 5.1.2006/6.1.2006. Thereafter, they were promoted on the post of the Personal Assistant in the pay scale of Rs.5500-175-9000/- on 10.07.2006. Meanwhile, the recommendations of the 6th Pay Commission with regard to the employees of the State Government were implemented by the State Government with effect from 01.01.2006 by means of Government Order dated 8.12.2008, wherein the pay scale of Rs.5500-175-9000/-, which was applicable for the post of Personal Assistant, had been replaced/substituted in the Pay Band of Rs.9300-34800/- Grade Pay of Rs.4200/- w.e.f. 01.1.2006.

5. The State Government issued Government order dated 8.8.2007, whereby the pay scale on the post of Personal Assistant (Additional Private Secretary) as well as Upper Division Assistant (Review Officer) working in the establishment of the High Court, Allahabad was upgraded from the pay scale of Rs.5500-9000/- to the pay scale of Rs.6500-10500/- with effect from 26.6.2007. Thereafter, by means of Government order dated 22.10.2008 the pay scale on the post of Personal Assistant (Additional Private Secretary) as well as Upper Division Assistant (Review Officer) of the office of U.P. State Law Officers, Allahabad/Lucknow, High Court, Allahabad was also upgraded to the pay scale of Rs.6500-10500/- with effect from 21.6.2007. The State Government had issued another Government order dated 8.12.2008, wherein the procedure for fixation of salary has been laid down in accordance with the recommendations of the 6th Pay Commission w.e.f. 01.01.2006 and when an employee is given promotion on a higher category post from the lower category post, in that event the fixation of the salary of such promottee will be made in accordance with the procedure laid down in Para-11 of the Government order dated 8.12.2008.

6. On 25.03.2010 another Government Order was issued wherein the State Government made provision that the payment of salary to the holder of such posts of the State Government, which are carrying the pay scale of Rs.6500-200-10500 (Pay Band-2 of Rs.9300-34800 along with the Grade Pay of Rs.4200/-), would be made in accordance with the Fitment Chart No.1 attached with the said Government Order, and in such cases, the posts carrying the pay scale of Rs.6500-200-10500 (Pay Band-2 of Rs.9300-34800/- along with Grade Pay of Rs.4200/-) have been upgraded subsequently after 01.01.2006 when the recommendations of the Sixth Pay Commission were made applicable. Again by the Government order dated 29.4.2010 the Grade Pay and the Pay Band of the incumbents, holding the post of the Additional Private Secretary (Personal Assistant) and the Review Officer and the Review Officer (Accounts) in the

establishment of the High Court, Allahabad were upgraded to the Grade Pay of Rs.4600/- in the Pay Band of Rs.9300-34800 with effect from 01.01.2006 by making the provision in Paragraph No.2 of the said Government order that the fixation of the salary would be made in accordance with the Fitment Chart given in Schedule-I and Schedule-II attached with the Government Order dated 29.04.2010.

7. Since the employees of the U.P. State Law Officers' Office have been granted parity with the employees of Allahabad High Court by the State Government vide Government Order dated 11.09.1974, another Government Order dated 16.09.2010 was issued by the State Government with regard to the Personal Assistants (Additional Private Secretaries), Review Officers and Review Officers (Accounts) of the U.P. State Law Officers' Office exactly on the same terms and conditions contained in the aforesaid Government Order dated 29.04.2010 pertaining to the Additional Private Secretaries (Personal Assistants), Review Officers and the Review Officers (Accounts) of the establishment of this Court by which the Pay Band and the Grade Pay of the incumbents holding the posts of the Review Officer, Personal Assistant (Additional Private Secretary) and the Review Officer (Accounts) in the U.P. State Law Officers' Office was upgraded to the Grade Pay of Rs.4600/- in the Pay Band of Rs.9300-34800/- with effect from 01.01.2006 by further making the provision under Paragraph No.2 of the Government Order dated 16.09.2010 that the fixation of their salary would be made in accordance with the Fitment Chart given in Schedule-I and Schedule-II attached with the Government Order dated 16.09.2010.

8. It is being claimed that the petitioners are entitled to be paid their salary in the upgraded Grade Pay of Rs.4600/- instead of Grade Pay of Rs.4200/- in the Pay Band of Rs.9300-34800/-. After implementation of the recommendations of the 6th Pay Commission w.e.f. 01.01.2006, the classification of various categories of posts made by Government order dated 7.10.2003 have also been re-determined by the State Government on 14.5.2012, wherein the status and rank of the concerned posts are determined on the basis of Pay Scales/Pay Band and Grade Pay, which have been assigned to the concerned posts. Till the post of Personal Assistant of the office of U.P. State Law Officers was carrying the Grade Pay of Rs.4200/- in the Grade Pay of Rs.9300-34800/-, they were classified as Group-C Category posts and immediately after the posts of the Personal Assistant etc. had been upgraded by assigning the Grade Pay of Rs.4600/- in the Pay Band of Rs.9300-34800/-, automatically the posts of the Personal Assistant etc. of the said office became classified as Group-B category posts.

9. Ultimately, the petitioners were promoted on the post of Private Secretary (Grade-I) in the Pay Band of Rs.15600-39100/- Grade Pay of Rs.5400/- on 29.9.2016. They joined on the post of Private Secretary (Grade-I) on 30.9.2016 and since then they are continuously working on the post of Private Secretary Grade-1. The petitioners are claiming similar treatment in the matter of payment of salary at par with the comparable employees working in the establishment of this Court.

10. The conditions of service of the employees of the office of U.P. State Law Officers' High Court, Allahabad/Lucknow are regulated by means of Service Rules known as "The Uttar Pradesh Advocate

General and Law Officers' Establishment Service Rules, 2009", which came into effect from 11.11.2009, as amended from time to time. Earlier their services were regulated by means of Rules known as "The United Provinces Legal Remembrancer's and Law Officers Establishments Rules, 1942, as amended from time to time.

11. Now the bone of contention in the present dispute is as to what would be the procedure for fixation of the salary to the incumbents holding the post of Personal Assistant, when the status of the post of Personal Assistant alongwith certain other posts of the office of State Law Officers, Allahabad/Lucknow itself has been upgraded by giving higher Grade Pay of Rs.4600/- instead of Grade Pay of Rs.4200/- in the Pay Band of Rs.9300-34800/-.

12. In this backdrop, Shri Ramesh Upadhyay, learned Senior Advocate, appearing for the petitioners submits that ever since 11.9.1974 the employees of the office of the U.P. State Law Officers are being treated to be similarly situated with the employees of the High Court holding corresponding post in pursuance of the concept of parity as provided in the Government order dated 11.9.1974 in respect of their source and method of recruitment etc. and they are getting the same pay scales and allowances as is being paid to the employees of the High Court holding corresponding posts.

13. It is submitted that by the Government Orders dated 25.03.2010, 29.04.2010 and 16.09.2010 the incumbents of the establishment of the High Court, Allahabad and the U.P. State Law Officers' Office holding the posts of Personal Assistant (Additional Private Secretary), Review Officer and Review Officer (Accounts) became entitled for the payment of their salary by making the payment of Rs.17,140/-, which is the minimum of the Grade Pay of Rs.4600/- in the Pay Band of Rs.9300-34800/-. However, as per Government Order dated 31.01.2011 it is evident that the establishment of the High Court, Allahabad referred the matter for clarification to the State Government for payment of the salary by making the payment at par with the Review Officers appointed through direct appointment process in pursuance of the Government Order dated 29.04.2010 to those Review Officers of the establishment of the High Court, Allahabad, who were promoted on the promotional post of Review Officer on or after 01.01.2006. Initially the same was rejected by the State Government by means of the aforesaid Government Order dated 31.01.2011 on the same basis on which the claim of the petitioners has been rejected by means of the impugned order dated 25.10.2016 by taking the shelter of the same Paragraph No.11 of the Government Order dated 08.12.2008, but later on, when the concerned Review Officers of the establishment of High Court, Allahabad agitated the matter at various appropriate levels of the High Court as well as the State Government, ultimately, with the consent of the State Government the same was made available to them under the order of Hon'ble The Chief Justice of the High Court dated 02.09.2011 by giving the minimum of the Grade Pay of Rs.4600/- in the Pay Band of Rs.9300-34800, i.e. Rs.17,140/- with effect from the date of their promotion on the post of the Review Officer from the post of the Assistant Review Officer, in pursuance of the aforesaid Government Order dated 29.04.2010.

14. It is sought to be contended that a large number of similarly situated employees of the establishment of High Court, Allahabad have already been granted the benefits of the pay fixation by giving them the minimum of Grade Pay of Rs.4600/- in the Pay Band of Rs.9300-34,800/- in accordance with the Government order dated 29.4.2019 and inspite of the parity having been granted with the staff of the High Court, the said benefit with effect from the date of their promotion on the post of the Personal Assistant (Additional Private Secretary) was not made available to them even after the issuance of the aforesaid Government Order dated 16.09.2010. The petitioner no.2 made an application under the Right To Information Act, 2005 dated 18.11.2011. Consequently, the Central Public Information Officer, High Court, Allahabad provided the following information to him by his letter No. 9381/R.T.I./751/2011/AHC, dated 05.01.2012: -

"With reference to your application dated 18/11/2011 in which you have sought following information under Right to Information Act, 2005, please find enclosed herewith the following information: -

Information regarding officials working in this Hon'ble Court namely Sri Santosh Kumar (Emp.No.7305), Akhil Kumar Kureel (Emp.No.7306) and Sanjeev Kumar Mishra (Emp.No.7327) as Review Officers, High Court, Allahabad, are as under:

1. Attested copies of the Appointment and Promotion Letter.

2. Attested copies of all pages of Service Book with posting.

3. Attested copies of Pay Fixation Chart after promotion from the post of Assistant Review Officer to Review Officer.

4. Attested copies of Option Form of Pay Fixation.

Attested copies of the G.O. and letter from which the option was opted to fix the pay."

15. It is contended that after receiving the aforementioned details the petitioners have also made detailed representation dated 25.7.2016 to the competent authority and requested for fixation of pay in accordance with the provisions of Fitment Chart as per Government orders dated 25.3.2010 and 16.9.2010 by fixing their salary at the minimum stage of Rs.17,140/- w.e.f. 10.7.2006 in the case of the petitioner nos.2 to 7 (the date on which they joined on the promoted post of Personal Assistant) and with effect from 15/16.3.2007 in the case of the petitioner no.1 (the date on which he joined on the promoted post of Personal Assistant). The aforesaid representation was forwarded by learned Advocate General, U.P to the State Government on 31.7.2016/3.8.2016 with categorical term that the grievance of the petitioners is genuine and the same is required to be considered at the end of the State Government but in most arbitrary manner by the impugned order dated 25.10.2016 the respondents have denied the claim set up by the petitioners by holding that the petitioners were appointed after 1.1.2006 or promoted after the said date. Consequently, they are entitled only for the payment of the salary, which was applicable without upgradation of the post and for which the reliance has been placed on paragraph no.11 of the Government order dated 8.12.2008.

16. It is submitted that earlier the Association of the Private Secretaries

working in the office of the U.P. State Law Officers preferred Civil Misc. Writ Petition No.17885 of 1996 claiming that they were being paid salary in the scale of Rs.2000-3200 while the Private Secretaries working in the establishment of the High Court were getting the salary in the pay scale of Rs.3000-4500 and since both the establishments have to be treated at par in accordance with the decision of the State Government itself, the same pay scale be made applicable to them. The aforesaid writ petition was allowed by a Division Bench of this Court on 29.7.1998, with following observations:-

"From the year 1988 all the employees, whether of the State Government or of the High Court, are getting the same pay scale as is admissible to the corresponding posts of the Central Government and the said decision was taken with effect from 1.1.1986, according to the report of Equivalence Committee, U.P.

In view of the fact that ever since the issuance of the Government order dated 11.9.1974 the employees working in the High Court as well as the employees working in the office of the U.P. State Law Officers were being treated similarly in the matter of post and pay scale etc., we are of the view that the petitioners are also entitled to the same pay scale of Rs.3000-4500 as carrying on the same work and possess the same qualification. The method of recruit is also similar. The non-payment of the same salary to the petitioners is arbitrary and violative of Article 14 & 16 of the Constitution of India as well as assigned to Article 39(D) of the Constitution. It is directed to the respondents to fix the salary of the Private Secretaries working in the office of the U.P. State Law Officers, Allahabad/Lucknow in the revised pay scale of Rs.3000-4500 from the date of filing of this writ petition. We have refrained ourselves from granting the same pay scale to the petitioners with effect from 1.1.1986 because it will cost a great burden on the Government.

With the aforesaid direction the writ petition is allowed."

17. It is submitted that the aforesaid judgment was subjected to challenge before Hon'ble Apex Court in Civil Appeal No. 2732 of 1999 (**State of Uttar Pradesh vs. Private Secretaries Brotherhood and ors**) and the same was dismissed on 28.11.2007. Again, the State of Uttar Pradesh preferred a Review Petition (C) No.877 of 2008 in the said Civil Appeal and the same was also dismissed on 23.7.2008. The judgment inter parties i.e. State and the Private Secretaries working in the office of the U.P. State Law Officers had become final. The employees working in the Office of U.P. State Law Officers at Allahabad as well as at Lucknow are entitled to be treated similarly vis-a-vis the employees working in the establishment of this Court on the corresponding posts as held by a Division Bench of this Court in Writ Petition No.17885 of 1996 and affirmed by the Hon'ble Supreme Court in Civil Appeal No. 2732 of 1999.

18. On the other hand, Shri Sanjay Kumar Singh, learned Additional Chief Standing Counsel alongwith Shri Devesh Vikram, learned Standing Counsel, has vehemently placed reliance and reiterated the averments made in the counter affidavit dated 25.8.2017 filed on behalf of respondent nos.1 and 2 sworn by Arun Kumar Rai, Under Secretary, Law Department, U.P. Secretariat, Lucknow,

wherein it has been stated that so far as the employees of the State Government, who were appointed on any post on 1.1.2006 or after 1.1.2006, is concerned, the right of exercising the option in the matter, given in the paragraph nos.10 and 11 of the counter affidavit, is not available to them. The employees of the said category will be entitled to receive their salary only in the revised pay structure, which was made effective with effect from 01.1.2006 by means of the Government order dated 8.12.2008. From the documents brought on record in the shape of annexures filed alongwith the present writ petition, it is evident that the petitioners were not in the employment of the State Government at the relevant date i.e. 01.1.2006 and thereafter, the pay of the petitioners was not to be revised according to the Government order dated 8.12.2008, rather the payment of salary of the petitioners was to be made in the Pay Band/Grade Pay as mentioned in the revised pay structure, which was made effective from 01.1.2006 by the Government order dated 8.12.2008 treating them to have been appointed on the post carrying the Pay Band/Grade Pay as against the post of the concerned category. Admittedly, the petitioners came in the government service on 05.1.2006/6.1.2006.

19. It is submitted that the petitioners were promoted to the post of Personal Assistant on 10.7.2006. The petitioner no.1 had assumed the charge of the post of Personal Assistant after his promotion on 15.3.2007. So far as the petitioners are concerned, they were appointed after 01.1.2006 and thereafter they were promoted on the post of Personal Assistant in the month of July, 2006/March, 2007. The fixation of their pay is to be made according to the procedures laid down in paragraph no.11 of the Government order dated 8.12.2008, wherein specific provision has been made by the State Government for fixation of the pay of such categories of employees. Para-11 of the Government order dated 8.12.2008 specifically deals with the matter of pay fixation of those employees, who had been given promotion in the revised pay structure i.e., after the relevant cut-off date 1.1.2006. The fixation of pay of the petitioners after promotion on the post of Personal Assistant was to be made strictly in accordance with the procedure laid down in para-11 of the Government order dated 8.12.2008. The petitioners cannot be allowed to continue to draw the pay on the post of Stenographer in the un-revised pay scale. They are not entitled to claim that they should be allowed to continue to draw their pay on the post of Stenographer in the unrevised pay scale. Similarly, the petitioners are also not entitled to be given the option of making the choice that the fixation of the pay be made with regard to them in the revised pay structure only after their promotion from the post of Stenographer to the post of Personal Assistant.

20. It has been submitted that the Grade Pay of the post of the Additional Private Secretary of the office of U.P. State Law Officers, High Court, Allahabad/Lucknow was upgraded with effect from 01.1.2006. The petitioners were promoted on the post of Personal Assistant in the month of July, 2006/March, 2007 and therefore, they are entitled for the benefit of the upgraded Grade Pay of Personal Assistant by making the fixation of their salary on the said post in accordance with the provisions made in Para-11 of the Government order dated 8.12.2008. In accordance with the

provision of Para no.1 of the Government order dated 8.12.2008 the right to exercise the option was available only to those employees, who were working in the establishment of the High Court as on 01.01.2006. If any benefit of right to exercise the option has been provided to any employee of the establishment of the High Court, who came into service of the establishment of the High Court after 01.01.2006, the same is contrary to the provisions of Para no.11 of the Government order dated 8.12.2008.

21. By the Government order dated 24.12.2009 a provision has been made for fixation of the pay regarding those posts wherein the pay scales were upgraded after 01.1.2006 and by the Government order dated 29.6.2019 the provision has been made for providing opportunity to fill up the revised option form for the said category of posts. The provisions of the Government orders dated 24.12.2009 and 29.6.2010 are not applicable to those posts, wherein the pay scales were upgraded w.e.f. 1.1.2006. The post of Additional Private Secretary has been upgraded w.e.f. 1.1.2006 and as such, the provision of the said Government orders are not applicable to the petitioners. According to the provisions of the Government order dated 29.6.2010 they were not entitled to be allowed to fill up the revised option form. The petitioners were given appointment for the first time after 01.01.2006, therefore, they cannot be permitted to avail the opportunity to exercise the option in the revised pay structure. It has been submitted that the grant of parity to the petitioners does not mean that if any benefit has been given to the employees of the High Court in a wrongful manner, contrary to the provisions of the relevant rules, the same should also be made available to the petitioners and the procedure followed in the matter of concerned Review Officers of the High Court, cannot be followed in the matter of the petitioners and the writ petition is liable to be dismissed.

22. The Court has proceeded to examine the record in question and also perused the documents provided by the High Court under the Right to Information Act, 2005 and finds that in the Office Order No.2556 dated 09.07.2008 issued by the establishment of this Court, which consists of 126 persons, the names of Santosh Kumar and Akhil Kumar Kureel find place at Sl. No.114 and 117 respectively by which they were for the first time appointed on the post of the Assistant Review Officer in the establishment of the High Court, Allahabad, i.e. much after 01.01.2006. Similarly, from the Office Order No.2302 dated 09.06.2009 it is evident that Sanjeev Kumar Mishra was allowed to join on the post of the Assistant Review Officer in the establishment of this Court. Thereafter, by the Office Order No.6542 dated 27.11.2010 the Assistant Review Officers namely Santosh Kumar and Akhil Kumar Kureel, were promoted on the posts of Review Officer in the establishment of this Court and their names find place at Sl. No. 63 and 67, respectively. Similarly, Sanjeev Kumar Mishra was also promoted from the post of Assistant Review Officer to the post of Review Officer by Office Order No.9594 dated 04.03.2011 in which his name has been mentioned at Sl. No. 3 in Column-B of the same.

23. From the service books of Santosh Kumar, Sanjeev Kumar Mishra and Akhil Kumar Kureel, which have been brought on record as Annexure Nos. 29-A,

29-B and 29-C to the writ petition, it is evident that in pursuance of the order of Hon'ble the Chief Justice, High Court, Allahabad dated 02.09.2011, the salary of the Review Officers of the establishment of the High Court, Allahabad namely Santosh Kumar, Akhil Kumar Kureel and Sanjeev Kumar Mishra, after assuming the charge of the post of Review Officer has been fixed at Rs.17,140/- which is the minimum of the Pay Band of Rs.9300-34800/- + Grade Pay of Rs. 4600/- (i.e. minimum in the Pay Band Rs.12540 + Grade Pay of Rs.4600 = 17140/-). Similarly, from the perusal of the revised Pay Fixation of the Review Officers of establishment of the Court, Santosh Kumar, Sanjeev Kumar Mishra and Akhil Kumar Kureel, it is evident that on assuming the charge of the post of Review Officer in the establishment of this Court the salary of Santosh Kumar, Sanjeev Kumar Mishra and Akhil Kumar Kureel has been fixed at Rs.17,140/- which is the minimum of the Pay Band of Rs. 9300-34800/- + Grade Pay of Rs.4600/- (i.e. minimum in the Pay Band of Rs. 12540/- + Grade Pay Rs. 4600/- =17,140/-). From the perusal of Annexure Nos. 31-A, 31-B and 31-C of the writ petition, which are the copy of the Revised Option Form of Sanjeev Kumar Mishra, Akhil Kumar Kureel and Santosh Kumar, Review Officers of this Court, it is evident that in compliance of order of Hon'ble the Chief Justice dated 02.09.2011 they opted their revised option in view of the 6th Pay Commission from the respective date of their promotion on the post of Review Officer.

24. Annexure No.32 of the writ petition, which is part of the information provided to the petitioner no. 2 under the Right to Information Act, 2005, clearly shows that by its own letter dated 24.08.2011 the State Government had communicated its decision to the Registrar General of this Court along with the other Government Orders dated 29.06.2010 and 24.12.2009 that the salary of the concerned Review Officers of the High Court may be fixed and paid to them on the basis of which the concerned Review Officers have already been provided the minimum of the Grade Pay of Rs.4600/- in the Pay Band of Rs.9300-34800/-, i.e. Rs.17,140/-. Similarly, from the minutes of the proceedings and deliberations etc. at various stages in between the establishment of the High Court and the concerned departments of the State Government, from time to time it is evident that whatever action has been taken in the establishment of the High Court for fixation of the salary of the concerned Review Officers of the establishment of High Court at Rs.17,140/- , which is the minimum of the Grade Pay of Rs. 4600/- in the Pay Band of Rs. 9300-34800/-, the same is based upon the order of Hon'ble the Chief Justice, High Court, Allahabad dated 02.09.2011 and the order of the Hon'ble the Chief Justice dated 02.09.2011 is based upon the own decision of the State Government contained in the relevant Government Orders issued from time to time, by the State Government itself.

25. The present writ petition has been filed for similar treatment in the matter of payment of salary to the petitioners at par with the comparable employees working in the establishment of this Court. The employees and officers working in the office of the U.P. State Law Officers, Allahabad/Lucknow under the control of Advocate General, U.P., High Court, Allahabad, have been granted parity

by the State Government in the matter of pay scales, allowances and other conditions of service with the employees and officers working in the establishment of this Court, Allahabad by means of Government Order dated 11.09.1974. Similarly, the employees and officers working in the establishment of High Court, Allahabad have been granted parity with the employees and officers of the U.P. Secretariat, Lucknow by means of the Government Order dated 20.03.1968.

26. The issue of grant of the parity to the employees of the U.P. State Law Officers' Office by the Government Order dated 11.09.1974 with the employees and officers of the High Court, Allahabad, has already been settled by the Division Bench Judgment of this Court dated 29th July, 1998 passed in Civil Misc. Writ Petition No. 17885 of 1996 (**Private Secretaries Brotherhood & others vs. The State of U.P. & The Advocate General, U.P.**), wherein the Division Bench, after considering the Government Orders issued from time to time, as well as the judgments of this Court passed in earlier writ petitions, recorded a categorical finding that the employees working in the office of U.P. State Law Officers both at Allahabad as well as at Lucknow, are entitled to be treated similarly with the employees working in this Court on the corresponding post. This judgment of the Division Bench was subjected to challenge before the Hon'ble Supreme Court by way of Civil Appeal No. 2732 of 1999, which was dismissed vide judgment dated 28th November, 2007. The review application filed before the Hon'ble Supreme Court being Review Petition (C) No. 877 of 2008 was also dismissed vide order dated 23rd July, 2008.

27. From the perusal of the aforesaid judgment dated 29.07.1998 it is also evident that earlier the Division Bench of this Court at Lucknow while allowing Civil Misc. Writ Petition No. 254 of 1984 filed by the State Law Officers' Ministerial Staff Association, Allahabad/Lucknow vide judgment and order dated 31.03.1986 had held that the Government Order dated 11.09.1974 was issued to give effect to the provisions of Article 39 (d) read with Article 14 and 16 of the Constitution of India. Similarly, while allowing Civil Misc. Writ Petition No. 21815 of 1987 (**State Law Officers' Ministerial Officers' Association and others vs. the State of U.P. and others**) on 26.02.1988 the Division Bench of this Court held that the employees of the High Court, Allahabad and the employees of the U.P. State Law Officers' Office are the same. Both the said judgment and orders dated 31.03.1986 and 26.02.1988 have already been attained finality as the State Government had decided not to file any Special Leave Petition before Hon'ble the Supreme Court against the same.

28. The aforesaid Division Bench judgment dated 29.7.1998 passed in Private Secretaries Brotherhood's case (supra) was followed by this Court in Writ A No.40762 of 1996 (**Personal Assistants Brotherhood, Office of U.P. State and another vs. State of UP and others**) and learned Single Judge had proceeded to allow the writ petition on 23.5.2011 with following observations:-

"From the aforesaid it is clear that the Chief Secretary was asked to file an affidavit justifying the non-payment of salary to the petitioners at par with Personal Assistants working in the establishment of this High Court with effect from the date of the institution of the writ proceedings. The Court found that such parity in fact has been provided w.e.f.

21.06.2007. A pointed query was made as to what has happened between the date of filing of the writ petition and 21.06.2007 on the basis whereof such parity could be refused from the date as has been prayed in this petition.

Today an affidavit has been filed by the Chief Secretary and it has been stated that in respect of all the three issues so framed i.e. a, b and c, there has been no change between 16.12.1996 to 21.06.2007. Except for reiterating what has been stated earlier, no fresh material has been brought on record which can lead to a conclusion that the State is justified in not granting the parity in the pay scale from the date the writ petition was filed i.e. 16.12.1996 as has been done in the case of Private Secretaries Brotherhood & others vs. The State of U.P. & The Advocate General, U.P. (Civil Misc. Writ Petition No. 17885 of 1996).

Since there is absolutely no justification forthcoming from the State to deny such parity from the date aforesaid and it being an admitted position that the present petitioners have been granted the said parity from 31.07.2007, this Court finds little or no justification to refuse such parity to the petitioners from the date of the institution of this writ petition like in the case of Private Secretaries Brotherhood & others (Supra) i.e. from 16.12.1998.

Accordingly, the present writ petition is allowed. The respondents are directed to grant the pay-scale to the members of petitioners' brotherhood at par with those working on the similar posts in the establishment of the High Court, Allahabad, w.e.f. 16.12.1996. Arrears in that regard may be released within three months from the date a certified copy of this order is filed before the authority concerned."

29. The State of Uttar Pradesh had assailed the said judgment passed by learned Single Judge by preferring Special Appeal No.1298 of 2011 (**State of UP and another vs. Personal Assistants Brotherhood, Office of U.P. & another**) and a Division Bench of this Court had proceeded dispose of the Special Appeal on 14.8.2018 with following directions:-

"The submission of the petitioners before learned Single Bench was that employees working in the Office of U.P. State Law Officers at Allahabad as well as at Lucknow are entitled to be treated similarly vis-a-vis the employees working in the High Court of Judicature at Allahabad on the corresponding posts as held by a Division Bench of this Court that came to be affirmed by the Supreme Court in Civil Appeal No. 2732 of 1999. The Division Bench held that the Members of the respondent-petitioners' Brotherhood are required to be treated at par with the employees working in the High Court at Allahabad on the corresponding posts. In spite of the judgment aforesaid, the Government of Uttar Pradesh did not extend the pay-scales applicable for the Members of the respondent-petitioner's Brotherhood at par with the employees of the High Court. During pendency of the writ petition, the pay-scale aforesaid was allowed but w.e.f. 31.07.2007. Learned Single Bench after considering the entire issue arrived at the conclusion that Members of the respondent-petitioner's Brotherhood are also entitled for grant of the pay-scales concerned w.e.f. 16.12.1996. A direction, thus, was issued accordingly with entitlement of the Members of the respondent-petitioner's Brotherhood for arrears accruing on grant of the pay-scales w.e.f. the date referred above.

In appeal, the argument advanced by learned counsel for the appellant-State is that Single Bench erred while awarding the arrears to the Members of the respondent-petitioner's Brotherhood. It is stated that issue with regard to the entitlement of the pay-scale with parity to the employees of the High Court is pending consideration and that consume some time, therefore, no need was there to award the arrears.

Having considered the arguments advanced, we deem it appropriate to modify the order passed by learned Single Bench to the extent of grant of arrears accrued.

Accordingly, the appeal is disposed of with directions as under:-

1. The members of the respondent-petitioners' Brotherhood shall be entitled for grant of pay-scales applicable to the employees working with the High Court of Judicature at Allahabad on the corresponding posts w.e.f. 16.12.1996.

2. Such employees shall be entitled for fixation of their pay in the pay-scale aforesaid on notional basis uptil 31.07.2007.

3. The pay of the employees concerned shall be revised accordingly and they shall also be entitled for revision of pay-scales at par with the employees of the High Court holding the posts corresponding.

4. The members of the respondent-petitioners' Brotherhood shall be entitled for arrears, if any, accruing to them subsequent to 31.07.2007, the date from which the appellant-State decides to grant the pay-scale at par with the High Court's employees."

30. Admittedly the petitioners joined the post in question after 1.1.2006, whereas similarly situated employees of the establishment of this Court were engaged in the year 2008. They were accorded promotion as Review Officer and they had been extended the said benefit. All the employees working in the State Government or in the establishment of this Court are getting the same pay scale as is admissible to the corresponding posts of the Central Government and the said decision was taken with effect from 01.1.1986 according to the report of Equivalence Committee, U.P. The State Government failed to take into consideration the aforesaid policy decision of the State Government and to provide same pay scale to the petitioners as is admissible to their counterparts working in the establishment of this Court as well as the State Government. Consequently the reasons assigned in the impugned order, ignoring the said policy decision of the State Government, cannot be legally sustained. There has been complete non-application of the mind in not adhering the policy decision of the State Government providing for pay scales at par with the counterparts working in the establishment of this Court as well as to the Division Bench judgment of this Court in the case of **P.S. & P.A. Brotherhood, High Court Allahabad and another v. State of U.P. & Others** (Supra), which has since been affirmed by the Hon'ble Supreme Court and the judgment passed in Writ A No.40762 of 1996. Therefore, the stand of the respondents is absolutely illegal and unjust.

31. In view of above the impugned order dated 25.10.2016 passed by the respondent no.1 served on petitioner no.1 on 31.3.2017 through letter dated 22.3.2017 cannot sustain and the same is accordingly set aside.

32. Consequently, the writ petition is allowed and the respondents are directed to fix and pay the salary of the petitioners in accordance with the fitment chart given in Schedule-I and Schedule-II attached with the Government Order dated 16.09.2010 with effect from the date of their promotion on the post of Personal Assistant at par with those working on the similar posts in the establishment of this Court. Arrears in that regard may be released within three months from the date a certified copy of this order is filed before the authority concerned.

(2020)1ILR 1837

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 21669 of 2004
with
Writ-A No. 31955 of 2005
&
Writ-A No. 21210 of 2004

Ram Jatan ...Petitioner
Versus
Banaras Hindu University & Anr. ...Respondents

Counsel for the Petitioner:
Sri P.M.N. Singh, Sri Amit Kumar Singh

Counsel for the Respondents:
S.C., Sri V.K. Upadhyay, Sri Arun Prakash, Sri Hem Pratap Singh

A. Indian Penal Code, 1860 - Section 457, 380, 411 - theft from Garbh Grih of Vishwanath Temple-recovery of cash amount- suspension-violation of Ordinance 23, Sub-Rule (2) of non-teaching employees of BHU-petitioner challenged suspension as well as punishment-no opportunity given to petitioner by Disciplinary Committee for his defence-inconsistent to principle of natural justice-impugned orders of punishment cannot be sustained-Procedure laid down in Rule 24 of Ordinance which is consistent with natural justice should be followed. (Para 32 to 35)

In a departmental inquiry an employee is entitled to be given adequate opportunity of defence and if a particular procedure is prescribed in relevant Rules, employer is bound to follow and observe the same in words and spirit and violation thereof would vitiate an order of punishment. (Para 33)

Writ Petitions allowed. (E-6)

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

1. Heard Sri Amit Kumar Singh, Advocate, for petitioners and Sri V.K. Upadhyay, learned Senior Advocate, assisted by Sri Arun Prakash, Advocate, for respondent-University.

2. The Writ Petition No. 21669 of 2004 (hereinafter referred to as "WP-1") under Article 226 of the Constitution of India has been filed by sole petitioner, Ram Jatan, being aggrieved by order dated 26.11.1996 (Annexure-5 to WP-1) imposing punishment of dismissal and order dated 07.01.2004 (Annexure-9 to WP-1) communicating him that his appeal has been rejected and punishment imposed vide order dated 26.11.1996 has been upheld.

3. Facts in brief, giving rise to present dispute, as pleaded in WP-1, are that petitioner was appointed as Farrash in 1977 in Banaras Hindu University (hereinafter referred to as "BHU") and posted to work in Vishwanath Temple situated in Campus of BHU. An incident

of theft occurred in the intervening night of 26/27.03.1996 in the Garbh-Grih of Vishwanath Temple situated in Campus of BHU in respect whereof a First Information Report was lodged under Sections 457, 380, 411 I.P.C. by Ram Auatar, an employee of BHU against petitioner and four others. Petitioner was placed under suspension vide order dated 29.03.1996 passed by Registrar, BHU exercising power under Section 4(5)(a) of Statute of BHU. A charge-sheet dated 10/12.04.1996 was issued containing a charge that he was indulged in theft, in the Temple, committed on 26/27.03.1996 and in the past also he was indulged in such type of thefts which he has admitted. Entire charge levelled against petitioner reads as under:

''1. दिनांक 26/27 मार्च, 1996 को श्री राम जतन सिंह, फर्रास, श्री विश्वनाथ मन्दिर के अन्य व्यक्तियों के साथ चोरी करने के उद्देश्य से श्री विश्वनाथ मन्दिर, काशी हिन्दू विश्वविद्यालय के गर्भ–गृह के अन्दर दाखिल हुए।

2. विश्वविद्यालय के सुरक्षा सैनिकों एवं स्थानीय पुलिस के संयुक्त छापे के दौरान श्री राम जतन सिंह, फर्रास, अन्य लोगों के साथ गर्भ–गृह से चोरी करते हुए रंगे हाथ पकड़ा गया एवं रू0 1808.50 नकद बरामद हुआ।

3. पुलिस द्वारा पूछ–ताछ के दौरान श्री राम जतन सिंह, फर्रास इस तरह की चोरियों में पिछले सात–आठ वर्षो से (हर मंगलवार) को लिप्त रहना स्वीकार किया है और यह भी स्वीकार किया है कि इस कार्य के लिए उनके पास डुप्लीकेट चाबियां हैं।

4. चोरी की उक्त घटनाओं के पश्चात, पकड़े जाने पर बरामद की गयी धनराशि, ताला–चाबी, गन्नी बैग आदि को लंका पुलिस थाना के कब्जे में कर दिया गया। श्री राम जतन सिंह, फर्रास को लंका पुलिस द्वारा जेल भेज दिया गया।

5. श्री राम जतन सिंह, फर्रास का उपरोक्त प्रकार का आचरण घोर आपत्तिजनक है जिससे विश्वविद्यालय की पवित्रता व गरिमा पर आघात लगा है और उनका इस प्रकार का आचरण गैर शिक्षण कर्मचारी की सेवा शर्तें की आचरण संहिता / नियम 2.1 के प्रतिकूल है।''

"1. On 26/27 March, 1996 Sri Ram Jatan Singh, Farrash, along with some other persons associated with Sri Vishwanath Temple, entered the Garbhagrih (sanctum sanctorum) of Sri Vishwanath Temple, Banaras Hindu University with an intent to commit theft.

2. During the joint raid of security personnel of the University and the local police, Sri Ram Jatan Singh, Farrash was caught red handed along with other accomplishes while committing theft in the Garbhagrih and a cash amount of Rs 1808.50 was recovered.

3. While being interrogated by the police, Sri Ram Jatan Singh, Farrash has confessed his involvement in similar thefts over the past seven-eight years (on every Tuesday) and also having duplicate keys for the said act.

4. On being arrested for the aforesaid theft incidents, recovered amounts, locks & keys, gunny bags, etc were given into possession of the Lanka police station. Sri Ram Jatan Singh, Farrash was sent to jail by the police of P.S. Lanka.

5. The aforesaid type of conduct of Sri Ram Jatan Singh, Farrash is highly objectionable having undermined the sanctity and dignity of the University and this type of conduct of his is contrary to the Conduct Code/ Rule 2.1 of the Service Conditions of the Non-teaching Employees." (English Translation by Court)

4. Petitioner was required to submit reply within ten days. In the charge-sheet, there was no reference to any evidence relied in support of charges, whether oral or documentary.

5. Petitioner submitted reply dated 19.04.1996 (Annexure-3 to WP-1) wherein he denied all the charges and also stated that relevant documents and statements, which are foundation of charge, have not been supplied, therefore, the same may be made available to him so that he may give a further effective reply. He also stated that he shall give his evidence and cross-examine witnesses produced against him in support of charge.

6. It appears that besides petitioner, three other employees were also similarly charged and BHU constituted an Inquiry Committee consisting of Prof. Janardan Singh, Department of Entomology and Agricultural Zoology, Dr. M.N.P. Srivastava, Reader, Faculty of Law; and, Dr. Babu Lal Mishra, Honorary Manager of Vishwanath Temple and also clubbed all the inquiries together which comprised of petitioner and Shiv Charan, Farrash, Rama Shankar Singh Yadav, Chowkidar and Lal Bahadur Singh, Chowkidar.

7. Vide letter dated 23.07.1996, Assistant Registrar (Administration)-II and Secretary, Inquiry Committee informed petitioner and others that Inquiry Committee shall hold its meeting on 2nd and 3rd, August 1996 at 2.00 PM in the Chamber of Chairman, i.e., Prof. Janardan Singh.

8. Petitioner and other charged employees appeared before Inquiry Committee on the dates, scheduled and informed, as above, when no evidence was recorded by Inquiry Committee and petitioner and others were only required to sign some papers and thereafter they were asked to leave campus. No further inquiry was held and no date, time or place was fixed. Instead, Inquiry Committee submitted inquiry report dated 14.10.1996. Thereafter petitioner was straightway served with an order of dismissal dated 26.11.1996 (Annexure-5 to WP-1).

9. Petitioner appealed against dismissal order vide representation dated 01.01.1997 in which he specifically pleaded that no adequate opportunity of defence was provided and no proper inquiry was conducted.

10. In the meantime, petitioner was also tried in Criminal Case No. 596 of 1996 in the Court of Special Chief Judicial Magistrate, Varanasi, who vide judgment dated 19.02.2000 convicted petitioner under Section 457, 380 and 401 I.P.C. and awarded four years rigorous imprisonment (hereinafter referred to as "R.I.") and 1000/- fine under Section 457 I.P.C., three and half years R.I. and fine of Rs. 1,000/- under Section 380 I.P.C. and 2 years R.I. and fine of Rs. 500/- under Section 411 I.P.C. Criminal Appeal No. 52 of 2000 was preferred by petitioner which came to be heard along with other appeals by Sri T.N. Pandey, Additional Sessions Judge, Court No. 13, Varanasi who allowed appeal vide judgment dated 10.04.2003, set aside order of sentence awarded by Magistrate and held that there was no credible evidence and circumstances to convict petitioner, hence, judgment of Special Chief Judicial Magistrate dated 19.02.2000 was set aside.

11. The above judgment of Appellate Court was communicated by petitioner to Registrar, BHU vide letter dated 02.09.2003. However, vide letter dated 07.01.2004, Deputy Registrar (Administration)-II has informed petitioner that his appeal has been rejected and earlier order of punishment has been maintained.

12. Respondents have filed counter affidavit contesting WP-1 stating that in the night of 26/27.03.1996 petitioner and four others were caught red handed in the night about 2.00 AM while emptying Dan-Patra, kept at ground floor of Garbh-Grih of Vishwanath Tempt at BHU Campus. Police registered Case No. 77 of 1996 under Section 457, 380, 411 I.P.C. and sent all the culprits to Jail. Considering seriousness of criminal incident and involvement of petitioner and other employees, an order of suspension was passed on 28.03.1996 by Vice-Chancellor, BHU, which was communicated to petitioner vide Registrar, BHU's letter dated 29.03.1996.

13. A disciplinary inquiry was initiated for act of misconduct, i.e., violation of Ordinance 23, Sub-Rule (2) which governs terms and conditions of service of non-teaching employees of BHU. It was served upon petitioner vide letter dated 10/12.04.1996 issued by Deputy Registrar (Administration), BHU. Further vide Office Order dated 12.04.1996 an Inquiry Committee was constituted and petitioner was given opportunity to submit his defence before Inquiry Committee. Inquiry Committee submitted inquiry report dated 14.10.1996 and a copy thereof has been filed along with counter affidavit as Annexure CA-3. It is not disputed that in the criminal trial, petitioner has been acquitted by Appellate Court vide judgment dated 10.04.2003. Thereafter, petitioner submitted representation dated 02.09.2003 requesting for the reinstatement but since he was not dismissed from service on the basis of conviction in criminal case but after finding him guilty in a departmental inquiry, hence, question of his reinstatement on the basis of Appellate Court's judgment had not arisen, hence his request was not accepted. It is also said that petitioner and others confessed their involvement in theft before Sri Ram Auatar, Assistant Security Officer in the office of Chief Proctor and others, hence report was lodged against them, besides initiating departmental inquiry. However, after service of charge-sheet in disciplinary proceedings, since petitioner denied all the charges vide reply dated 19.04.1996, therefore competent authority in BHU passed order dated 14.05.1996 requesting Inquiry Committee to proceed with the disciplinary proceedings. Petitioner and others were given ample opportunity of defence. Representation dated 01.01.1997 submitted by petitioner against punishment order was considered by competent authority and its decision was communicated to petitioner vide Assistant Registrar (Administration), BHU's letter dated 03/06.03.1997. The punishment order has been passed by Vice-Chancellor after considering report of Inquiry Committee and same has been ratified by Appointments Committee of BHU constituted under Section 26 of Banaras Hindu University Act, 1915 (hereinafter referred to as "Act, 1915").

14. In the Rejoinder Affidavit, petitioner has reiterated that no departmental inquiry was conducted in accordance with relevant Statute and he was never communicated about the order dated 03/06.03.1997 whereby his representation was rejected. He specifically denied that he was caught red handed at any point of time.

15. Writ Petition No. 31995 of 2005 (hereinafter referred to as "WP-2") has been filed by Rama Shankar Singh Yadav, who was appointed as Chowkidar in BHU

and posted in Vishwanath Temple. Rest of the facts are similar to that of WP-1 including punishment order dated 26.11.1996 (Annexure-5 to WP-2) and all other pleadings are similar. Hence, I am not repeating the same.

16. Writ Petition No. 21210 of 2004 (hereinafter referred to as "WP-3") has been filed by Shiv Charn, who was appointed as Farrash on 01.10.1963 and posted in Vishwanath Temple and all other facts are similar to WP-1 including the punishment order dated 26.11.1996 and the letter dated 07.01.2004 whereby Assistant Registrar, BHU has communicated him rejection of his representation dated 03.09.2003. All other pleadings are common, hence are not repeated.

17. Inquiry Report dated 14.10.1996 placed on record by University along with its Counter Affidavit filed in WP-1 shows that it recommended punishment to petitioners as per Rules of University but further proposed that they should be kept in active service with immediate effect, except Temple, and be required to deposit Rupees three hundred per month for five years in the form of draft/cash/cheque in 'Dan Patra', in the presence of Manager and Poojari, after taking proper oath before donating money, in front of Lord Shiva Idol, for not committing any such illegal and immoral act in future and if any of them is retired before five years, he shall be required to deposit consolidated amount for remaining period and also to take proper oath that he will not commit any such illegal or immoral act in future.

18. In view thereof petitioners sought amendments in their writ petitions that Inquiry Committee since recommended for a corrective measure and not punishment in accordance with Rules, and recommended for reemployment/reinstatement in active service, University in taking a different decision has erred.

19. Thereafter order sheet also shows that on a statement made by counsel for BHU that matter of petitioners would be considered afresh sympathetically by BHU, indulgence was granted and matter was postponed but no concrete result came. In these circumstances matter was heard by Court on merits on 16.05.2009 when it was argued that inquiry was not conducted in accordance with procedure prescribed in Statute and there was a gross violation of principles of natural justice resulting in denial of adequate opportunity of defence to petitioners. Hence, this Court observed that perusal of record of inquiry would be necessary and directed BHU to produce inquiry record before this Court.

20. A supplementary Counter Affidavit was filed by BHU in WP-2 and affidavit has been sworn by Sri Neeraj Tripathi, Registrar stating that record of inquiry was not available/traceable and for its discovery a Committee consisting of Prof. H.B. Srivastava as Chairman and Prof. Rakesh Singh as Member was constituted wherein Pushya Mitra Dwivedi was Member Secretary and they submitted report on 28.06.2019 that record of inquiry is not available and responsible persons, supposed to be custodian of record, had either retired about two decades ago or expired.

21. In this backdrop, Court proceeded to hear matter again on the basis of record whatever is available and pleadings of parties.

22. The common case of all the petitioners is that they received information to appear before Inquiry Committee vide letter dated 23.07.1996 on the scheduled dates, i.e. 2nd and 3rd, August, 1996. On these dates they appeared and they were required to sign some papers and nothing further happened and they were directed to leave the premises. Thereafter no date, time or place was fixed for oral inquiry whatsoever. On the contrary, Inquiry Report dated 14.10.1996 submitted by Committee consisting of Sri Janardan Singh, Chairman and Sri M.N.P. Srivastava, Member shows that it recorded statements of Dr. S.K. Singh, Deputy Chief Proctor, Ram Autar, Assistant Security Officer, Dinkar Kumar Singh, a Student of B.Com.-II, Sri Chandra Bhan Ram, a student of B.Com.-II and also statement of these petitioners. Dr. Babu Lal Mishra, Honorary Manager of Temple also submitted a written statement before Committee.3

23. Inquiry Committee held its meeting on 30.04.1996, 07.06.1996, 02.08.1996, 03.08.1996 and 04.09.1996. It is evident that petitioners were communicated to participate in the inquiry before Inquiry Committee for the first time vide letter dated 23.07.1996 and they were required to appear before Inquiry Committee only on 2nd and 3rd August, 1996 while Inquiry Committee had already held its meeting twice earlier, i.e, on 30.04.1996 and 07.06.1996 in respect whereof no information was given to petitioners and thereafter also held proceedings on 04.09.1996 and this date was also not communicated to petitioners.

24. It is also not stated in the entire inquiry report that statements of various witnesses in support of charges were recorded in presence of delinquent employees namely petitioners and they were given opportunity to cross-examine those witnesses.

25. In the findings recorded by Inquiry Committee, it says that statements of witnesses are corroborative to each other; there is no contradiction and they have repeated the same facts regarding occurrence of incident and involvement of petitioners in the theft committed in temple in the night of 26/27.03.1996, hence charges levelled against petitioners are established. Petitioners have only denied charges but failed to produce any evidence, hence their defence is not acceptable. Inquiry Committee has also held that Rama Shankar, petitioner of WP-2 was arrested in connection with theft incident occurred on 10.08.1994 and therein he was granted bail which also prove his character and involvement in the present incident though from inquiry report it does not appear that there was any material evidence to prove involvement of petitioner of WP-2 in the alleged incident of 10.08.1994 since witnesses examined by Inquiry Committee all corroborated alleged incident of 26/27.03.1996 and not of 10.08.1994.

26. It cannot be doubted that it was incumbent upon Inquiry Committee, constituted to hold inquiry, to examine witnesses of employer in presence of charged employees and these witnesses appeared in support of charges ought to have been allowed to be cross examined by charged employees. Only thereafter, when employer prima facie succeed to prove the charges, question of defence by employee could have arisen. However, in the present case, charged employees have

specifically pleaded that virtually no oral inquiry was held. They were called to appear on 2nd and 3rd August, 1996 on which date they appeared and they were required to sign certain papers only and thereafter nothing happened except they were served with the punishment order. To contradict above submission, respondents, despite repeated opportunity, could not bring anything on record to show that oral inquiry was conducted with due participation of charged employees and they were given due opportunity to cross examine the witnesses.

27. Oral evidence recorded in a departmental inquiry without giving opportunity to cross-examine is not admissible in evidence, even though Evidence Act, 1872 (hereinafter referred to as "Act, 1872") is not applicable in departmental inquiry. The statement of such person is an ex-parte version with which charged employee remained un-confronted and such ex-parte version is in the nature of hearse evidence which is not admissible even in departmental inquiry.

28. Moreover, record clearly shows that as per own stand taken by Inquiry Committee, it held its meetings on five dates, i.e., 30.04.1996, 07.06.1996, 02.08.1996, 03.08.1996 and 04.09.1996 but petitioners were called only on two dates, i.e., 02.08.1996 and 03.08.1996 and not others. Neither respondents' counsel could explain nor anything has been placed on record nor during the course of argument, this Court could be informed of any reason as to why Inquiry Committee, as and when held its meetings for holding oral inquiry, on all such dates charged employees were not called. Therefore, finding of guilt recorded against petitioners, based on such inadmissible evidence, amounts to holding petitioners guilty in an inquiry held in utter violation of principles of natural justice and the same cannot be sustained in law.

29. There is another flaw in the proceedings. Petitioners have quoted Rule 24.4 of the Ordinance dealing with departmental proceedings, and in particular, action on the inquiry report. Its applicability is not disputed before this Court. It reads as under:

"24.4 If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clauses (v) to (ix) of rule 20 should be imposed on the employee, ***it shall****:*

(a) ***Furnish to the employee a copy of the report of the inquiry held by it and its findings on each article of charge****, or where the inquiry has been held by* ***an inquiring authority appointed by it, a copy of the report of such authority and a statement of its findings on each article of charge together with brief reasons for the inquiring authority.***

(b) Give ***the employee a notice stating the penalty proposed to be imposed on him*** *and calling upon him to submit within fifteen days of receipt of the notice or such further time not exceeding fifteen days, as may be allowed, such representation as he may wish to make on the proposed penalty on the basis of the evidence adduced during the inquiry held under rule 23.*

The disciplinary authority shall consider the representation, if any, made by the employee in pursuance of the notice given to him under clause (1) and determine what penalty, if any, should be imposed on him and made such order as it may deed fit. (emphasis added)

30. Above Rule clearly says that Disciplinary Authority having regard to finding on the charge if, of the opinion that any of the penalty specified in Clauses (v) to (ix) of Rule 20 should be imposed, then it shall furnish a copy of report of inquiry and also its own findings, if any, and give the employee an opportunity informing him about proposed penalty to submit his reply and after considering his representation, if any, only thereafter an order of punishment, if necessary, would be passed.

31. In the present case, learned counsel appearing for BHU could not dispute that no inquiry report was furnished to petitioners. In fact, respondents treated the charge-sheet and reply submitted by petitioners as also petitioners' participation on 2nd and 3rd August' 1996 before Inquiry Committee to be sufficient compliance of requirement of Rule 24.4. In this regard, I may reproduce Para-14 of WP-1 and its reply contained in para-20 of Counter Affidavit submitted by BHU in WP-1 as under:

"14. That petitioner was served with the impugned order dated 26-11-96 by means of which services of the petitioner were terminated by the Registrar. That it is pertinent to mention here that no Show cause was ever issued to the petitioner before inflicting the ultimate punishment i.e. order of termination."

"20. That the contents of paragraph no. 14 of the writ petition are wrong and denied. In reply, it is stated that it is wrong to allege that no show cause was ever issued to petitioner before inflicting the order of termination. In fact the petitioner was directed to submit his written defence of the office memorandum dated 10/12.4.1996 and thereafter he was accorded sufficient opportunity of hearing vide letter dated 23.7.1996 of the Assistant Register (Admit) II, BHU. Since the petitioner and other accused were caught red handed in the incident of theft and the charges levelled against them were established by the Disciplinary enquiry committee, as such the services of the petitioner was terminated vide letter dated 26.11.1996 after initiating proper disciplinary proceedings by the respondent university under Ordinance 23 governing the terms and conditions of service of the non-teaching employees of the University."

32. Learned Senior Counsel, Sri Upadhyay, when confronted to the above pleadings, could not dispute that after receiving inquiry report, it was never supplied to petitioners and this is virtually an admitted fact from the pleadings of University also. There is nothing to contradict it. Therefore, even procedure laid down in Rule 24 of Ordinance, which is consistent to principles of natural justice made with an intention to give adequate opportunity of defence to employee concerned, has not been followed by BHU.

33. In a departmental inquiry an employee is entitled to be given adequate opportunity of defence and if a particular procedure is prescribed in relevant Rules, employer is bound to follow and observe the same in words and spirit and violation thereof would vitiate an order of punishment.

34. In view of above discussion, I have no hesitation in holding that impugned orders of punishment cannot be sustained.

35. In the result, writ petitions are allowed. Impugned orders dated

26.11.1996 are hereby quashed and the orders dated 07.01.2004 whereby representation of petitioner in Writ Petition No. 21669 of 2004 and Writ Petition No. 21210 of 2004 have been rejected are also set aside.

(2020)1ILR 1845

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 21944 of 2003

Smt. Dulari Devi & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri M.D. Mishra, Sri J.H. Khan, Sri N.H. Khan, Sri W.H. Khan, Sri Ramanuj Pandey, Sri Awadhesh Kumar

Counsel for the Respondents:
Sri A.N. Roy, A.S.G.I., Sri Arun Kumar, Sri Arvind Srivastava, Sri Ashok Singh, Sri B.N. Singh, Sri K.C. Shukla, Sri K.C. Sinha, Sri K.C. Srivastava, Sri K.K. Shukla, Sri R.S. Mishra, S.S.C.

A. Service – Retrenchment – Industrial Disputes Act, 1947: Section 25-L(b)(ii), 25-K, 25-N, 25-N(1)(a), 25-N(2), 25-N(3), 25-N(9), 25-S; Industrial Disputes Rules, 1957: Rule 76-A; Constitution of India: Art. 77; Companies Act, 1956: Section 619, 620; Sick Industrial Companies (Special Provisions) Act, 1985: Section 3(1)(o);

VSS is a well-recognized mode of "Golden Handshake" principle known in the business world - Circular dated 16.09.2002 circulating VSS was not found illegal and arbitrary - Facts demonstrate the genuineness of claim of respondent-Employer that it had sustained losses, became sick to the extent of incapable of revival/ rehabilitation, hence, its closure was found appropriate. Petitioners could not demonstrate any of the terms and conditions, to be unreasonable, illegal or against public policy so as to justify interference by this Court. Opting of VSS by all employees i.e. 5712 (except-11 i.e. petitioners), also shows that terms and conditions of VSS are reasonable and almost all employees were satisfied with them. (Para 47, 50 to 53)

B. Every individual company incorporated and registered is a separate and independent entity and employees of such company, as a matter of right, cannot claim employment in another company since every company has its own right in its individual employer and has its own authority and power to make appointment of its employees. Promotor of FCIL is GOI, as it holds 100% shares of FCIL. But it still is an independent and separate legal entity, different from its Promotor. Employees of such company cannot be said to be employees of Central Government or Promoters of Company.

Petitioners could not show any legal or otherwise right to claim that FCIL has obligation to ensure their absorption/rehabilitation or re-employment or continued employment in any other company/department of Central Government. No appointment in any manner can be made on any post in the department of Government contrary to statutory provisions made for such recruitments and appointments. (Page 55, 56, 73 & 74)

C. Sufficient compliance with procedure prescribed - Facts indicate that workmen concerned have been given notice in writing as required u/s 25-N(1)(a). A copy of application was sent by speed post as required u/s 25-N(2). Petitioners also availed opportunity of hearing given by the Government Department. After receiving approval from GOI, retrenchment orders along with retrenchment compensation were sent to petitioners by registered post, which they refused to receive. Therefore, there is no illegality in retrenchment/termination. (Para 82 to 90)

Writ Petition dismissed. (E-4)

Precedent followed: -

1. A.K. Bindal and another Vs. Union of India and others, JT 2003 (4) SC 328 (Para 34, 41, 53, 58 & 59)

2. Officers and Supervisors of IDPL Vs. Chairman and M.D. IDPL and others, JT 2003 (6) SC 68 (Para 34, 57, 59)

3. State of U.P. and another Vs. UPTRON Employees Union, CMD and others, AIR 2006 SC 2081 (Para 60)

4. Heavy Engineering Mazdoor Union Vs. State of Bihar and others, (1969) 1 SCC 765 (Para 61)

5. Steel Authority of India and others Vs. National Union Water Front Workers and others, (2001) 7 SCC 1 (Para 62)

6. Kanpur Jal Sansthan and another Vs. Bapu Construction, (2015) 5 SCC 267 (Para 63)

7. State of Punjab and others Vs. Raja Ram and others, (1981) 2 SCC 66 (Para 64)

8. Ramana Dayaram Shetty Vs. International Airport Authority of India and others, (1979) 3 SCC 489 (Para 64)

9. Food Corporation of India Vs. Municipal Committee, Jalalabad, AIR 1999 SC 2573 (Para 65)

10. M/s Electronics Corporation of India Ltd etc. Vs. Secretary Revenue Department, Government of Andhra Pradesh, AIR 1999 SC 1734 (Para 65)

11. Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology and others, 2002 (5) SCC 111 (Para 66)

12. National Textile Corporation Ltd Vs. Naresh kumar Badri Kumar Jagad and others, AIR 2012 SC 264 (Para 67)

13. Satinder Singh Arora Vs. State Bank of Patiala and others, 1992 Supp (2) SCC 224 (Para 68)

14. State Bank of India Vs. S. Vijaya Kumar, (1990) 4 SCC 481 (Para 69)

15. Rajasthan State Road Transport Corporation Ltd. and others Vs. Gurudas Singh, (2004) 13 SCC 418 (Para 70)

16. Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd. Haldia and others, (2005) 7 SCC 764 (Para 71)

17. S.L. Agarwal (Dr.) Vs. G.M. Hindustan Steel Ltd., (1970) 1 SCC 177 (Para 71)

18. State of Uttar Pradesh Through the Principal Secretary and others Vs. Kalpana Verma and another, (2019) 1 UPLBEC 659 (Para 72)

Precedent distinguished: -

1. Workmen of Meenakshi Mills Ltd. Vs. Meenakshi Mills Ltd. and another, AIR (1994) SC 2697 (Para 28(vi), 89)

Precedent cited: -

1. Shiv Kumar and others Vs. State of Haryana and others, (1994) 4 SCC 445 (Para 28(iii))

2. Om Prakash and another Vs. Union of India and another, JT 2010 (2) SC 91 (Para 28(iv))

3. Jaipur Development Authority and others Vs. Vijay Kumar Data and others, (2011) 12 SCC 94 (Para 28(vi))

4. Anoop Sharma Vs. Executive Engineer, Public Health Division No. 1 Panipat (Haryana), JT 2010 (4) SC 229 (Para 28(viii))

5. M/s Orissa Textiles and Steel Ltd. Vs. State of Orissa and others, AIR 2002 SC 708 (Para 35)

6. State of Rajasthan and another Vs. Sripal Jain, AIR 1963 SC 1323 (Para 35)

7. Major E.G. Barsay Vs. State of Bombay, AIR 1961 SC 1762 (Para 35)

8. State of Maharashtra and others Vs. Basanti Lal and another, AIR 2003 SC 4688 (Para 36)

9. Air India Cabin Crew Association Vs. Yeshawinee Merchant and others, AIR 2004 SC 187 (Para 36)

Petition challenges Circular dated 16.09.2002, circulating "Voluntary Separation Scheme", letter dated 28.04.2003, sent by Chairman/Managing Director, FCIL to GOI, Ministry of Labour, order dated 09.07.2003, issued by Deputy Director, GOI, Ministry of Labour.

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

1. Heard Sri W.H. Khan, learned Senior Advocate assisted by Sri J.H. Khan, learned counsel for petitioners; and, Sri Arun Kumar, learned counsel appearing for respondents-2, 3 and 4, Sri Arvind Srivastava, learned counsel for proposed respondent-6 and Sri A.N. Roy, learned counsel for Union of India.

2. This writ petition under Article 226 of Constitution of India has been filed by nine petitioners namely, Smt. Dulari Devi, Ram Darash, Jagan Nath, Dina Nath Sonkar, Dwigendra Kumar Singh, Mahabal Prasad, Harendra Kumar Singh, Murari and Bhawnath, all employed and working on different posts like Counter Clerk, Personal Assistant, Junior Stenographer, Senior Accounts Assistant, Technician Grade-I and Grade-II, Gang Man and Pump Operator Grade-2 in Fertilizer Corporation of India Limited *(hereinafter referred to as "FCIL")* Unit, Gorakhpur. They have prayed for issue of a writ of certiorari to quash Circular dated 16.09.2002 (Annexure-4 to the writ petition) circulating "Voluntary Separation Scheme" *(hereinafter referred to as "VSS")* due to closure of FCIL and notice dated 28.04.2003 sent by Chairman/Managing Director, FCIL addressed to Government of India, Ministry of Labour seeking permission for proposed retrenchment of above nine workmen i.e. petitioners, with effect from 30.06.2003.

3. Subsequently, by way of amendment, petitioners have also challenged order dated 09.07.2003 (Annexure-8 to the writ petition) issued by Deputy Director, Government of India, Ministry of Labour granting approval for retrenchment of nine workmen i.e. petitioners; Memorandum dated 11.07.2003 (Annexure-9 to the writ petition) which are nine in number issued to all petitioners, separately, giving another opportunity to them to opt for VSS by 31.07.2003 failing which they shall be retrenched; and Memorandum dated 01.08.2009 issued to all petitioners (collectively filed as Annexure-10 to the writ petition), issued by General Manager, FCIL retrenching all petitioners with effect from 01.08.2003 since they did not opt for VSS.

4. Petitioners have also prayed for issue of a writ of mandamus commanding respondents to absorb petitioners in any other unit of Government of India i.e. Jodhpur Mining Organization or Hindustan Fertilizers Corporation, Nampur or any other Government of India Undertaking, including Central Schools, being run in the premises of FCIL Unit at Gorakhpur. A further direction has been sought to respondents to make payment under VSS/retrenchment compensation at the rate of 90 days per year for the balance service of all petitioners as has been given to the employees who have opted for VSS.

5. Facts in brief, as stated in the writ petition, are that FCIL (a Government of India undertaking under the Ministry of Chemicals and Fertilizer, Department of Fertilizers), is a Company whereof 100 % shares are held by Government of India. It was incorporated as a Central Government Company under the provisions of

Companies Act, 1956 *(hereinafter referred to as "Act, 1956")*, on 01.01.1961. With the passage of time, FCIL sets up units at Sindri (District Dhanbad, State of Jharkhand); Ramagundam; Talcher and Gorakhpur. At Jodhpur, it had set up Jodhpur Mining Organization where it was mining and marketing Gypsum.

6. Petitioners were appointed on various dates, between 1981-87, on different posts, as given in the form of chart, as under:-

S. No.	**Name of Petitioner**	**Date of Appointment**	**Post/ Designation**
1	Smt. Dulari Devi	13.12.1986	Counter Clerk
2	Ram Darash	-	Personal Assistant
3	Jagan Nath	15.2.1983	Junior Stenographer
4	Dina Nath Sonkar	3.9.1981	Senior Accounts Assistant
5	Dwigendra Kumar Singh	12.12.1986	Technician Grade-I
6	Mahabal Prasad	15.5.1981	Technician Grade-I
7	Harendra Kumar Singh	1.1.1982	Technician Grade-II
8	Murari	1.1.1987	Gangman
9	Bhawnath	4.4.1984	Pump Operator Grade-II

7. FCIL sustained heavy losses resulting in suspension of production of fertilizer i.e. urea, in Gorakhpur unit, on 01.06.1990. In Talchar and Ramagundam Unit, production of urea was suspended with effect from 01.04.1999, while Sindri unit also stopped production with effect from 16.03.2002 and another unit at Korba, proposed by FCIL, was not set up at all.

8. FCIL was declared sick by Board for Industrial and Financial Reconstructions *(hereinafter referred to as "BIFR")* on 06.11.1992 under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 *(hereinafter referred to as "Act, 1985")*. BIFR, vide order dated 02.11.2001 formed an opinion that revival of FCIL is not possible, therefore, recommended winding up and forwarded to Delhi High Court since registered office of FCIL is at Nehru Place, New Delhi.

9. Against order dated 02.11.2001 of BIFR, Department of Fertilizer, FCIL as well as workers' union filed five appeals before Appellate Authority of Industrial & Financial Reconstruction *(hereinafter referred to as "AAIFR")* but vide order dated 16.04.2002, AAIFR also confirmed order of BIFR for winding up, and dismissed appeals.

10. It is said that some writ petitions were filed in Delhi High Court against order of AAIFR i.e. Writ Petition No. 4310 of 2002 and 4430 of 2002 etc.

11. Delhi High Court decided writ petitions vide judgement dated 26.11.2002. It took the view that since Government of India was not ready to infuse funds for revival of company and no viable proposal was submitted by Government of India, FCIL and operating agency for revival of company for more than a decade, BIFR and AAIFR were right in holding that it was not possible to revive the company.

12. The above view, therefore, was affirmed. However, taking into consideration, a new development which was noted by Delhi High Court in the light of Chairman and Managing Director, FCIL's letter dated 10.09.2001, it required BIFR to consider certain aspect of the matter again. Vide letter dated 10.09.2001, approval was conveyed by Chairman and Managing Director, FCIL in respect of part of revival package of FCIL as under:-

"i) Closure of FCIL and hiving off the Jodhpur Mining Organization (JMO) into a separate entity;

ii) Disposal of the assets of the company (excluding JMO) in accordance with the procedure prescribed under SICA and other applicable laws;

iii) Extension of VSS benefits to all the employees of the company.

iv) Permission to extend VSS benefits to employees of all the units and offices of FCI approved for closure pending final permission for closure by the competent authority; and grant of retrenchment compensation under ID Act to employees not availing of this offer within three months, after obtaining the required permission from the competent authority."

13. The package was in respect of closure of FCIL but hive off Jodhpur Mining Organization into a separate entity. Delhi High Court, therefore, found that question relating to hiving off Jodhpur Mining Organization into a separate entity has to be considered by BIFR at the first instance and for this purpose, it remitted the matter to BIFR. It also observed the stand taken by parties that they were not asking for revival of company and clarified as under :-

"At this stage, learned counsel for parties in order to clarify the stand of the parties state that their clients are not asking for the revival of the company. They, however, submit that it should be open to the BIFR to consider the proposals for hiving off other units of the FCIL as separate entities. We do not see any harm in leaving the door open for the BIFR to consider the question of hiving off other units of the FCI in case proposals in this regard are received by it within a reasonable period of time.

The writ petitions are accordingly disposed of. The order of the BIFR is modified to the extent indicated above."

14. In this backdrop, FCIL came up with Circular dated 16.09.2002 conveying decision of Government of India to close FCIL in respect of all units except Jodhpur Mining Organization which was proposed to be separated as a separate entity, and to extend VSS benefit to all the employees of FCIL (except Jodhpur Mining Organization) who would opt for the same. Aforesaid scheme was in operation for a period of three months with effect from 21.09.2002 to 20.12.2002. Employees of FCIL were required to submit their options for claiming benefit under VSS. Circular dated 16.09.2002 further said that those employees who would not opt for VSS

during the period scheme remain in operation, their matter shall be dealt by the provisions relating to "retrenchment" under Industrial Disputes Act, 1947 *(hereinafter reffered to as "Act, 1947").*

15. Petitioners did not opt for VSS but made representation (Annexure-5 to the writ petition) that they should be accommodated in some other unit/department. It is also pointed out that instead of retrenchment or termination, some persons were absorbed/accommodated at other places and one such memorandum dated 26.03.2003 has been placed on record showing that one Sri S.K. Jain, Assistant Plant Manager was transferred to BVFCI, Namrup (District Dibrugarh, State of Assam) and absorbed permanently therein.

16. FCIL officials did not consider request of petitioners for their absorption in some other undertaking. Instead FCIL proceeded to retrench petitioners and sent letter dated 28.04.2003 to Government of India, Ministry of Labour, seeking approval for retrenchment of petitioners in purported compliance of Section 25-N(3) of Act, 1947. Notices proposing retrenchment were also served upon petitioners.

17. At this stage, present writ petition was filed by petitioners challenging Circular dated 16.09.2002 (Annexure-4 to the writ petition) and letter dated 28.04.2003 sent by FCIL to Government of India seeking approval in compliance of Section 25-N(3) of Act, 1947.

18. During pendency of this petition, some further developments took place which have been brought on record by way of amendment.

19. Government of India granted approval for retrenchment of petitioners vide letter dated 09.07.2003. Consequently, respondent-3 sent notices dated 11.07.2003 to petitioners giving fresh opportunity to apply for VSS by 31.07.2003 failing which they shall be retrenched. Since petitioners did not submit any option, retrenchment orders were passed on 01.08.2003.

20. It is said that several employees were absorbed/adjusted in Jodhpur Mining Organization, Bramhaputra Valley Fertilizer Limited but petitioners have been discriminated. Retrenchments have been challenged on the ground of non-compliance of Section-25-N and that retrenchment compensation as contemplated under Statute was not paid, therefore, it is bad in law..

21. Petitioners were also occupying official occupations in the premises of FCIL, therefore, initially, they prayed for protection against eviction from official accommodations.

22. On 23.04.2003, this Court by way of interim order directed that respondents shall not insist upon petitioners to vacate quarters allotted to them. This protection was given upto 31.12.2003. Subsequently, interim order was extended from time to time. Respondents came up with a complaint that petitioners were not paying rent, therefore, on 20.05.2004, interim order was modified and this Court said:

"Meanwhile, it is provided that till 15.07.2004 the petitioners shall be permitted to continue to stay in the quarters allotted to them by the respondent-Corporation provided that

petitioners pay the entire dues of the monthly rent and the current rent at the rate at which they were paying earlier."

23. On 24.02.2006, when matter came up before this Court, Respondents complained that petitioners were not paying rent for several years and illegally occupying official accommodations. This Court, therefore, passed order directing petitioners to deposit entire arrears of rent before the next date and also file receipt on that date. Subject to this condition, their eviction was stayed and the case was directed to be listed on 21.03.2006.

24. On 21.03.2006, this Court passed following order:-

"The following order was passed on 24.02.2006.

"Learned counsel for the petitions states that he is being evicted from the service quarter, which he has occupying. Sri R.S. Mishra, learned counsel for the respondents states that the ***petitioners are not paying the rent for the last several years and are illegally occupying the quarter.***

The petitioners shall deposit the entire arrears of rent before the next date fixed and shall file its receipt on that date. *Subject to this condition they will not be evicted till that date. Subject to this condition they will not be evicted till that date.*

Learned counsel for the Union of India prays for and is granted ten days time to file a reply to the supplementary affidavit.

List on 21.03.2006."

However, no compliance affidavit has been filed but it is stated that the rent has been paid together with its arrear upto February, 2006. *The counsel for the respondents states that the* ***electricity dues and water tax have yet not been paid. The same should be paid before the next date and on the next date compliance affidavit should be filed*** *on behalf of the petitioners.*

List on 29.03.2006. The interim order shall continue till then."

(Emphasis added)

25. The complaint of non-compliance with regard to payment of rent was again made by respondents on 10.09.2008 whereafter this Court passed following order:-

"List is being revised.

No one is present on behalf of the petitioners.

The government accommodations were allotted to the petitioners, while they were in service, but after their retrenchment, they did not vacate the official accommodation and as such a notice was issued to the petitioners requiring them to vacate the official accommodation. Against the retrenchment of the petitioners, the instant writ petition has been filed and this Hon'ble Court by means of the order dated 24.02.2006 has directed that in case the petitioners deposit the rent as well as other dues such as electricity dues and water tax etc. which are payable by the occupants of the government accommodations, the petitioners may not be ordered for ejectment.

Counsel for the respondents submits that the petitioners, after passing of the aforesaid interim order, ***are neither paying any rent for the government accommodation which they are occupying, though not entitled for after retrenchment, nor any other dues such as electricity charges and water tax etc.***

In view of the above, it is provided that ***in case the petitioners did***

not pay the arrears of rent including taxes such as electricity charges and water charges etc. within three months from today, the benefit of the interim order with regard to their retention of the official accommodation shall stand vacated *and if they continue to pay the monthly rent as and when demanded by the respondents and the electricity and water charges etc., they shall be permitted to retain the official accommodation.*

The interim order dated 24.02.2006 stands modified accordingly."

(Emphasis added)

26. In regard to compliance of this order, I find nothing on record. Learned counsel for parties also could not inform as to whether aforesaid order was complied with and petitioners are still occupying official accommodations or have been ejected or voluntary vacated.

27. On the contrary, this Court has been addressed on merits of the matter, therefore, I proceed to hear the matter on merits and decide accordingly.

28. Sri W.H. Khan, learned Senior Counsel appearing for petitioners has contended that retrenchment of petitioners is illegal and void. He urged:

(i) Government of India decided to absorb employees of FCIL in various other Central Public Sector Companies and a number of employees were so absorbed but petitioners have been discriminated by not extending said benefit.

(ii) Three months' notice as contemplated under Section 25-N(1)(a) of Act, 1947 was not served upon petitioners. Thus, there is non compliance of Section 25-N of Act, 1947.

(iii) Section 25-N of Act, 1947 read with Rule 76-A of Industrial Disputes Rules, 1957 *(hereinafter referred to as Rules, 1957")* contemplates that application submitted by Employer to Government of India shall be in-triplicate and copy thereof shall also be supplied to workmen concerned but no such copy was supplied to workmen concerned and, therefore, there is non-compliance of Rule 76-A and retrenchment is illegal in view of law laid down in **Shiv Kumar and Others vs. State of Haryana and others 1994 (4) SCC 445.**

(iv) On the question of approval, Sri J.P. Pati, Joint Secretary, Government of India heard the matter on 24.06.2003 but order conveying approval has been issued by Smt. Chandani Raina, Deputy Director on 09.07.2013, meaning thereby hearing has been conducted by one officer while order has been passed by another officer and it is in violation of principles of natural justice as held in **Om Prakash and Another vs. Union of India and Another JT (2010) 2 (SC) 91 (paras 100 and 101).**

(v) Order passed by Smt. Chandani Raina, Deputy Director is without jurisdiction as she was not competent either to hear the matter or pass order as no such authority was conferred upon her by Government of India and despite direction of this Court, no such order of authority given to Smt. Chandani Raina, has been placed on record.

(vi) The defence of Government that under the Rules of business, decision was taken by Government and Smt. Chandani Raina has only communicated is not correct, inasmuch as, order under Section 25-N(3) is a *quasi judicial* order and has to be passed after making enquiry

considering various relevant factors and by giving reasons. Moreover, Smt. Chandani Raina was not authorized to communicate decision of Government of India even under the Rules of business. There is a total non-compliance of Article 77 of Constitution of India. In this regard, Sri Khan placed reliance on Supreme Court's decision in **Workmen of Meenakshi Mills Ltd. etc. Vs. Meenakshi Mills Ltd. and Another AIR (1994) SC 2697** and **Jaipur Development Authority and Others Vs. Vijay Kumar Data and Others 2011 (12) SCC 94.**

(vii) No enquiry was conducted before granting approval by Government of India though it was mandatory and, therefore, there is non-compliance of Section 25-N of Act, 1947.

(viii) Retrenchment compensation has not been paid along with order of retrenchment though it has to be simultaneous and this is again another non-compliance of Section 25-N in particular sub-section (9), hence, retrenchment is illegal. Reliance is placed on Supreme Court's decision in **Anoop Sharma Vs. Executive Engineer, Public Health Division No. 1 Panipat (Haryana) JT 2010 (4) SC 229.**

29. Contesting petitioners' claim, on behalf of respondents- 2, 3 and 4, Sri Arun Kumar, learned counsel stated, that FCIL is admittedly a Central Government Company within the meaning of Section 619 of Act, 1956. it had set up four fertilizer units at Gorakhpur, Talcher, Ramagundam and Sindri and a small Gypsum mining set up i.e. Jodhpur Mining Organization. Starting from 1979, FCIL suffered colossal losses which increased every year, compelling Management to close unit at Gorakhpur on 10.06.1990; Talchar and Ramagundam on 31.03.1999 and Sindri on 16.03.2002. By amendment made in 1991, Government Companies were also brought within the purview of Act, 1985. Since FCIL had eroded its entire net worth and became chronically sick, it was referred to BIFR on 20.04.1992. After initial scrutiny BIFR declared FCIL sick vide order dated 06.11.1992 in terms of Section 3(1)(o) of Act, 1985. After finding revival improbable, BIFR took a decision for winding up of FCIL and passed order on 02.11.2001 referring the matter to Delhi High Court for winding up. AAIFR confirmed the order of BFIR by dismissing appeal. The orders of BIFR and AAIFR were challenged by various units in Delhi High Court in Writ Petitions No. 3298 of 2002, 4310 of 2002, 4060 of 2002 and 4061 of 2002. When the matter was pending in Delhi High Court, Government of India, Ministry of Chemical and Fertilizer, Department of Fertilizers vide letter dated 30.07.2002 and 10.09.2002 conveyed approval of revival package of FCIL by providing as under:-

"i) ***Closure of FCIL and hiving off the Jodhpur Mining Organization (JMO) into a separate entity;***

ii) Disposal of the assets of the company (excluding JMO) in accordance with the procedure prescribed under SICA and other applicable laws;

iii) Extension of VSS benefits to all the employees of the company.

iv) Permission to extend VSS benefits to employees of all the units and offices of FCI approved for closure pending final permission for closure by the competent authority; and grant of retrenchment compensation under ID Act to employees not availing of this offer within three months, after obtaining the required permission from the competent

authority."

(Emphasis added)

30. Further vide Government Order dated 15.11.2002, Government of India stopped all financial support to FCIL.

31. When revival package of FCIL was submitted to Delhi High Court, it referred the matter to BIFR to re-consider the matter in the light of revival package. Matter was again considered by BIFR and vide order dated 02.04.2004/ 17.05.2004 it again recommended winding up of FCIL and approved hiving off of Jodhpur Mining Organization, a small unit of Gypsum in the State of Rajasthan in Fertilizer Unit of FCIL.

32. In the meantime, since VSS was also offered to employees of FCIL, vide Government of India's circular dated 16.09.2002, almost all the employees i.e. 5701 out of the total 5712 as on 20.09.2002 (i.e. except petitioners) opted for VSS. Two employees who did not avail VSS, were terminated in terms of Circular dated 16.09.2002.

33. With respect to petitioners, FCIL sought approval for retrenchment from Ministry of Labour which was granted. Claim of petitioners for seeking absorption in other companies of Government of India is impermissible, inasmuch as, all the Companies are independent units and FCIL has no control over them. Petitioners were given another opportunity of option for VSS as per the terms of approval granted by Ministry of Labour but they failed to avail the same, hence retrenched after following the procedure under Section 25 of Act, 1947. Government of India also requested other Fertilizer Companies to absorb employees of FCIL having more than 10 years of service, but all the companies have refused on the ground that they are already over staffed and have no vacancy for further employment. Not a single person of FCIL has been re-employed in other Companies.

34. It is also said that so far as VSS contained in Circular dated 16.09.2002 is concerned, its validity was challenged and upheld in **A.K. Bindal and Another Vs. Union of India and Others JT 2003 (4) SC 328;** Employees of a Government Company are not Government employees; they cannot claim absorption in other departments of Government or independent Government Companies since each and every company is a separate and individual entity. Therefore, claim of petitioners for absorption in other Public Sector Enterprises is misconceived. He placed reliance on Supreme Court's judgement in **A.K. Bindal (supra) and Officers and Supervisors of IDPL Vs. Chairman and M.D. IDPL and Others JT 2003 (6) SC 68.** Copy of application sent to Ministry of Labour dated 28.04.2003 was also sent to petitioners through speed post on 29.04.2003. Letters sent subsequently in reply to queries made by Ministry of Labour are not required to be served upon petitioners and non serving of such letters, cannot be said to be violation of procedure of retrenchment. Cheques of retrenchment compensation were sent to petitioners through registered post but they refused to receive the same, therefore, it cannot be said that there is non-compliance of Section 25-N with regard to payment of retrenchment compensation.

35. With regard to alleged enquiry which may be conducted by Central Government before granting permission

under Section 25-N, it is urged that neither Employer nor Employee are required to be heard and such enquiry is at the discretion of Government as held in **M/s Orissa Textiles and Steel Limited Vs. State of Orissa and Others AIR 2002 SC 708.** Merely for the reason that an order is not referred to, being in the name of President, it will not be bad, since provisions of Article 77 are directory and in this regard, reliance is placed on Constitution Bench Judgement in **State of Rajasthan and Another Vs. Sripal Jain AIR 1963 SC 1323** and an earlier judgement in **Major E.G. Barsay Vs. State of Bombay AIR 1961 SC 1762.**

36. It is further said that on the one hand, petitioners claim that order of approval is quasi judicial order but on the contrary they are challenging the same as an executive order not in compliance of Article 77 and both the contentions are mutually destructive. Once an order is quasi judicial, the manner in which executive order is to be authenticated and issued as provided under Articles 77 and 166 is not applicable. It is said that statutory order need not be issued in the name of President or Governor, as the case may be. Here reliance is placed on Supreme Court's Judgement in **State of Maharashtra and Others Vs. Basanti Lal and Another AIR 2003 SC 4688; Air India Cabin Crew Association Vs. Yeshawinee Merchant and Others AIR 2004 SC 187.**

37. Sri A.N. Roy, Advocate who has put in appearance on behalf of Government of India has also advanced his submissions which are similar to that advanced on behalf of respondents- 2, 3 and 4, therefore, I am not repeating the same.

38. In addition to the oral submissions, petitioners as well as respondents- 1 to 4 have also submitted their written arguments which are broadly the same as the oral arguments which I have already noticed above.

39. The rival submissions noticed above would require this Court to answer the following issues:-

(i) Whether Circular dated 16.09.2002 (Annexure-4 to the writ petition) circulating VSS is arbitrary and illegal.

(ii) Whether termination of petitioners amounts to retrenchment and has been made in compliance of Section 25-N of Act, 1947.

(iii) Whether petitioners are entitled to be considered for absorption in other Public Sector Enterprises, Central Government Companies or Departments of Central Government.

40. Coming to first question as to whether Circular dated 16.09.2002 circulating VSS is per se illegal and arbitrary and this facts in the backdrop of said Circular, has to be examined.

41. The history of coming up of FCIL in existence, and, its development, has been stated in detail in **A.K. Bindal (supra)** and therefrom, I find that in 1961, there were two Fertilizer companies namely, Sindri Fertilizers and Chemicals Limited *(hereinafter referred to as "Sindri FCL")* and Hindustan Fertilizers and Chemicals Limited *(hereinafter referred to as "Hindustan FCL").* Both these Companies were Central Government Companies. In January, 1961, Sindri FCL and Hindustan FCL were merged together giving rise to a new company, namely,

FCIL. Between 1961 and 1977, FCIL sought to set up 17 fertilizer units, 7 whereof came in operation while remaining 10 were at various stages of implementation. In 1978, Government of India set up a Committee to work out modalities for reorganization of Fertilizer Industry. A recommendation was made by Committee which was approved by Government of India bifurcating or reorganizing FCIL and to constitute another unit, namely, National Fertilizer Limited *(hereinafter referred to as "NFL").* NFL became an independent and separate undertaking and allocated various units to the newly created undertakings which were five in number. A new company, namely, Hindustan Fertilizer Corporation Limited *(hereinafter referred to as "HFCL")* was also incorporation and thereunder units set up at Namrup, Haldia, Barauni and Durgapur were allocated. Fertilizer Units set up at Sindri, Gorakhpur, Ramagundam, Talchar and Korba along with Jodhpur Mining Organization were retained with FCIL. Remaining units were allocated to another newly created entity i.e. Rashtriya Chemicals and Fertilizers Limited *(hereinafter referred to as "RCFL")* and NFL. There was a fifth company known as Project and Development (India) Limited which was left with the work of planning and development.

42. FCIL under the reorganized system with its allocated units, however, could not function well and started sustaining losses since 1979 and onwards. The year-wise losses sustained by FCIL from 1979 to 1990 have been given in the supplementary counter affidavit dated 09.10.2006 filed on behalf of respondents-2, 3 and 4 and reads as under:-

Year	Loss (in crores)	Year	Loss (in crores)
1979	21.83	1985	45.15
1980	48.63	1986	127.21
1981	100.80	1987	105.91
1982	126.78	1988	115.42
1983	80.68	1989	160.89
1984	80.59	1990	163.90

43. In the light of continuous and sustained heavy losses, production of fertilizer in Gorakhpur Unit of FCIL was suspended on 01.06.1990. It is not the case that in respect of other units, position became any better. Instead heavy losses continued resulting in suspension of production in Talchar and Ramagundam Unit with effect from 01.04.1999 while Sindri unit also stopped production with effect from 16.03.2002.

44. In the supplementary counter affidavit dated 09.10.2006, losses sustained by FCIL from 1991 to 2002 have also been given and as under:-

Year	Loss (in crores)	Year	Loss (in crores)
1991	167.88	1997	538.00
1992	226.52	1998	735.69
1993	245.48	1999	838.29
1994	272.60	2000	865.29
1995	336.13	2001	856.68
1996	449.71	2002	951.36

45. It is also on record that BIFR examined the matter and found FCIL incapable of survival and, therefore, passed order on 02.11.2001 for its winding up which was confirmed initially in appeal by AAIFR while dismissing the same on 09.04.2002.

46. Thereafter, when matter was taken in Delhi High Court, it appears that Government of India made an attempt by giving a revival package and in the light of revival package offered by Government of India, Delhi High Court set aside orders of BIFR and AAIFR and remanded the matter to BIFR to re-examine whether FCIL could have been rehabilitated or not. That was also not found sustainable and BIFR passed another order for winding up on 02.04.2004/ 17.05.2004.

47. These facts at least demonstrate the genuineness of claim of respondent-Employer that it had sustained losses, eroded its entire net worth and became sick to the extent of incapable of revival/ rehabilitation, hence, its closure was found appropriate.

48. VSS was brought by respondents in this backdrop. Circular dated 16.09.2002 was issued when on the first occasion BIFR had passed order recommending winding up on 02.11.2001 which was confirmed by AAIFR dismissing appeal on 09.04.2002. The bonafide on the part of Government of India as also that of Employer (FCIL) of petitioners cannot be doubted for the reason that when matter was taken in Delhi High Court, a revival package was offered by Government of India whereupon Delhi High Court sent the matter to BIFR for re-examination but ultimately BIFR could not found any scope of rehabilitation/ revival.

49. Copy of judgement of Delhi High Court has been filed along with supplementary counter affidavit dated 29.02.2012 which shows that it upheld the decision of BIFR and AAIFR holding that it is not possible to revive Company but thereafter it found decision of Government of India communicated vide letter dated 10.09.2001 about closure of FCIL and hiving off Jodhpur Mining Organization into a separate entity and offered VSS to all employees. For the purpose of this "hiving off Jodhpur Mining Organization", Delhi High Court observed that this aspect ought to have been considered at the first instance, hence, it remanded the matter to BIFR for considering proposal of hiving off of Jodhpur Mining Organization into a separate entity. In that context, Delhi High Court also left open to BIFR to consider the question of hiving off other units of FCIL in case proposal in this regard are received. The relevant observations of Delhi High Court's judgement read as under:-

"We have heard learned counsel for the parties. In the circumstances ***we are of the opinion that since the Government of India was not ready to infuse funds for the revival of the company and no viable proposal was submitted by the Government of India, FCIL and the operating agency for revival of the company, for more than a decade, the BIFR and the AAIFR were right in holding that it was not possible to revive the company.***

Inspite of this view the matter cannot be closed as a new development has taken place. The Government of India, Ministry of Chemicals and Fertilizers vide its letter dated 10th September 2001 to the Chairman and Managing Director, FCIL has conveyed the following approvals in respect of the so-called revival package of FCIL:-

(i) Closure of FCI and hiving off the Jodhpur Mining Organization (JMO) into a separate entity;

(ii) Disposal of the assets of the company (excluding JMO) in accordance with the procedure prescribed under SICA and other applicable laws;

(iii) Extension of VSS benefits to all the employees of the company;

(iv) Permission to extend VSS benefits to employees of all the units and offices of FCI approved for closure pending final permission for closure by the competent authority; and grant of retrenchment compensation under ID Act to employees not availing of this offer within three months, after obtaining the required permission from the competent authority.

It is apparent from the aforesaid revival package that the Government of India would like the closure of FCIL and to hive off Jodhpur Mining Organization into a separate entity. The question relating to hiving off Jodhpur Mining Organization into a separate entity will have to be considered by the BIFR in the first instance. Therefore, the matter needs to be remitted back to the BIFR. Accordingly we remit the matter to the BIFR for consideration of the proposal for hiving off the Jodhpur Mining Organization into a separate entity. We order accordingly. Let the parties appear before the BIFR on 18th December, 2002.

At this stage, ***learned counsel for parties in order to clarify the stand of the parties state that their clients are not asking for the revival of the company. They, however, submit that it should be open to the BIFR to consider the proposals for hiving off other units of the FCIL as separate entities.*** *We do not see any harm in leaving the door open for the BIFR to consider the question of hiving off other units of the FCI in case proposals in this regard are received by it within a reasonable period of time.*

The writ petitions are accordingly disposed of. The order of the BIFR is modified to the extent indicated above." (Emphasis added)

50. It is also stated in para-5 of supplementary counter affidavit dated 29.02.2012 that after receiving approval from Government of India, retrenchment orders along with retrenchment compensation were sent to petitioners by registered post but they refused to receive the same.

51. So far as terms and conditions offered in VSS are concerned, Sri W.H. Khan, learned Senior Counsel for petitioners could not address or demonstrate any of such terms and conditions which can be said to be unreasonable or per se illegal or arbitrary or against public policy so as to justify interference by this Court.

52. Further fact that all employees i.e. 5712 (except-11) as on 20.09.2002, had opted VSS except petitioners also supports the fact that terms and conditions of VSS are reasonable and almost entire set of employees were satisfied therewith. More than 5700 employees had opted for VSS leaving only petitioners who have challenged the same and two officers who did not opt VSS, hence, they were terminated in terms of their conditions of service. There is a relevant consideration to hold terms and conditions of VSS reasonable and for the benefit of employees.

53. Moreover, FCIL policy in terms of Government announcement/scheme on 06.11.2001 whereunder VSS was issued by FCIL has been examined by Supreme Court in **A.K. Bindal (supra)** and

considering the terms of scheme, it has found that such VSS is a well recognized mode of "Golden Handshake" principle known in the business world. Court has also observed that:-

"a considerable amount is to be paid to an employee ex-gratia besides the terminal benefits in case he opts for voluntary retirement under the Scheme and his option is accepted. The amount is paid not for doing any work or rendering any service. It is paid in lieu of the employee himself leaving the services of the company or the industrial establishment and forgoing all his claims or rights in the same. ***It is a package deal of give and take. That is why in business world it is known as "Golden Handshake".*** *The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights, with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period."* (Emphasis added)

54. In the light of above discussions and after considering the entire VSS and its terms and conditions, I do not find anything therein to hold it illegal, arbitrary or in any manner bad in law. **Question-(i)** is, therefore, answered in negative and against petitioners.

55. Now, I move on to consider question-(iii) first. Petitioners claim is that they should be employed/absorbed in any other company owned by Government of India or department of Government of India. This submission, in my view, is absolutely misconceived and ignores not only status of petitioners vis-a-vis its employer but also the factum that there is no common employer and the identity and individualness of different companies cannot be ignored. Petitioners are employees of FCIL which is admittedly a Company registered under Act, 1956. It is true that 100 per cent shares of FCIL are held by Government of India, therefore, Promoter of FCIL is Government of India still it is an independent and separate legal entity. When a company is incorporated and registered under Act, 1956, a new juristic personality comes into existence having its identity, different from its Promoters. Such a company is not a department of Government merely for the reason that promoters of such Company are officials of Government and share holding also that of such officers. Employees of such company cannot be said to be employees of Central Government or Promoters of Company. Moreover, in the present case, petitioners also cannot claim to be holders of civil posts under the Government of India, therefore, they also cannot claim absorption on a civil post under Government of India.

56. Every individual company incorporated and registered is a separate and independent entity and employees of such company, as a matter of right, cannot claim employment in another company since every company has its own right in its individual employer and has its own authority and power to make appointment of its employees.

57. In a little bit different circumstances but almost raising a similar

contention, employees of Central Government Company namely, Indian Drugs and Pharmaceuticals Limited claimed that if a public sector company i.e. Government Company is incurring losses then for the welfare of employees, Government should provide financial support to cover up such expenses of Government Company. Rejecting this contention in **Officers and Supervisors of I.D.P.L. Vs. Chairman and Managing Director I.D.P.L. and others (supra),** Court held that employees of government companies are not government servants, they have absolutely no legal right to claim that Government should pay their salary or that additional expenditure incurred on account of revision of their pay-scales should be met by Government. Being employees of a company, it is the responsibility of such Employer-Company to pay salary to its employees. Employees of such government company cannot claim any legal right to ask for a direction to the Central Government to meet expenses of company for the purpose of payment to their employees.

58. Question about independent status of a company registered under Act, 1956, irrespective of factum as to who is or are its shareholder, has been considered in **A.K. Bindal (supra)** wherein Company was wholly owned by Government of India. Court said that identity of Government Company remains distinct from Government. Government Company is not identified with Union but has been placed under a special system of control and conferred certain privileges by virtue of provisions contained in Section 619 and 620 of Act, 1956. Merely because the entire shareholding is owned by Central Government, will not make incorporated company as Central Government. Court also held that employees of Government Company are not civil servants and so are not entitled to protection afforded by Article 311 of Constitution of India. Since employees of Government Companies are not Government servants, they have absolutely no legal right to claim that Government should pay their salary or that additional expenditure incurred on account of revision of their pay-scale should be met by Government. Being employees of a Company, it is responsibility of Company to pay them salary and if Company is sustaining losses continuously over a period and does not have financial capacity to revise or enhance pay-scale, employees cannot claim any legal right to ask for a direction to Central Government to meet additional expenditure which may be incurred on account of revision of their pay-scale.

59. Similarly, in **Officers and Supervisors of I.D.P.L. Vs. Chairman and Managing Director I.D.P.L. and others (supra),** Court considered question "whether employees of public sector enterprises have any legal right to claim revision of wages irrespective of financial condition of Company in which they are working on the ground that Government should provide financial support since Company is public sector enterprises and a Government Company". Answering aforesaid question, Court said that no legal right can be claimed by such employees against Government obliging it to pay their salary or any additional expenditure. Court followed and relied on its earlier decision in **A.K. Bindal (supra).**

60. In the context of M/s UPTRON itself, issue has been considered by Apex Court in **State of U.P. and another Vs. UPTRON Employees Union, CMD and**

others AIR 2006 SC 2081. Court held, even if M/s UPTRON is a subsidiary of Government Company, there is no legal obligation cast upon State Government to pay wages due to workmen. Rights of workmen are governed by relevant provisions of Act, 1956 where their claim have been accorded priority.

61. Similar issues have been considered time and again and we reproduced some more authorities on the subject in **Heavy Engineering Mazdoor Union Vs. State of Bihar and Others 1969 (1) SCC 765,** it was argued that the entire shares were held by Central Government; Board of Directors as well as Chairman and Managing Director were appointed by Central Government and in all matters of importance,. power to take decision was reserved to the President of India, therefore company should be treated to be an 'industry' carried on under the authority of Central Government. A three Judges Bench considered the matter and observed " A commercial corporation acting on its own behalf, even though it is controlled wholly or partly by Government department, will be ordinarily presume not to be a servant or agent of State.

62. Matter again came up for consideration before a Constitution Bench in **Steel Authority of India and others Vs. National Union Water Front Workers and Others 2001 (7) SCC 1**, Court said:

"There can not be any dispute that all the Central Government companies with which we are dealing here or not and can not be equated to the Central Government though they may be "State" within the meaning Article 12 of the Constitution".

63. An Argument was advanced that Kanpur Jal Sansthan is a Government department in Kanpur Jal Sansthan and another Vs. Bapu Construction 2015 5SCC 267 but it was negatived by observing "The submission of learned counsel for appellant that the appellant being a Jal Sansthan it would come within the extended wing of the Government does not commend acceptance".

64. In **State of Punjab and others Vs. Raja Ram and others 1981 (2) SCC 66**, Court followed and referred, with approval, following passage from **Ramana Dayaram Shetty Vs. International Airport Authority of India and others 1979 (3) SCC 489**

"Even the conclusion, however that the corporation is an agency or instrumentality of Central Government does not lead to the further inference that the corporation is a Government Department".

65. In **Food Corporation of India Vs. Municipal Committee, Jalalabad AIR 1999 SC 2573**, in the context of imposition of House Tax under Punjab Municipality Act, 1911, Court held that Food Corporation of India was a Government company but not a 'Government department' and, therefore, a distinct entity from Central Government. Similar view was taken in the context of M/s Electronics Corporation of India Ltd which is also a Government company in **M/s Electronics Corporation of India Ltd etc Vs. Secretary Revenue Department, Government of Andhra Pradesh AIR 1999 SC 1734.**

66. In **Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology**

and others 2002 (5) SCC 111, Court said that a company may be an agency or instrumentality of Government for limited purpose may be "State" within the ambit of Article 12 of the Constitution but it can not be said to be a Government or department of Government.

67. In the context of "National Textile Corporation Ltd", Court in its judgment in **National Textile Corporation Ltd Vs Naresh kumar Badri Kumar Jagad and others AIR 2012 SC 264** said that it is neither Government nor department of Government but a 'Government company'. It cannot identify itself within Central Government.

68. Applicability of Article 311(1) in respect of employees of State Bank of Patiala came to be considered in **Satinder Singh Arora Vs. State Bank of Patiala and others 1992 Supp (2) SCC 224.** Court held that employees of Bank do not belong to such category to which Article 311(1) applies. Relevant observations made in para 8 of judgment read as under:-

"8. Mr. Garg then submitted that the Regulation 67(g) read with Regulation 68(1)(ii) permits hostile discrimination, in that, while in the case of employees governed by Article 311(1) only the authority which had actually appointed the officer can terminate his service whereas under the Regulation any officer even lower than the one who initially appointed him could be designated as the appointing authority and once so designated he can visit the employee with an order of major punishment. We do not think that the submission is well founded. ***Article 311(1) governs those belonging to certain stated services to which employees - the petitioner does not belong. The petitioner clearly belongs to a different class whose terms and conditions of employment are governed by a different set of regulations.*** *The petitioner is, therefore, governed by the Regulations and as the Regulations stood at the date of the passing of the impugned order the Managing Director was clearly competent to pass the impugned order of removal."*

(emphasis added)

69. Similar issue in the context of employees of State Bank of India came up for consideration in **State Bank of India Vs. S. Vijaya Kumar (1990) 4 SCC 481** where Court held:-

"The ***right that an officer or employee of the State Bank of India cannot be dismissed from service by an authority lower than the appointing authority is a creation of statutory rules and regulations. So far as the right or protection guaranteed under Article 311*** *of the Constitution is concerned,* ***it applies to members of the Civil Service of the Union or an All India service or a Civil Service of a State or who holds a Civil Post under the Union or a State. Admittedly the employees of the State Bank do not fall under any one of these categories*** *and they cannot seek any protection under Article 311(1) of the Constitution."*

(emphasis added)

70. In **Rajasthan State Road Transport Corporation Ltd. and others Vs. Gurudas Singh (2004) 13 SCC 418**, an argument was advanced that Rajasthan State Road Transport Corporation being an authority under Article 12, employees would be entitled for protection under

Article 311 of Constitution of India. Repelling it, Court in paras 7-10, said:-

"7. A bare reading of the aforesaid provision in the Constitution shows that ***it is applicable only to a member of civil service or the Union or all-India service or civil service of a State or a person holding civil post under the Union or a State.***

8. For the purpose of Article 12 the Corporation may be treated as an "authority" for the purpose of being subject to Part III of the Constitution.

9. In ***Som Prakash Rekhi Vs. Union of India*** *this Court categorically observed that Bharat Petroleum Corporation Ltd. was a limb of Government, an agency of the State, a vicarious creature of the statute working on the wheels of the Acquisition Act. It was however held that the* ***conclusion does not mean that for the purpose of Article 309 or otherwise, the aforesaid government company is a State*** *and it was limited to Article 12 and Part III of the Constitution.*

10. Judged in the light of the decisions of the two Constitution Bench decisions referred to above, ***the inevitable conclusion is that the respondent was not entitled to protection under Article 311 of the Constitution.*** *Article 311 occurs in Part XIV of the Constitution which deals with "Services under the Union and the States" and more specifically in Chapter I of that part which deals with "Services". The head of the article reads "Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or State". The text of the article refers to members of civil services of the Union or State". The text of the article refers to members of civil services of the* ***Union or an all-India service or a civil service or a civil post under the Union or a State.*** *A Constitution Bench of this Court in S.L. Agarwal (Dr.) Vs. G.M. Hindustan Steel Ltd. considered as to who are the persons entitled to the protection of Article 311. In State of Assam Vs. Kanak Chandra Dutta also applicable tests were indicated by a Constitution Bench."*

(emphasis added)

71. In **Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd. Haldia and others (2005) 7 SCC 764** relying on Constitution Bench judgment in **S.L. Agarwal (Dr.) Vs. G.M. Hindustan Steel Ltd. (1970) 1 SCC 177**, Court held that "an employee of a Corporation cannot be said to have held a "civil post" and, therefore, not entitled to protection of Article 311. According to Court, Corporation could not be said to be a "Department of Government" and employees of such Corporation were not "employees under Union". Corporation has an independent existence and appellant was not entitled to invoke Article 311.

72. A Division Bench of this Court also followed the above authorities and reiterated above exposition of law in **State of Uttar Pradesh Through the Principal Secretary and Others Vs. Kalpana Verma and another (2019) 1 UPLBEC 659.**

73. Despite repeated query, learned Senior Counsel for petitioners could not show any legal or otherwise right to sustain their claim that FCIL is obliged to ensure absorption/rehabilitation or re-employment or continued employment by getting petitioners' employed in any other company of Central Government or in the department of Central Government.

74. Further, with regard to department of Central Government, I may

also add that recruitment on civil posts, in the department of Government, is governed by statutory rules framed under Proviso to Article 309 of Constitution of India. No appointment can be directed to be made in a manner which is not permitted or prescribed in the said Rules. In other words, no appointment in any manner whether absorption or otherwise can be directed to be made on any post in the department of Government contrary to statutory provisions made for such recruitments and appointments. Thus, I answer **question-(iii)** also against petitioners.

75. Now there remains only the last submission i.e. question-(ii) whether retrenchment/termination of petitioners is illegal and has not been made following the procedure prescribed in Section 25-N of Act, 1947.

76. Section 25N of Act, 1947 reads as under:-

"25N. Conditions precedent to retrenchment of workmen.-

(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,--

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

(2) An ***application for permission under sub- section (1) shall be made by the employer in the prescribed manner*** *stating clearly the* ***reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.***

(3) Where an application for permission under sub- section (1) has been made, the appropriate Government or the specified authority, ***after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the persons interested in such retrenchment,*** *may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing,* ***grant or refuse to grant such permission*** *and a copy of such order shall be communicated to the employer and the workmen.*

(4) Where an application for permission has been made under sub-section (1) and the appropriate Government or the specified authority ***does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.***

(5) An order of the appropriate Government or the specified authority granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all the parties concerned and shall remain in

force for one year from the date of such order.

(6) The appropriate Government or the specified authority may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub- section (3) or refer the matter or, as the case may be, cause it to be referred, to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub- section, it shall pass an award within a period of thirty days from the date of such reference.

(7) ***Where no application for permission under sub- section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the*** *workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.*

(8) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such establishment for such period as may be specified in the order.

(9) Where ***permission for retrenchment has been granted under sub- section (3)*** *or where permission for retrenchment is deemed to be granted under sub- section (4), every* ***workman*** *who is employed in that establishment immediately before the date of application for permission under this section* ***shall be entitled to receive, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.****"*

(Emphasis added)

77. A perusal of Section 25N of Act, 1947 shows that a workman who is covered by Chapter V-B and has been in continuous service for at least one year, shall not be retrenched unless:

(i) Three months' written notice with reasons for retrenchment has been given and the period of notice has expired or wages in lieu of notice has been paid to him.

(ii) Prior permission of appropriate Government or specified authority has been obtained by making an application in the prescribed manner with copy to concerned workman.

78. Chapter V-B contains Sections 25-K to 25-S i.e. Special Provisions Relating to Lay-off Retrenchment and Closure in Certain Establishments.

79. Section 25-K of Act, 1947 provides "Establishment" whereupon Chapter V-B will apply and says that such industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.

80. It is not disputed by learned counsel for respondents that FCIL satisfies the requirement of industrial establishment

and, therefore, Chapter V-B is attracted in the case in hand. In respect of an appropriate Government, Section 25-L(b)(ii) provides when Central Government shall be the appropriate Government. It is also not disputed in the present case that in respect of FCIL it is Central Government which is the appropriate Government.

81. Much argument has been advanced on the question of non-compliance of Section 25-N(1), (2) and (3) of Act, 1947.

82. Sri Khan, learned Senior Counsel submitted that employer is supposed to send an application for permission under sub-section (1) to the appropriate Government in the prescribed manner stating reasons for intended retrenchment and a copy of application has to be served simultaneously on the workmen concerned in the prescribed manner. It is said that no such application was served upon petitioners.

83. The case set up by respondents is that a letter dated 28.04.2003 was sent to Central Government seeking permission for retrenchment of petitioners. A copy of said letter was also sent to workmen i.e. petitioners. These letters were sent by speed post as stated in para-4 of supplementary counter affidavit filed on behalf of respondents 2, 3 and 4 sworn by Sri Uma Dutt Sati, Assistant Office Superintendent, FCIL. Para-4 reads as under:-

"4. That in reply to the contents of paragraph 3 of the Supplementary Affidavit, it is stated that the application dated 28.04.2003 was sent by the respondent Corporation to the Ministry of Labour, Government of India seeking permission to retrench the petitioners. A copy of the said application was sent to the Petitioners through speed post on 29.04.2003. In pursuance of the application of the answering respondent dated 28.04.2003, certain queries were made by the Ministry of Labour, Government of India, through the letter dated 09.05.2003. The said queries were answered by the answering respondent by the letter dated 19.05.2003. The original application seeking permission to retrench the petitioners was sent to them as required under law. The letter dated 19.05.2003, which was a reply to the queries made from the Corporation was not necessary to be served on the Petitioners."

84. In regard to above averments, I do not find anything on record to show that copy of application sent by registered post on 22.04.2003 to petitioners was not served or received by them. On the contrary, it is admitted case of petitioners that they attended hearing before Sri J.P. Pati, Joint Secretary on 24.06.2003 which shows that not only copy of application was received by them but they were given opportunity of hearing by Government Department and the same was availed. Therefore, the contention that there is a violation of Section 25-N(2) of Act, 1947 is not accepted. It appears that petitioners claim that the subsequent query made by Government of India and replied by respondents that was not supplied to petitioners but that is not requirement of statutes, inasmuch as, statute requires copy of application sent to Government of India for permission to be supplied simultaneously to workmen. If petitioners wanted to have any copy of subsequent document which was sent to Government

of India in reply to query made by it, it could have been complaint even before authority of Government of India when petitioners attended oral hearing but there is neither any averment nor any material placed before this Court to show that any such objection was raised. Hence, I am not satisfied that there is any violation of Section 25-N(2).

85. Further, in the letter written to Government of India dated 28.04.2003, in para-2, specific statement was made that workmen concerned have been given notice in writing as required under Section 25-N(1)(a) of Act, 1947 and a copy of said notice was also enclosed with letter sent to Government of India in the prescribed proforma. Para-2 of letter dated 28.04.2003 sent to Government of India in the prescribed proforma reads as under:-

"2. The workmen concerned have been given notice in writing as required under Clause (a) of sub-section (1) of Section- 25N."

86. It is not stated anywhere by petitioners that during the course of oral hearing before Sri J.P. Pati, Joint Secretary on 24.06.2003, any of the petitioners ever pointed out the fact stated in para-2 of letter dated 28.04.2003 is incorrect and no notice was given to them. Neither any such averment in that regard has been made in the amended writ petition or any affidavit filed subsequently nor any document to support this fact, has been placed on record.

87. As already said, concerned Secretary of Government of India sought some clarifications from Employer-FCIL which was given through letter dated 19.05.2003 but the said clarification cannot construed as a notice contemplated to be served upon workmen under Section 25-N(1)(a) and (2) of Act, 1947, hence, non service of said clarification sent to Government of India can be held to be non-compliance of Section 25-N(1)(a) and (2) of Act, 1947.

88. It is true that hearing was conducted by Sri J.P. Pati, Joint Secretary and letter of approval has been communicated by Smt. Chandani Raina, Deputy Director but I find that the very opening sentence of letter reads as under:-

"I am directed to refer to your application"

89. This sentence clearly shows that it is not order passed by Smt. Chandani Raina but she has conveyed the decision taken by Government on the application of employer. The said letter is only a communication of decision taken by Government. Therefore, it cannot be said that hearing was conducted by one officer and decision has been taken by another. I am also not impressed with the argument that letter dated 09.07.2003 is not in compliance of Article 77 of Constitution of India. In these facts, decision of Supreme Court in **Workmen of Meenakshi Mills Ltd. etc. (supra)** has no application in the facts of this case.

90. With respect to payment of compensation, I find that it was offered but not accepted by petitioners. Therefore, it is sufficient compliance and for this reason, retrenchment cannot be said to be invalid. **Question-(ii)**, therefore, is answered against petitioners.

91. Considering the entire facts and circumstances, I do not find any merit in

the writ petition. Admittedly, production in Gorakhpur Unit was suspended in 1990 and it has never been restored. 900 and odd employees working in Gorakhpur Unit have accepted VSS except petitioners. A few senior level officers were retained at Gorakhpur Unit for the purpose of completion of winding up of Unit and their retention for the said purpose cannot be construed as if Unit has continued to run.

92. There is one more suggestion that some officials have been employed in other organizations. Here also, explanation has been given by respondents in the supplementary counter affidavit that Hindustan FCL was looking for technical hands and they desired particulars of technical staff sought to be retrenched. After consideration, some of them have been employed there. It is not the case of absorption or re-employment of staff of FCIL Unit at Gorakhpur in any other establishment but a separate and independent employment given by concerned Employer to some technical staff whom they (employees) found suitable for their purpose.

93. Respondents have categorically said with respect to other staff that an attempt was made but various different establishments communicated that there was no vacancy. Therefore, I do not propose to enter into this aspect for the reason that I have already held that petitioners, as a matter of right, could not have claimed their absorption or continued employment in different independent establishments who constitutes different employer in their own rights and are under no obligation, either in the statute or otherwise, to absorb or re-employ petitioners.

94. In the result, I find no merit in the writ petition. Dismissed.

(2020)1ILR 1868

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2019

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 32680 of 2019

Suresh Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Kaushlendra Tewari, Santosh Kumar Yadav

Counsel for the Respondents:
C.S.C.

A. U.P. Government Servant (Discipline & Appeal) Rules, 1999 - assailing-order-directing re-enquiry-after a delay of 7 years-since finding produced by the enquiry officer-no reasons assigned-only stating "enquiry conducted in a cursory manner"-does not suffice-explanation required-also assailing charge sheet-submitted right after the order of re-enquiry-to be quashed-as consequential proceeding to an illegal order.

B. Held, I am of the considered opinion that since the impugned office order dated 22.7.2019 is nullity in the eyes of law, therefore, it cannot be sustained, so its consequential proceedings i.e. charge sheet dated 2.8.2019 stand automatically vitiated and is liable to be declared non est in view of the legal maxim 'SUBLATO FUNDAMENTO CADIT OPUS'.

Writ Petition allowed. (E-8)

List of cases cited: -

1. K. R. Deb V/s. the Collector of Central Excise, Shillong AIR 1971 SC 1447

2. Union of India V/s. M. L. Capoor and others AIR 1974 SC 87

3. Nand Kumar Verma vs. State of Jharkhand and others (2012) 3 SCC 580

4. Vijay Shankar Pandey vs. Union of India and another (2014) 10 SCC 589

5. Vijay Shankar Pandey v. Union of India and another, (2014) 10 SCC 589

6. In Badrinath v. State of Tamil Nadu & others, AIR 2000 SC 3243

7. State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr,, (2001) 10 SCC 191

8. Mangal Prasad Tamoli (dead) by Lrs. v. Narvadeshwar Mishra (dead) by Lrs. & Ors., (2005) 3 SCC 422

9. In C. Albert Morris v. K. Chandrasekaran & Ors, (2006) 1 SCC 228

10. Upen Chandra Gogoi vs. State of Assam & Ors.,, (1998) 3 SCC 381

11. Satchidananda Misra v. State of Orissa & Ors.(2004) 8 SCC 599

12. Regional Manager, SBI v. Rakesh Kumar Tewari,, (2006) 1 SCC 530

13. Ritesh Tewari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823)

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

1. Heard Sri I.P. Singh, learned Senior Advocate, assisted by Sri Kaushlendra Tewari, learned counsel for the petitioner and Sri Vishal Verma, learned State counsel for the State-respondents.

2. By means of this petition, the petitioner has assailed the order dated 22.7.2019 (Annexure No.1 to the writ petition) passed by the Principal Secretary, Public Works Department, U.P., Lucknow directing for re-enquiry against the petitioner appointing enquiry officer. The petitioner has also assailed the charge sheet dated 2.8.2019 (Annexure No.2 to the writ petition) whereby the petitioner has been directed to file defence reply to the charge sheet.

3. Learned counsel for the petitioner has informed that the petitioner has not filed defence reply to the charge sheet nor the departmental enquiry has been conducted as yet.

4. The question for consideration is that as to whether the disciplinary authority may direct for re-enquiry without assigning reasons in writing in view of Section 9 of the U.P. Government Servant (Discipline & Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999").

5. The next question to be considered is as to whether the contention of disciplinary authority that departmental enquiry has been conducted 'in a cursory manner' would suffice and shall be treated sufficient reason in terms of Rule 9 of the Rules, 1999.

6. The next question to be considered is that if the disciplinary authority keeps the findings of enquiry officer for substantially long period and thereafter directs for re-enquiry saying the disciplinary enquiry has been conducted in a cursory manner may be permissible in the eyes of law.

7. As to whether the departmental enquiry against an employee may be conducted serving the charge sheet pursuant to the order of re-enquiry being issued by the disciplinary authority, if the

very order of re-enquiry is quashed by the Court treating the same as nullity in the eyes of law.

8. All the detailed facts are being shorn off and admitted position is being considered for adjudication of the aforesaid facts.

9. The petitioner was initially appointed on the post of Assistant Engineer on 23.2.1995 at Construction Division Deoria. On 11.11.2011, a departmental enquiry has been initiated against the petitioner under Rule 7 of the Rules, 1999. On 14.12.2011, charge sheet has been provided to the petitioner. The petitioner submitted his defence reply to the charge sheet on 9.4.2012. Thereafter, the departmental enquiry against the petitioner was conducted strictly in accordance with law. The enquiry officer has concluded the departmental enquiry examining the charge, considering defence reply of the petitioner, appreciating the comments of presenting officer and making thorough analysis of the evidences. The aforesaid departmental enquiry was concluded and the findings of the enquiry officer have been produced before the disciplinary authority on 26.10.2012.

10. Admittedly, since 26.10.2012, no order has been passed by the disciplinary authority till 22.7.2019 when the direction for re-enquiry has been given by the disciplinary authority. The disciplinary authority took about seven years in taking decision that the matter of the petitioner should be re-enquired as the enquiry officer has conducted the departmental enquiry in a cursory manner.

11. Notably, no other reason has been assigned in the impugned office order dated 22.7.2019 directing for re-enquiry of the issue of the petitioner except that the enquiry in the matter of the petitioner has been conducted in a cursory manner.

12. On 28.11.2019, direction has been issued to the State counsel to seek complete instructions in the matter fixing the date for 5.12.2019. On 5.12.2019, the State counsel has produced a letter dated 4.12.2019 preferred by one Sri Sanjai Kumar Upadhyaya, Special Secretary, Government of U.P. addressing to the Chief Standing Counsel, High Court, Lucknow Bench, Lucknow. The aforesaid letter provides that since the disciplinary authority was not agreeable with the findings of the enquiry report, which was made available on 26.10.2012, therefore, direction for re-enquiry has been issued and the Chief Engineer, Ayodhya Kshetra, Ayodhya has been appointed enquiry officer, who has issued charge sheet on 2.8.2019 and re-enquiry shall be conducted in the case of the petitioner.

13. Since the issue in question is squarely covered with the judgment and order dated 5.4.2016 passed in **Writ-A No.10552 of 2016, Dr. Atul Darbari Vs. State of U.P. and others**, whereby the Division Bench has set aside the identical order of re-enquiry and this Court following the decision in re; **Dr. Atul Darbari** (supra) decided one writ petition bearing Service Single No.32015 of 2019, Rajesh Chaudhary Vs. State of U.P. and another, vide judgment and order dated 2.12.2019 allowing the writ petition quashing the identical impugned order of re-enquiry, therefore, the present writ petition is being decided on the basis of legal submissions so advanced by the learned counsel for the parties.

14. Learned counsel for the parties are agreeable that the matter may be

decided at the admission stage considering their respective legal arguments and material available on record and made available from the department.

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

16. For the brevity, the impugned office order dated 22.7.2019 is being reproduced herein below:-

"उत्तर प्रदेश शासन
लोक निर्माण अनुभाग–13
संख्या–1886/23–13–19–12(8)ईएम/11
लखनऊ : दिनांक 22 जुलाई, 2019
कार्यालय आदेश

श्री सुरेश राम, तत्कालीन सहायक अभियन्ता, प्रान्तीय खण्ड, लो0नि0वि0, जौनपुर द्वारा उक्त खण्ड में तैनात रहते हुए अनुबन्ध संख्या–8/एस0ई0/05–06, दिनांक 7.11.2005 के अन्तर्गत लुम्बिनी–दुद्धी मार्ग के चैनेज 228 से 236.40 तक के चौड़ीकरण एवं सुदृढ़ीकरण के कार्य मैं निम्न ग्रेड की बिटुमिन हेतु उच्च दर पर भुगतान करने, विभागीय स्टोर से सस्ती दर पर सामग्री निर्गत करके ठेकेदार को रू0 24.90 लाख का अनुचित लाभ दिये जाने तथा शासन को आर्थिक क्षति पहुॅचायें जाने आदि अनियमितताओं के दृष्टिगत उनके विरूद्ध उ0प्र0 सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 के अन्तर्गत कार्यालय ज्ञाप संख्या–5701/23–13–11–12(8)ईएम/11 दिनांक 11.11.2011 द्वारा अनुशासनिक कार्यवाही संस्थित करते हुए मुख्य अभियन्ता (मध्य क्षेत्र), लो0नि0वि0 लखनऊ को जॉच अधिकारी नियुक्त किया गया था।

2– जॉच अधिकारी /मुख्य अभियन्ता (मध्य क्षेत्र), लो0नि0वि0 लखनऊ के पत्र दिनांक 26.10.2012 द्वारा जॉच आख्या उपलब्ध करायी गयी। जॉच अधिकारी द्वारा प्रस्तुत जॉच आख्या के परीक्षणोपरान्त यह पाया गया कि जॉच अधिकारी द्वारा अपचारी अधिकारी पर लगाये गये आरोप एवं उसके समर्थन में लगाये गये साक्ष्यों/अभिलेखों का गहनतापूर्वक परीक्षण न कर सरसरी तौर पर जॉच कार्यवाही सम्पन्न कर जॉच आख्या उपलब्ध करायी गयी है। अतः उ0प्र0 सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–9(1) के अन्तर्गत जॉच अधिकारी द्वारा प्रस्तुत जॉच आख्या दिनांक 26.10.2012 एतद्द्वारा अस्वीकार की जाती है।

3– इस सम्बन्ध में सम्यक् विचारोपरान्त श्री सुरेश राम, तत्कालीन सहायक अभियन्ता, प्रान्तीय खण्ड, लो0नि0वि0, जौनपुर के विरूद्ध प्रचलित उक्त अनुशासनिक कार्यवाही में आरोप–पत्र का उत्तर दिये जाने के स्तर से पुनः जॉच करने हेतु मुख्य अभियन्ता, अयोध्या क्षेत्र, अयोध्या को जॉच अधिकारी नामित किये जाने का आदेश श्री राज्यपाल एतद्द्वारा प्रदान करते हैं।

अधिशासी अभियन्ता, प्रान्तीय खण्ड, लो0नि0वि0 जौनपुर प्रस्तुतकर्ता अधिकारी होंगे।

श्री राज्यपाल की आज्ञा से,

नितिन रमेश गोकर्ण
प्रमुख सचिव

संख्या–1886(1)/23–13–19
तद्दिनांक

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित–

1. प्रमुख अभियन्ता (विकास) एवं विभागाध्यक्ष, लो0नि0वि0, उ0प्र0 लखनऊ।"

17. For the convenience, Rule 9 of the Rules, 1999 is being reproduced herein below:-

"9. Action on Inquiry Report. - *(1) The disciplinary authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the disciplinary authority, according to the provisions of Rule 7. (2) The disciplinary authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own*

findings thereon for reasons to be recorded.(3) In case the charges are not proved, the charged Government servant shall be exonerated by the disciplinary authority of the charges and inform him accordingly;(4) If the disciplinary authority having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

18. Rule 9 (1) of the Rules, 1999 clearly mandates that the disciplinary authority may, for the reasons to be recorded in writing, remit the case for re-enquiry to the same or any other enquiry officer, meaning thereby if the disciplinary authority remits the matter for re-enquiry, reasons to that effect must be reduced in writing. The impugned office order dated 22.7.2019 does not reveal any specific reasons for remitting the case for re-enquiry. Therefore, the office order dated 22.7.2019 is apparently in violation of Rule 9 (1) of the Rules, 1999.

19. Since the Division Bench in re; **Dr. Atul Darbari** (supra) has considered the identical controversy thoroughly, therefore, paras 8, 13, 16, 17, 19, 20, 22, 23, 25, 27, 28 & 29 of the said judgment are being reproduced herein below:-

"8. Be that as it may, the question is whether the disciplinary authority could have resorted to such a practice of abandoning the Inquiry already undertaken and resort to appointment of a fresh enquiring officer.

13. The controversy in hand has been subjected to detailed scrutiny by a Constitution Bench of the Supreme Court in K. R. Deb V/s. the Collector of Central Excise, Shillong AIR 1971 SC 1447 in which Hon'ble Apex Court has proceeded to examine the question in the context of Rule 15 (1) Rule 15(1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957. It was a case where an enquiry was ordered against a sub-Inspector, Central Excise. The inquiry officer held that the charge was not proved. Thereafter the disciplinary authority appointed another inquiry officer "to conduct a supplementary open inquiry". Such supplementary inquiry was conducted and a report that there was "no conclusive proof" to "establish the charge" was made. Not satisfied, the disciplinary authority thought it fit that "another inquiry officer should be appointed to inquire afresh into the charge". In K.K. Deb's case (supra) Hon'ble Supreme Court observed that an Enquiry Officer may be asked by the Disciplinary Authority to record further evidence if there had been no proper enquiry because of some serious defect or because some important witnesses were not examined. The Court categorically held therein that the previous enquiry could not be set aside on the ground that the report of the Enquiry Officer did not appeal to the disciplinary Authority. Relevant paragraphs 12 and 13 of the judgement are reproduced hereinafter:-

"12. It seems to us that Rule 15, on the face of it, really provides for one inquiry but it may be possible if in a particular case there has been no proper enquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the inquiry or for some other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. But there is no provision in Rule 15 for completely setting aside previous inquiries on the ground that the report of the Inquiring Officer or Officers does not appeal to the Disciplinary Authority. The Disciplinary Authority has enough powers to reconsider the evidence itself and come to its own conclusion under Rule 9.

13. In our view the rules do not contemplate an action such as was taken by the Collector on February 13, 1962. It seems to us that the Collector, instead of taking responsibility himself, was determined to get some officer to report against the appellant. The procedure adopted was not only not warranted by the rules but was harassing to the appellant."

16. It appears that the respondent no.1 dissatisfied with such earlier enquiry reports, ordered a de novo enquiry under the impugned order dated 4.2.2016 and appointed Shri Rudra Kumar Gupta, Special Secretary, Labour Department, Government of UP as Enquiry Officer. This practice of the respondent no.1 in carelessly and callously discarding enquiry reports, which are not to its liking and ordering for denovo enquiry without even disclosing the reasons, which weighed with it for rejecting the findings of the previous enquiry Officer, is a clear transgression of the law and requires to be deprecated in the strongest terms.

17. In Union of India V/s. M. L. Capoor and others AIR 1974 SC 87, the Supreme Court observed:

"28. . . . Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. . . . "

19. 'Reasons' are the milestones which chart the journey of the 'decision-maker' in reaching his destination. Absence of reasons thus leaves the decision-making process without a rudder and open to arbitrariness. Viewed in this light, the approach of respondent no.1 in instituting denovo enquiry by appointing Enquiry Officer afresh without even setting aside the findings recorded by the earlier Enquiry Officer, giving due reasons therefore, is clearly unsustainable in law.

20. In the present matter, it has been urged that the impugned order is in teeth of Rules 8 and 9 of Rules 1999. For ready reference, Rules 8 and 9 of Rules 1999 are extracted:-

"8. Procedure for imposing major penalties - (1) No order imposing any of the major penalties specified in Rule 6 shall be made except after an inquiry is held as far as may be, in the manner provided in this rule and Rule 10, or, provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850) where such inquiry is held under that Act.

(2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a member of the Service, it may appoint under this rule or under the

provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, an authority to inquire into the truth thereof.

(3) Where a Board is appointed as the inquiring authority it shall consist of not less than two senior officers provided that at least one member of such a Board shall be an officer of the service to which the member of the service belongs.

9. Action on Inquiry Report.-- (1) The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation tot he charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.

(2) The Disciplinary Authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government servant shall be exonerated the Disciplinary Authority of the charges and informed him accordingly.

(4) If the Disciplinary Authority, having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned speaking order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

22. Rule 9 prescribes action on the enquiry report. Rule 9 (1) provides that the Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7. Rule 9 (2) provides that the Disciplinary Authority shall, if it disagrees with the findings of the enquiry Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded. Rule 9 (3) provides that in case the charges are not proved, the charged Government servant shall be exonerated the Disciplinary Authority of the charges and informed him accordingly. Rule 9 (4) provides that If the Disciplinary Authority, having regard to its finding on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government Servant, he shall give a copy of the inquiry report and his finding recorded under sub-rule (2) of Rule 9 to the charged Government Servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall having regard to all the relevant records relating to the inquiry and representation of the charged Government Servant, if any, and subject to the provisions of Rule 16 of these rules, passes a reasoned order imposing one or

more penalties mentioned in Rule 3 of these and communicate the same to the charged Government Servant.

23. It can be seen from the above that the normal rule is that there can be only one enquiry. Hon'ble Apex Court has also recognized the possibility of a further enquiry in certain circumstances enumerated therein. The decision, however, makes it clear that the fact, that the report submitted by the enquiring authority is not acceptable to the disciplinary authority, is not a ground for completely setting aside the enquiry report and ordering a fresh denovo enquiry. Therefore, we are of the considered opinion that the principle laid down in K.R. Deb's case, would squarely apply to the case in hand.

25. In our opinion, on general principles, there can be only one enquiry in respect of charges for a particular misconduct and that is also what the Rules usually provide. If, for some technical or other good ground, procedural or otherwise the first enquiry or punishment or exoneration is found bad in law, there is no principle that a second enquiry cannot be initiated. Therefore, when a completed enquiry proceedings is set aside by a competent forum on a technical or on the ground of procedural infirmity, fresh proceedings on the same charges is permissible.

27. A bare perusal of the order impugned and the record in question this much is accepted position that at no point of time the disciplinary authority had proceeded to give any reason for disagreeing with the earlier enquiry reports in question. Therefore, in these circumstances there is no justification for conducting a second enquiry on the very same charges. Law is clear on the subject, and permits only disciplinary proceedings and same cannot be approved as harassment and allowing such practice is not in the interest of public service. Same view has also been approved by Hon'ble Apex Court in Nand Kumar Verma vs. State of Jharkhand and others (2012) 3 SCC 580 and Vijay Shankar Pandey vs. Union of India and another (2014) 10 SCC 589.

28. We, therefore, have no hesitation in holding that the impugned order dated 4.2.2016 for denovo/ a fresh enquiry against the petitioner on the same charges, which were subject matter of the enquiry reports dated 29.9.2014 and 14.10.2014, is illegal and arbitrary; and hence, is liable to be set aside. The impugned order dated 4.2.2016 is consequently set aside.

29. The writ petition is accordingly allowed and the respondent no.1 is directed to take appropriate decision in the light of the enquiry reports dated 29.9.2014 and 14.10.2014 within a period of two months from the date of production of a certified copy of this order before him. There shall be no order as to costs."

20. So far as the term being used by the disciplinary authority while directing for re-enquiry that the enquiry officer has conducted enquiry in a cursory manner, the Hon'ble Apex Court in re; **Vijay Shankar Pandey v. Union of India and another**, (2014) 10 SCC 589 has interpreted the word 'cursory' in para-32. Para 32 of the aforesaid judgment is being reproduced herein below:-

"32. Coming to the first reason- that the report is a cursory report. A copy of the report is not made available to the appellant. The content of the said report is not known. The only admitted fact about the report is that the appellant was

exonerated of all the charges made against him. If such a conclusion is otherwise justified, whether the report is cursory or elaborate, should make no difference to the legality of the report. What matters is the correctness of the conclusions recorded, not the length or the elegance of the language of the report which determines the legality of the conclusions recorded in it. Therefore, this ground is equally untenable."

21. As per the Hon'ble Apex Court in re; **Vijay Shankar Pandey** (supra) indicating the word that enquiry officer has made enquiry in a cursory manner would not suffice but as to how the findings of the enquiry officer are cursory should be explained. In view of the aforesaid reason, the Hon'ble Apex Court has disapproved using the word 'cursory' without indicating the reason as to how it was cursory.

22. Therefore, the impugned office order dated 22.7.2019 is not in conformity with Rule 9 (1) of the Rules, 1999 as no reasons have been assigned and assigning the reason that the enquiry in question has been conducted in a cursory manner has not been approved by the Hon'ble Apex Court in re; **Vijay Shankar Pandey** (supra), so I am of the considered opinion that the office order dated 22.7.2019 is not sustainable in the eyes of law.

23. I have also noted that the disciplinary authority has not taken final decision for about seven years after receiving the findings of the enquiry officer on 26.10.2012 without any cogent reasons to that effect, therefore, such an inordinate delay in taking final decision after receiving the findings of enquiry officer vitiates the entire purpose of conducting re-enquiry.

24. Since I am of the considered view that the impugned office order dated 22.7.2019 is non est in the eyes of law being violative of Rule 9 (1) of the Rules, 1999, therefore, I also hold that the charge sheet, which has been issued pursuant to the office order dated 22.7.2019, is non est in the eyes of law and no departmental enquiry can be conducted against the petitioner on the basis of the aforesaid charge sheet in view of legal maxim '**SUBLATO FUNDAMENTO CADIT OPUS**'.

25. The Hon'ble Apex Court in re; **State of Punjab Vs. Davinder Pal Singh Bhullar and others connected with Sumedh Singh Saini Vs. Davinder Pal Singh Bhullar and others**, reported in **(2011) 14 SCC 770** has considered the aforesaid maxim in paras-107 to 111, which are being reproduced here-in-below:-

"107. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

108. In Badrinath v. State of Tamil Nadu & others, AIR 2000 SC 3243; and State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr,, (2001) 10 SCC 191, this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.

109. Similarly in Mangal Prasad Tamoli (dead) by Lrs. v. Narvadeshwar Mishra (dead) by Lrs. & Ors., (2005) 3 SCC 422, this Court held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be non est and have to be necessarily set aside.

110. In C. Albert Morris v. K. Chandrasekaran & Ors, (2006) 1 SCC 228, this Court held that ***a right in law exists only and only when it has a lawful origin****. (See also: Upen Chandra Gogoi vs. State of Assam & Ors.,, (1998) 3 SCC 381; Satchidananda Misra v. State of Orissa & Ors.,, (2004) 8 SCC 599; Regional Manager, SBI v. Rakesh Kumar Tewari,, (2006) 1 SCC 530; and Ritesh Tewari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823).*

111. Thus, in view of the above, we are of the considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/ orders/ FIR/ investigation stand automatically vitiated and are liable to be declared non est."

26. In view of the aforesaid dictums of the Hon'ble Apex Court considered in re; **Davinder Pal Singh Bhullar** (supra), I am of the considered opinion that since the impugned office order dated 22.7.2019 is nullity in the eyes of law, therefore, it cannot be sustained, so its consequential proceedings i.e. charge sheet dated 2.8.2019 stand automatically vitiated and is liable to be declared non est in view of the legal maxim '**SUBLATO FUNDAMENTO CADIT OPUS**'.

27. Accordingly, all the questions have been answered in favour of the petitioner.

28. A writ in the nature of certiorari is issued quashing the office order dated 22.7.2019 passed by opposite party no.1, which is contained in Annexure No.1 to the writ petition and charge sheet dated 2.8.2019, which is contained in Annexure No.2 to the writ petition.

29. A writ in the nature of mandamus is issued commanding the opposite parties to provide all consequential service benefits, promotion, benefit of ACP etc. with expedition, preferably within a period of three months from the date of production of certified copy of this order.

30. The writ petition is accordingly **allowed.**

(2020)1ILR 1877

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.01.2020

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 35429 of 2019

Avanindra Dikshit ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Neel Kamal Mishra

Counsel for the Respondents:
C.S.C.

A. U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 4 - suspension order is violative of Rule 4 - petitioner wrongly applied the Government Order while providing the benefit of revised pay scale to the Class III employees of the department-major punishment may not be given subject to the findings of enquiry officer-the suspension order is not sustainable in the eyes of law-mandamus writ is issued to

reinstate the petitioner and pay him salary. (Par 16)

The suspension order should not be exercised in arbitrary manner and without any reasonable ground or as misuse of power. Suspension should be made only in a case where there is a strong prima-facie case against the delinquent employee and the allegations involving moral turpitude, grave misconduct or indiscipline or refusal to carry out the orders of superior authority are there or there is strong prima-facie case against him, if proved, would ordinarily result in major punishment. (Para 15)

Writ Petition allowed. (E-6)

List of cases cited: -

1. St. of Orissa Vs. Bimal Kumar Mohanty 1994 (4) SCC 126

2. Punjab National Bank Vs. D.M. Amarnath (2006) 10 SCC 162

3. Union of India & Anr. Vs. Ashok Kumar Aggarwal, para 21 and 22

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

1. Heard Sri Upendra Nath Mishra, learned Senior Advocate assisted by Sri Neel Kamal Mishra, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. The order under challenge is the suspension order dated 10.12.2019 passed by the Additional Chief Secretary, Department of Finance (Lekha Parikchha), Anubhag-1, Civil Secretariat, Lucknow, which is contained as Annexure no. 1 to the writ petition.

3. By means of aforesaid suspension order the petitioner has been placed under suspension on the allegation that by wrongly indicating the Government Order dated 24.12.2009 instead of Government Order dated 7.9.2009 the employees of the department has illegally been given the benefit of pay fixation. However, the charge-sheet dated 31.12.2019 has been issued against the petitioner containing three charges which has been framed by breaking the sole allegation of wrong fixation of revised pay scale of Class-III employees of the Cooperative Societies and Panchayat into three charges. The three charges are (i) wrong fixation of pay of Senior Assistants of the Department due to issuance of alleged illegal order dated 25.6.2017 by the petitioner, (ii) issuance of an irregular correction order dated 29.3.2019 by the petitioner and (iii) the alleged excess payment of arrears due to pay fixation thereby causing huge loss to the State-Exchequer.

4. The aforesaid charge-sheet has been assailed by the petitioner by filing Service Single No. 299/2020 wherein the counter affidavit has been called to the effect as to whether charge-sheet dated 28.12.2019 is dated 31.12.2019 when the inquiry officer has made signature on the said charge sheet on 28.12.2019 as it is said to have been prepared by the disciplinary authority on 28.12.2019. No interim protection restraining to conduct the departmental inquiry has been passed. As a matter of fact this Court is of the view that since the charge-sheet has been issued containing some charges, veracity of the charges may not be examined and those charges may be proved or disproved during the course of the departmental inquiry strictly in accordance with law.

5. So far as the suspension order dated 10.12.2019 is concerned the Court is appreciating the validity of the suspension order as under.

6. This Court is conscious that if the allegations of the suspension order and the charge-sheet are appreciated, the inquiry officer / disciplinary authority would have nothing to inquire during the course of the departmental inquiry inasmuch as the allegations so levelled against the petitioner must be proved on the basis of preponderance of the probabilities for which the relevant material and evidences are led and examined by the inquiry officer. Therefore, the validity of the suspension order shall be tested on the settled principles as to whether the suspension order is sustainable in the eyes of law.

7. Learned counsel for the petitioner has submitted with vehemence that the impugned suspension order is violative of Rule 4 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999. For the brevity Rule 4(1) is being reproduced herein below :

*"**4. Suspension.** -(1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority :*

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty :

Provided further that concerned Head of the Department empowered by the Governor by an order in this behalf may place a Government servant or class of Government servants belonging to Group 'A' and 'B' posts under suspension under this rule :

Provided also that in the case of any Government servant or class of Government servants belonging to Group 'C' and 'D' posts, the appointing authority may delegate its power under this rule to the next lower authority."

8. A bare perusal of the aforesaid Rule 4 clearly mandates that the suspension order can be issued only when the charges against an employee are very serious entailing the major punishment i.e. dismissal, removal or reduction in rank. In other words in case the charges are not so serious and grave entailing the major punishment, the recourse of suspension order should be avoided.

9. In the present case the charges mentioned in the impugned suspension order are not serious enough, prima-facie, which in the event of being proved, would warrant imposition of any major penalty.

10. Notably, the petitioner has been placed under suspension on the allegations that petitioner has allegedly issued wrong directions in his letter dated 26.5.2017 and 29.3.2019, whereby subordinate authorities were directed to apply the provisions of G.O. dated 22.3.2013 read with G.O. dated 24.12.2009 and fitment table contained in G.O. dated 7.9.2009. However, the respondent-authorities are of the opinion that pay revision of Class-III employees i.e. Senior Assistants working in the department should have been made only as per provisions of para 11 of Government Order dated 8.12.2008 and not as per Government Order dated 7.9.2009 and 24.12.2009. Therefore, the said authorities have observed that the benefit of pay revision to such employees of the department should have been made only as per para 11 of the Government

Order dated 8.12.2008 read with fitment table of G.O. dated 11.12.2008. Accordingly, the petitioner has been charged for having committed misconduct as per Rule 3 of the Conduct Rules, 1956 for not applying the aforesaid Government Order dated 8.12.2008 and 11.12.2008.

11. While doing so, it appears, prima-facie, the State-respondents have not noticed that the provisions of Government Order dated 8.12.2008 were amended by the subsequent Government Order dated 24.12.2009 and similarly the provisions of fitment table applicable on the Pay-Band of Rs. 5200-20200 (relevant for the issue in question) were also amended by the fitment table issued through the subsequent Government Order dated 7.9.2009. However, the petitioner appears to have applied, prima-facie, both the aforementioned amended Government Orders daed 24.12.2009 and 7.9.2009. It appears that petitioner in a bonafide manner has applied those government orders which, as per him, were applicable at that point of time. There may be some confusion to that effect on the part of the petitioner but there is no allegation in the suspension order or charge-sheet to the effect that petitioner having any ulterior motive or malafide intention has applied the Government Orders dated 24.12.2009 and 7.9.2009 instead of 8.12.2008. Therefore, for any bonafide confusion having cogent explanation to that effect the petitioner should have not been placed under suspension. If there was no bonafide confusion on the part of the petitioner as aforesaid, the explanation from the petitioner could have been called and necessary orders against those employees who have received the benefit of revised pay scale could have been issued. During the course of argument it has been noted that the notices of recovery against all the employees who have got benefit of pay revision have been issued seeking explanation from those employees, therefore, if those employees could not justify the benefit so availed by them would be liable for recovery proceedings and in that case, prima-facie, no loss would be caused to the State-Exchequer.

12. Learned Additional C.S.C. has submitted with vehemence that since there is no case of the petitioner that the impugned suspension order is an outcome of malafide nor it is without jurisdictional order, therefore, such suspension order should not be interfered. In support of aforesaid argument Sri Ran Vijay Singh has placed reliance on the judgment of Hon'ble Apex Court in re: (1) ***State of Orissa vs. Bimal Kumar Mohanty -1994 (4) SCC 126***; and (2) ***Punjab National Bank vs. D.M. Amarnath -(2006) 10 SCC 162*** by submitting that if the suspension order has been passed pending departmental inquiry it should not be interfered with.

13. Sri Ran Vijay Singh has also placed reliance on some judgments of Hon'ble Apex Court by submitting that normally the constitutional courts should not interfere with the show cause notice or charge-sheet, therefore, the charge-sheet issued against the petitioner may not be interfered. Since the subject matter of the present writ petition is suspension order not the charge-sheet, therefore, those case laws are not applicable in the present issue.

14. However, Sri Upendra Nath Mishra, learned Senior Advocate has placed reliance of the judgment of Hon'ble Apex Court in re: ***Union of India and***

another vs. Ashok Kumar Aggarwal placing reliance on para 21 and 22 of the aforesaid judgment which are being reproduced herein below:

"21. The power of suspension should not be exercised in an arbitrary manner and without any reasonable ground or as vindictive misuse of power. Suspension should be made only in a case where there is a strong prima facie case against the delinquent employee and the allegations involving moral turpitude, grave misconduct or indiscipline or refusal to carry out the orders of superior authority are there, or there is a strong prima facie case against him, if proved, would ordinarily result in reduction in rank, removal or dismissal from service. The authority should also take into account all the available material as to whether in a given case, it is advisable to allow the delinquent to continue to perform his duties in the office or his retention in office is likely to hamper or frustrate the inquiry.

22. In view of the above, the law on the issue can be summarised to the effect that suspension order can be passed by the competent authority considering the gravity of the alleged misconduct i.e. serious act of omission or commission and the nature of evidence available. It cannot be actuated by mala fide, arbitrariness, or for ulterior purpose. Effect on public interest due to the employee's continuation in office is also a relevant and determining factor. The facts of each case have to be taken into consideration as no formula of universal application can be laid down in this regard. However, suspension order should be passed only where there is a strong prima facie case against the delinquent, and if the charges stand proved, would ordinarily warrant imposition of major punishment i.e. removal or dismissal from service, or reduction in rank etc."

15. As per the Hon'ble Apex Court the suspension order should not be exercised in arbitrary manner and without any reasonable ground or as misuse of power. Suspension should be made only in a case where there is a strong prima-facie case against the delinquent employee and the allegations involving moral turpitude, grave misconduct or indiscipline or refusal to carry out the orders of superior authority are there or there is strong prima-facie case against him, if proved, would ordinarily result in major punishment. The Hon'ble Apex Court has cautioned that while issuing the suspension order the aforesaid facts should be considered by the authority concerned carefully. The aforesaid observation of the Hon'ble Apex Court makes it abundantly clear that the authority competent who passed the suspension order must take care of the gravity of the seriousness of the charges and he must have strong satisfaction, prima-facie, that in case the charges are proved the delinquent employee would have to face major punishmet.

16. In the present case the sole allegation against the petitioner is that he has wrongly applied the Government Order while providing the benefit of revised pay scale to the Class-III employees of the department. It has also been noted that the necessary orders seeking explanation from the employees who have received the benefit of revised pay scale, have been issued for recovery and if those employees could not justify the benefit received by them, necessary orders of recovery may likely to be issued and in that case there would be no loss to

the State Exchequer. Further, there is no allegation against the petitioner to the effect that while applying the government orders which as per the State-respondent are not applicable in the issue in question, the petitioner was having any ulterior motive or malafide intention, therefore, at the best the petitioner could have been asked as to how he has applied wrong government orders and after considering the reply of the petitioner appropriate decision may be taken strictly in accordance with law during the course of the departmental inquiry but for this allegation, I think the major punishment may not be awarded to the petitioner subject to the findings of enquiry officer. It is clarified here that this observation shall not affect the departmental proceedings in any manner whatsoever and the inquiry officer shall not only conduct and conclude the departmental inquiry strictly in accordance with law while affording opportunity of hearing to the petitioner but shall not be influenced from any finding being given herein above. However, on the material available on records and the arguments so advanced by the learned counsel for the parties, I am of the considered opinion that in view of dictum of Hon'ble Apex Court in re: ***Ashok Kumar Aggarwal (supra)*** the impugned suspension order is not sustainable in the eyes of law and prima facie appears to be violative of Rule 4 of the Rules of 1999 besides being unwarranted and uncalled for in view of the facts and circumstances of the issue in question.

17. Accordingly, the suspension order dated 10.12.2019 passed by the Additional Chief Secretary, Department of Finance (Lekha Parikchha), Anubhag-1, Civil Secretariat, Lucknow which is contained as Annexure no. 1 to the writ petition, is hereby ***quashed.***

18. A writ in the nature of ***mandamus*** is issued commanding the opposite parties to reinstate the petitioner and pay him salary and other emoluments regularly with promptness, preferably within a period of 15 days from the date of production of certified copy of the order of this Court.

19. It is made clear that the departmental inquiry against the petitioner may be conducted and concluded, if it is so warranted but strictly in accordance with law.

20. In the result the writ petition succeeds and accordingly ***Allowed.***

21. No order as to costs.

(2020)1ILR 1882

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.01.2020

BEFORE
THE HON'BLE ABDUL MOIN, J.

Service Single No. 36210 of 2019

Ravi Kant Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Kaushlendra Tewari

Counsel for the Respondents:
I.P. Singh, Gyendra Kumar Srivastava, Kshitij Misra

A. Service – Usurpation of 'Public Office' - Sanjay Gandhi Post-Graduate Institute of Medical Sciences, First Regulation, 2011 – Maintainability of writ of quo-warranto would depend on whether office in question is a 'Public Office' and the person is holding it without any legal authority.

A 'Public Office' is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the

sovereign functions of the Government either executive, legislative or judicial, to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of portion of sovereign power. (Para 12)

There is a distinction between Public Office, Public Authority and Public Duty. A Chief Medical Superintendent of SGPGIMS can be said to be discharging a Public Duty but that ipso facto would not make the post of Chief Medical Superintendent a 'Public Office'. (Para 7)

B. 'Sovereign function' – For a particular function to be a 'sovereign function' it would depend on the nature of the power and the manner in which it is exercised. The mere fact that one is an employee of a statutory body would not ipso facto mean that the function exercised by such employee is 'Sovereign' in nature. (Para 13 & 14)

As per the determining test, the office in question cannot be held to a 'Public Office'. (Para 16)

Writ Petition dismissed. (E-4)

Precedent followed: -

1. Dr. Neetu Singh Vs State of U.P. and others, WP No. 24229 (MB) of 2019 decided on 05.09.2019 (Para 5 & 6)

2. Shashi Bhushan Ray Vs. Pramatha Nath Bandopadhyay, (1966) SCC Online Cal. 153 (Para 8)

3. Agriculture Produce Market Committee Vs. Ashok Hariauni and another, (2000) 8 SCC 61 (Para 13 & 14)

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri I.P. Singh, Senior Advocate, assisted by Sri Kaushlendra Tewari, learned counsel for the petitioner, learned Standing Counsel for State-respondents, Sri Sanjay Bhasin, Senior Advocate, assisted by Sri Kshitij Misra, learned counsel appearing for respondent no. 2 and Sri Gyanendra Srivastava, learned counsel appearing for respondent no.4.

2. Present petition has been filed by the petitioner praying for a writ in the nature of quo-warranto thereby ousting respondent no.3-Amit Agarwal from the post of Chief Medical Superintendent, Sanjay Gandhi Post-Graduate Institute of Medical Sciences, Raebareli Road, Lucknow.

3. The writ petition has been filed with the allegation that respondent no.3 has usurped the "Public Office" of Chief Medical Superintendent and is not qualified to hold the said post.

4. Sri Sanjay Bhasin, learned Senior Advocate, has raised a preliminary objection regarding maintainability of the writ petition by placing reliance on the Sanjay Gandhi Post-Graduate Institute of Medical Sciences, First Regulation, 2011 (hereinafter referred to as the '2011 Regulations') to contend that the post of Chief Medical Superintendent in Sanjay Gandhi Post-Graduate Institute of Medical Sciences (hereinafter referred to as the 'SGPGIMS') is not a 'Public Office'. It has been further argued that in order to maintain a writ of quo-warranto, the petitioner has to substantiate that the office is a 'Public Office' and the person against whom the writ of quo-warranto is sought is a usurper holding the 'Public Office' without any legal authority.

5. The entire aspect of the matter pertaining to what is a 'Public Office' has been considered by a Division Bench of this Court in the case of **Dr. Neetu Singh vs. State of U.P. and others** passed in

Writ Petition No.24229 (MB) of 2019 decided on 05.09.2019 wherein considering almost the entire law on the subject, the Division Bench has held as under:-

*"8.1 In case of **Dr P.S.Venkata Swamy Setty Vs University of Mysore-(AIR 1964 Mysore 159; Para 11,13,14)** it has been held that the Professors and Readers of a University do not exercise any governmental function nor they are vested with the power or charged with the duty of acting in execution or enforcement of law. They are merely employees of the Statutory Body. They cannot therefore in any sense be described as holders of Public Offices in respect of which a Writ of Quo-warranto would lie.*

*8.2 In **Dr P.S.Venkata Swamy Setty (Supra),** the University of Mysore though its Registrar, vide Notification dated 25th June,1959 invited Applications for various posts of Professors and Readers in different subjects. The Petitioner therein was one of the Applicants for the post of Reader in Physics. Several candidates were interviewed but none was selected and therefore, One Post of Professor and Three Posts of Reader in Physics were re-advertised and consequently the Private Respondents were selected. The Petitioner filed Writ Petition praying for a Writ of Mandamus or Writ of Quo-Warranto against the Private Respondents primarily on the ground that the appointments are invalid or unauthorized because qualifications set out in Second Notification were not shown to have been prescribed by Syndicate of the University and some of the Respondents did not possess the minimum qualifications.*

Specific objection was raised with regard to maintainability of a Writ of Quo-warranto and after considering various judicial pronouncements, the Mysore High Court has held as under in Paragraph 11, 13 & 14:

"PARA 11

The peculiar characteristics of the writ of quo-warranto and the history of its development in England are found discussed in the leading case of The King V.Speyer,(1916))1 KB 595.Lord Reading , C.L, points out that originally a writ of quo warranto was available only for use by the King against encroachment of royal prerogative or of rights, franchise or liberties of the Crown but that later it gave place to the practice of filing information by the Attorney General on the strength of which the Court enquired into the authority whereby the respondent held any public position. Later still, the King's coroner commenced the practice of exhibiting the information of quo warranto at the instance of even private persons. To prevent the abuse of this practice, statutes were subsequently passed during the reign of the King William and Queen Mary, after which the practice of coroner filing information was stopped. Another statute was passed during the reign of Queen Anne making the issue of a writ of quo warranto subject to the discretion of the Court to grant or refuse the same upon the information exhibited by private persons. In a sense, the proceedings were criminal in nature because the party who laid information before the Court was merely in the position of an informer or a relator. The long history of the proceedings in quo qarranto led to considerable conflict of decisions. The matter was fully examined by the House of Lords in the case of Darley v.R.,(1846) 12 Cl. And F. 520 at p.537: 8 ER 1513, in which Tindal , C.J expressed his conclusion in the following of quoted words :-

"After consideration of all the cases and dicta on this subject, the result appears to be that this proceeding by information in nature of quo warranto will lie for usurping any office, whether created by charter alone , or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others".

PARA 13

In India we have a republican Constitution. Hence in India the nature of Office in respect of which quo warranto will lie must be taken to be an office created by the Constitution itself or by any statute and invested with the power or charged with the duty of acting in execution or in enforcement of the law. We might add that the office may be either an elective office or one in respect of which a nomination or appointment is made by a specified authority and that in the case of elective office, we generally have the procedure of election petitions which makes it unnecessary for any one to proceed by way of a writ of quo warranto.

Provided the office is of the character or nature described above, it is well established in England that the Petitioner who is only a relator need not have any personal interest in the matter. All that is necessary is that he should act bona-fide in public interest and should not be a mere man of straw acting at the instance of others or on ulterior motives. The writ, as already stated, is purely discretionary with the Court and will not issue unless the Court is satisfied that it is necessary to issue the writ in public interest.

PARA 14

The principles stated in the case of 1916, 1 KB 595 have been applied in India also. The only case where it was held that even in the case of quo warranto the petitioner must have a personal interest before he could move the Court is the decision of a single Judge Chandra Reddi,J. as he then was, of the Madras High Court reported in re ,Chakkaral Chettiar , AIR 1953 Mad 96. His Lordship purported to follow the decision of a Bench of that High Court reported at Page 94 of the same Volume. That Bench decision, however, related to a case of certiorari.The opinion of Chandra Reddi ,J.,was dissented from by a subsequent Bench ruling of the Madras High Court in Sivarama Krishnan v.Arumugha Mudliar, (S) AIR 1957 Mad 17. It is pointed out in that case that no other High Court in India has accepted Justice Chandra Reddi's view, Among the rulings of other High Courts expressing such dissent are Biman Chandra V. Governor, West Bengal, AIR 1952 Cal 799 and V.D.Deshpande v. State of Hyderabad(S) AIR 1955 Hyderabad 36. In the latter decision other cases, both English and Indian, and found discussed and the principles formulated."

8.3 Similar observation have been made in the case of ***Dr D.K. Belsare Vs Nagpur University; (1980) 82 Bom LR 494, Para 60,61,64,66.***

8.4 In ***Dr D.K. Belsare (supra)*** *the Petitioner before the Bombay High Court filed a Writ of Quo-warranto against the incumbent appointed as Professor of Zoology. The Writ Petition was filed on the ground that: (a) the appointment is Malicious; (b) Selection Committee has not been constituted in terms of the provisions; and (c) Appointment of Respondent No.3 was illegal. After considering the provisions of the Act and the Statutes of the University*

and legal prepositions, the Bombay High Court held as under :

"PARA 60

We have presently pointed out earlier that in this case this submission about collateral attack is not at all maintainable. The next ruling is Alex Beets v. M.A Urmese. In this ruling, a writ for quo warranto was asked for by a medical graduate against an Hon.Medical Officer with certain other reliefs. It was contended that the Government has bound to observe the provisions of Art, 16 of the Constitution of India and to advertise invitations for applications thereof , which was not done in that case. It was held that in the absence of such a case in the Petition, this could not be urged at the final hearing. Consequently, it was held that a challenge under Art.16 cannot be urged by one who was not an aspirant to the post. It was further held that challenge under art.16 cannot be heard in a motion cannot be heard in a motion for quo warranto and breach of art.16 can be challenged in a writ of certiorari only and it was further held by the Kerala High Court that possession of a Public Office under a Government Order is not usurpation of Office, for which alone quo-warranto lies.

PARA 61

Then the next ruling is the University of Mysore v S.C.Govinda Rao, but there is nothing particular in this ruling and it only lays down the procedure and the next ruling is Dr P.S.Venkataswamy v.University of Mysore. In Para 11 of this ruling, the Mysore High Court observed as follows:

"In India we have a republican Constitution. Hence in India the nature of Office in respect of which quo warranto will lie must be taken to be an office created by the Constitution itself or by any statute and invested with the power or charged with the duty of acting in execution or in enforcement of the law."

PARA 64

We have already referred to the ruling of Rajasthan High Court. The Rajasthan High Court has held that it is a statutory post. We are respectfully not in agreement with the said reasoning of the Rajasthan High Court . It is admitted fact that Professor is appointed by the Executive Council upon recommendation made by the Selection Committee in that behalf. It is true that Professor is appointed under the powers vested in the Executive Council but that by itself does not go to show that the post of Professor is a statutory post created by Statute itself. We are in respectful agreement with the observations made by the Mysore High Court and we, therefore, hold that the post of Professor in Zoology, with which we are concerned in this case, is not a public office for which a writ of quo -warranto is issued.

PARA 66

We have already pointed out that it is not the contention of Mr.Oka that he is challenging the constitution of the Selection Committee but we have also pointed out that he is relying upon the statutory provisions to show that the Selection Committee was not properly constituted as per s.45 of the University Act. If the Petitioner were to challenge the very constitution of the Selection Committee itself, then the ruling on which Mr.Deshpande placed reliance, regarding collateral attach would have been applicable to the facts of the instant case but in as much as no such contention is raised by the Petitioner, there is no force in this contention raised by Mr.Deshpande. The only contention of the petitioner is that the post is not filled in

accordance with the section, which was required to be made in accordance with law. In result, therefore, it will be seen that it cannot be held that the post of Professor of Zoology is a public office and, therefore, a writ of quo warranto cannot be issued. The result is that there is no merit in this petition and it deserves to be dismissed and is accordingly dismissed. Rule is discharged, but in the circumstances of this case, there will be no Order as to costs."

8.5 In the case of ***University of Mysore Vs Govinda Rao AIR 1965 SC 491; Para 6,*** *the Hon'ble Apex Court has held that the Quo-warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty. If the enquiry leads to the finding that the holder of the Office has no valid title to it, the issue of the writ of Quo-warranto ousts him from that Office.*

8.6 In ***Govinda Rao (Supra)*** *the Mysore High Court allowed the Writ Petition and consequently issued a Writ of Quo-warranto against the Research Reader in English in Central College, Bangalore, being aggrieved thereof Special Leave Petitions were filed which were converted into Civil Appeal No.417 and 418 of 1963. Allowing the Civil Appeals, the Hon'ble Supreme Court held as under:*

PARA 6

"The Judgment of the High Court does not indicate that the attention of the High Court was drawn to the technical nature of the writ of quo-warranto which was claimed by the Respondent in the present proceedings, and the conditions which had to be satisfied before a writ could issue in such proceedings.

As Halsbury has observed:

"An information in the nature of a quo warranto took the place of the absolate writ of quo-warranto which lay against a person who claimed or usurped an Office, franchise, or liberty to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined.

Broadly stated, the quo-warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise , or liberty, is called upon to show by what right he holds the said office, franchise or liberty. If the enquiry leads to the finding that the holder of the Office has no valid title to it, the issue of writ of Quo-warranto ousts him from that Office. In other words, the procedure of quo-warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognized in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons, not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. <u>It is thus clear that before a citizen can claim a writ of quo warranto , he must satisfy the court, inter-alia, that</u>

the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

8.7 In the case of ***B. Srinivasa Reddy VS Karnataka Urban Water Supply and Drainage Board Employees Association reported in (2006) 11 SCC 731 II Para 76;*** *the judgment of Learned Single Judge directing for the ouster of Managing Director, Karnataka Urban Water Supply was affirmed by the Division Bench of High Court of Karnataka in Writ Appeal No.86 of 2006. The matter went up to the Hon'ble Supreme Court and after considering the definition of "**Public Office**' as defined in Black's Law Dictionary, the Hon'ble Apex Court has held that certain essential elements are to be established in order to hold an Office / Post as "**Public Office'.***

8.8 The aforesaid essential elements can be summarized as under:-

a) Position must be created by constitution, legislature or authority conferred by legislature.

b) Portion of sovereign power of government must be delegated to such position.

c) Duties and powers must be defined directly or impliedly.

d) Duties must be performed independently without control or superior power other than law.

e) Position must have some permanency and continuity.

8.9 The Hon'ble Apex Court in Srinivasa Reddy (Supra) observed that the Appeals involve substantial questions of law regarding interpretation of certain provisions of Karnataka Urban Water Supply and Drainage Board Act, 1973 and the Rules made there under ***and also the principles of law governing the writ of quo warranto.***

Consequently the Hon'ble Apex Court has held as under:

"PARA 76

"The Notification dated 31.01.2004 clearly stated that the appointment is on contract basis and until further orders. While laying down the terms of appointment in its order dated 21.04.2004, the Government of Karnataka clearly stated that the "term of contractual appointment of Shri B.Srinivasa Reddy shall commence on 01.02.2004 and will be in force until further orders of the Government and this is a temporary appointment". Section 6(1) of the Act categorically states that the Managing Director shall hold Office during the pleasure of the Government. The power and functions of the Board are laid down in Chapter V of the Act. A reading of the Act clearly shows that neither the Board nor its Managing Director is entrusted with any sovereign function. Black's Law Dictionary defines public office as under:"

"Public Office- Essential characteristics of "public office' and (1)authority conferred by law, (2) fixed tenure of Office, and (3) power to exercise some portion of sovereign functions of Government; key element of such test is that "Officer' is carrying out sovereign function, Spring v. Constantino. Essential elements to establish public position as "public office' are: position must be created by Constitution , legislature or through authority conferred by legislature, portion of sovereign power of Government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control or power other than law and position must

have some permanency and continuity .State v.Taylor."

*9. It is now a trite law that in order to maintain a Writ of Quo-Warranto it has to be established that the post held by the alleged usurper is a "**Public Office'.***

*10. In our opinion, one of the most important conditions which the person seeking a writ of quo-warranto must satisfy is that the Office in question is a "**Public Office'** and the same is of a public nature. If this condition is satisfied, only in such a case the Court may proceed further to inquire as to whether the appointment to the "Public Office' is really in violation of statutory rules and regulations or any provision of law.*

*11. Pre-requisite for maintaining a Writ of Quo-warranto is to establish and satisfy before the Court that the Office in question is a "**Public Office'** and it is held by a person without legal authority.*

6. When the facts of the instant case are tested on the touchstone of law laid down by this Court in the case of **Dr. Neetu Singh (supra)**, the basic question would be as to whether the holder of the post of Chief Medical Superintendent would be considered to be holder of a 'Public Office' and whether the post of Chief Medical Superintendent qualifies the essential characteristics of 'Public Office' as illustrated in the aforesaid Division Bench judgment.

7. There is a distinction between Public Office, Public Authority and Public Duty. A Chief Medical Superintendent of SGPGIMS can be said to be discharging a Public Duty but that *ipso facto* would not make that the post of Chief Medical Superintendent as a 'Public Office' for the purpose of maintaining a writ of quo-warranto.

8. In regard to ***"Public Office'***, the Calcutta High Court in the case of *Shashi Bhushan Ray Vs Pramatha Nath Bandopadhyay* reported in **(1966) SCC Online Cal 153;Paragraph 45** has relied upon *Ferris Extra-ordinary Legal Remedies* (Page 168), and consequently observed that the Law is stated to be that a Public Office is the right, authority and duty created and conferred by law by **which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the Public, for the term and by the tenure prescribed by Law. In other words, it entails an obligation of the sovereign power.**

9. ***"Public Office'*** as explained by the Major Law Lexicon IV Edition 2010 is as under:

"Public Office' *defined .55-6 V.c.40 S.4 A position whose occupant has legal authority* ***to exercise a government's sovereign powers*** *for a fixed period.*

10. A ***"Public Office'*** is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emoluments and duties. The determining factor, the test, is whether the Office involves a delegation of some of the solemn functions of government,

either executive, legislative or judicial, to be exercised by the holder for the public benefit.(72 CWN 64,Vol.72) *[Extraordinary Legal Remedies, by Ferris as referred in V.C.Shukla v. State(Delhi Admn),(1980) Supp 249,266 Para 26]* In Re Miram's(1891) IQB 594 Cave.J, said "to make the Office a Public Office the pay must come out of national and not out of local funds the Office must be public in the strict sense of that term. It is not enough that the due discharge of the duties should be for the public benefit in a secondary and remote sense".

11. According to the Black's Law Dictionary 6th Edition, the term ***''Public Office'*** is explained as under:

*"Public Office, Essential characteristics of "**Public Office'** are (1) authority conferred by law (2) fixed tenure of Office and (3) power to exercise some portion of sovereign functions of government; key element of such test is that "Officer" is carrying out sovereign function. Spring v. Constantino, 168 Conn.563,362 A...2nd 871, 875. Essential elements to establish public position as **''Public Office'** are position must be created by Constitution, Legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity. State ex rel.Eli.Lily and Co. v Gaertner, Mo.App,619 S.W, 2D , 761, 764."*

12. What can be deduced from the term ***''Public Office'*** as explained by various authorities and the authoritative pronouncements is that a ***''Public Office'*** is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the **sovereign functions of the Government** to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of portion of sovereign power. It is a trust conferred by public authority for a public purpose, embracing the idea of tenure, duration, emoluments and duties. A public officer is, thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached. The Common Law Rule is that in order for the writ of quo warranto to lie, the office must be of a public nature. The determining fact, the test, is whether the office involves a delegation of some of the solemn functions of Government either executive, legislative or judicial, to be exercised by the holder of such office for general public benefit at large. Unless his powers are of this nature, he is not a public officer.

13. Hon'ble Supreme Court in the case of ***''Agriculture Produce Market Committee VS Ashok Hariauni and another'*** reported in **(2000) 8 SCC 61**, in Paragraph 21, has held as under:

Para 21:

"In other words, it all depends on the nature of power and the manner of its exercise. What is approved to be "Sovereign' is defence of the Country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory. These are not amenable to the jurisdiction of ordinary Civil Courts. The other function of the State including welfare activity of State could not be construed as "Sovereign' exercise of power. Hence every governmental function

need not be "Sovereign'. State activities are multifarious, from the primal "Sovereign' power which exclusively inalienably could be exercised by the sovereign alone, which is not subject to challenge in any civil court to all the welfarte activities, which would be undertaken by any private person. So merely if one is an employee of statutory bodies would not take it outside the Central Act. If that be so then Section 2(a) of the Central Act read with Schedule I gives large number of statutory bodies which should have been excluded, which is not. Even if a statute confers on any statutory body, any function which could be construed to be "Sovereign' in nature would not mean every other functions under the same statute to be also sovereign. The court should examine the statute to sever one from the other by comprehensively examining various provisions of the Statute . In interpreting any statute to find if it is "industry' or not we have to find its pith and substance. The Central Act is enacted to maintain harmony between employer and employee which brings peace and amity in its functioning. This peace and amenity should be objective in the functioning of all enterprises. This is to the benefit of both the employer and employee. Misuse of rights and obligations by either or stretching it beyond permissible limits have to be dealt with within the framework of the law but endeavour should not be in all circumstances to exclude any enterprise from its ambit. That is why courts have been defining "industry' in the widest permissible limits and "sovereign' functioning within its limited orbit."

14. From the perusal of the judgment of Hon'ble Apex Court in ***Agriculture Produce Market Committee (supra)*** it is culled out that for a particular function to be a *"sovereign function'* it would depend on the nature of the power and the manner in which it is exercised. All Welfare Activities of the State could not be construed as ***''Sovereign'*** exercise of power. Hence, every governmental function need not be ***''Sovereign'***. The mere fact that one is an employee of a statutory body would not *ipso facto* mean that the function exercised by such employee is ***''Sovereign'*** in nature.

15. ***Soverign*** has been defined in *Black's Law Dictionary* as under:-

"Sovereign: *adj.*

(Of a state) characteristic of or endowed with supreme authority< sovereign nation> < sovereign immunity>.

Sovereign: *n*

1. A person, body or State vested with independent and supreme authority.

2. The ruler of an independent state-

Sovereign people

The political body consisting of the collective number of citizens and qualified electors who possess the powers of sovereignty and exercise them through their chosen representatives.

Sovereign power

The power to make and enforce laws."

16. From the aforesaid discussion, it is evident that the post of Chief Medical Superintendent of SGPGIMS cannot be held to be a 'Public Office' merely because the SGPGIMS is in the field of medical service. The office of Chief Medical Superintendent does not seem to involve an obligation of any of the sovereign functions of the Government either

Executive or Legislative or Judicial for public benefit. It cannot be said that the public in general is interested and non-observance of the obligations of employment of respondent no.3 as a Chief Medical Superintendent, in any event, shall effect the interest of public at large; and even if it would affect, the same shall be too remote so as to make the office of the Chief Medical Superintendent a 'Public Office'.

17. Taking into consideration the aforesaid discussion, the preliminary objection as raised by Sri Sanjay Bhasin, learned Senior Advocate is upheld and the writ petition is accordingly **dismissed.**

(2020)1ILR 1892

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-A No. 49709 of 2017
Connected With

Writ-A No. 48501 of 2017
With Writ-A No. 55657 of 2017
With Writ-A No. 5259 of 2018
With Writ-A No. 53240 of 2017

Nitin Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Kailash Singh Kushwaha, Sri Prabhakar Awasthi

A. Service – Appointment/Recruitment - U.P. Subordinate Service Selection Commission Act, 2014: Section 2, 15(2), 17, 18; U.P. Industry Department (Handloom and Textile Industry Directorate) Subordinate Service Rules, 1992; Direct Recruitment (4th Amendment) Rules, 2014: Rule 5(3)(A); U.P. Public Service Commission Rules, 2002; U.P. Direct Recruitment to Group 'C' Posts (Method and Procedure) Rules, 2015: Rule 8(1); U.P. Rules of Business, 1975 - The question for consideration before this Court is that whether the rules as amended in the year 2014, or Rules of 2015 notified after the formation of the Commission by the Act of 2014 would be applicable. (Para 24)

Once the Commission was established, it was bound to follow the rules and regulations so framed under the act and to do away with the earlier procedure prescribed under the various rules and regulations. Selection has to be made according to the rules applicable at the time of advertisement and not subsequently, but the present case is slightly different. The Rules of 2014 were not amended or aid of any other rules and regulations were taken into consideration, but after the Rules of 2014 were amended and notified on 29.01.2014, the U.P. Act No. 20 of 2014 came into force and gazette notification was made on 04.12.2014, pursuant to which Rules of 2015 were made which came into operation. (Para 31)

The Commission after advertisement proceeded to make selection on basis of interview after the notification of Rules of 2015 in the month of June 2015. If the interview was held and select list was prepared before the date of notification of Rules of 2015 i.e. 11.05.2015 then Rule 5 (3) (A) of Rules of 2014 would have been applicable and not Rules of 2015. (Para 32)

B. Rule 8 (1) of the Rules of 2015 - Approval of the State Government while conducting and completing the selection proceedings - State Government has power to amend or modify the said rules and any such amendment or modification is binding on the Commission. Therefore, prior to making selection, Commission was not required to send for approval to the State Government. (Para 34)

C. Entire selection process cannot be vitiated unless it was impossible to distinguish the case of tainted from non-tainted one - It is clear from the facts that 47 candidates, having discrepancies in the form filled up by them, are easily identifiable and can be segregated from the list of 152 selected candidates. Thus, the entire selection process cannot be set- aside in one go. (Para 35 & 37)

Writ Petitions allowed. (E-4)

Precedent followed: -

1. Union of India Vs. Rajesh P.U. Puthuvainikathu, (2003) 7 SCC 285 (Para 14 & 35)

2. Inderpreet Singh Kahlon Vs. State of Punjab and others, (2006) 11 SCC 356 (Para 14 & 35)

3. Jogendra Pal and others Vs. State of Punjab and others, (2014) 6 SCC 644 (Para 14, 35 & 36)

4. Ajeet Singh Patel and others Vs. State of U.P. and others, Writ -A No. 37143 of 2017 (Para 14 & 35)

5. Sonia Vs. Oriental Insurance Company Limited, (2007) 10 SCC 627 (Para 20 & 26)

Petition challenges order dated 28.09.2017, passed by State respondents cancelling the entire selection process.

(Delivered by Hon'ble Rohit Ranjan Agarwal,J.)

1. All these five connected writ petitions have been filed challenging the order dated 28.09.2017 passed by the State respondents whereby cancelling the entire selection process made pursuant to the advertisement dated 22.01.2015.

2. To appreciate the controversy in question, it is necessary to advert to the facts of the case, in brief, which are as under;

Facts

3. U.P. Subordinate Service Selection Commission Lucknow (hereinafter referred to as the "Commission') constituted under the U.P. Subordinate Service Selection Commission Act, 2014, issued an advertisement published on 22.01.2015 inviting applications for filling up 156 posts of group "C' which included post of Textile Inspector, Power Loom Inspector, Industrial Supervisor/Technical Supervisor-cum-Accountant, Viewer Textile and Examiner Textile in Hathkargha Evam Vastra Udyog department of the State of U.P. This advertisement was issued on the requisition sent by the Handloom and Textile Directorate on 07.01.2015 to the Commission.

4. Petitioners, in Writ Petition No. 49709 of 2017, applied pursuant to the said advertisement. According to the averment made in the writ petition petitioner nos. 1 to 16 applied for post of Textile Inspector, petitioner nos. 17 to 34 applied for the post of Power Loom Inspector, petitioner nos. 35 to 49 applied for the post of Industrial/Technical Supervisor, petitioner nos. 50 to 66 applied for the post of Supervisor-cum-Accountant, petitioner nos. 67 to to 79 applied for the post of Viewer Textile, petitioner nos. 80 and 81 applied for the post of Master Weaver and petitioner no. 82 applied for the post of Examiner Textile. These petitioners alongwith the petitioners of other connected matters were called for interview on different dates in the month of June 2015. Post interview a select list was published by the Commission on different dates as given below

(i)Select list for the post of Textile Inspector was published on 13.06.2015.

(ii)Select list for the post of Power Loom Inspector was published on 08.06.2015.

(iii)Select list for the post of Industrial Supervisor/Technical Supervisor was published on 23.06.2015.

(iv)Select list for the post of Supervisor-cum-Accountant was published on 09.07.2015.

(v)Select list for the post of Viewer Textile was published on 10.07.2015.

(vi)Select list for the post of Master Weaver was published on 25.05.2015.

(vii)Select list for the post of Examiner Textile was published on 26.05.2015.

5. The Commission thereof forwarded each of the select list for different categories to the Hathkargha Evam Vastra Udyog department. As stated in paragraph 9 of the Writ Petition No. 49709 of 2017, the result, so published, included the names of the petitioners selected for various categories. It was for the first time on 18.03.2016 that the respondent no. 2 referred the matter to the State Government regarding selection which was challenged before this Court and the Lucknow Bench. On 25.04.2016 the State Government directed the respondent no. 2 to issue appointment letters to 152 candidates with regard to whom proceedings for verification of documents had been completed subject to the decision of this Court and the Lucknow Bench.

6. As no appointment letters were issued, some of the selected candidates Mohd. Mustafa Ansari and others preferred Writ Petition No. 23905 of 2016 before this Court, and on 24.05.2016 this Court directed the respondent no. 2 to comply with the order of the State Government within three weeks. Copy of the order dated 24.05.2016 has been brought on record as Annexure No. 13 to the writ petition. Similarly, some other selected candidates filed another writ petition being Writ Petition No. 33177 of 2016 (Krishna Kumar Bharti and others Vs. State of U.P. and others), this Court relying upon the earlier decision of this Court dated 24.05.2016, on 21.07.2016 directed the second respondent to comply the orders of the State Government. This order has also been brought on record as Annexure No. 14 to the writ petition.

7. Respondent no. 2 on 06.05.2016 intimated the State Government regarding some complaints received and also apprised the Government of the fact that Direct Recruitment (4th Amendment) Rules, 2014 envisages for holding of written examination, but the Commission proceeded for selection on basis of interview conducted by giving a go by to the written examination. On the same date, respondent no. 2 also sent a communication to the Commission making certain queries. Further, respondent no. 2 on 07.06.2016 sought guidance of the State Government regarding orders of this Court dated 24.05.2016 and the irregularities made in the selection proceedings. The State Government on 20.06.2016 apprised that on basis of complaint received decision would be taken in consultation with the Administrative Department, Hathkargha Evam Vastra Udyog Department, Commission and Law Department of the State. From the pleadings, it transpires that several meetings and consultation of various agencies of the State Government was held and different opinions were

received, such as opinion of the Personnel Department, Commission and the Law Department. It was on 28.09.2017 that the State Government proceeded to cancel the selection of 152 candidates and also recalled its earlier order dated 25.04.2016.

8. The order impugned dated 28.09.2017 found following discrepancies in the selection made by the Commission, which are as under;

(i)The application forms of 31 candidates did not specify the required experience.

(ii)The application form with regard to one candidate did not specify the employment nor enclosed any experience certificate.

(iii)The experience certificate of six candidates was found to be suspicious.

(iv)In the experience certificate of one candidate as against the required experience of five years the specified experience was for a period of four years, two months and 30 days.

(v)Applications of six candidates instead of specifying the experience specified the training.

(vi)One application did not even bear the signature of the candidate.

(vii)The experience certificate of two candidates had been found to be incorrect.

(viii)Four candidates showed their experience of a period during which they were pursuing educational qualifications.

(ix)The select list did not comply with the requirement of horizontal/vertical reservation.

(x)There existed serious procedural irregularities with regard to 47 out of 150 selected candidates, which vitiated the entire selection.

(xi)The selection did not comply with the procedure as amended in the year 2014; U.P. Subordinate Services Selection Commission Act, 2014 read with U.P. Direct Recruitment Against Group-C Posts (Method and Procedural) Rules, 2015.

Law as applicable:

9. Before proceedings further it would be necessary to have a glance of the relevant Act, Rules and Regulations applicable at the relevant point of time for the selection and appointment on post of Group "C'.

(i)U.P. Industry Department (Handloom and Textile Industry Directorate) Subordinate Service Rules, 1992 (hereinafter referred to as the "Rules of 1992') in which only interview was mode prescribed for selection to the abovementioned posts.

(ii)Direct Recruitment for Group "C" Posts (Outside the purview of the U.P. Public Service Commission Rules, 2002 (hereinafter referred to as the "Rules of 2002') issued vide notification dated 29.06.2002. The said Rules were amended by First Amendment Rules, 2003 vide notification dated 21.06.2003.

(iii)U.P. Procedure for Direct Recruitment for Group "C" Posts (Fourth Amendment) Rules, 2014 (hereinafter referred to as the "Rules of 2014) were in existence at the time of advertisement. These amended Rules of 2014 provided in Rule 5 (3) (A) for direct selection on Group "C' post to be made on basis of written examination and interview both.

(iv)U.P. Subordinate Services Selection Commission Act, 2014 (hereinafter referred to as the "Act of 2014') came into force on 04.12.2014.

(v)Vide notification dated 11.05.2015 U.P. Direct Recruitment to

Group "C" Posts (Method and Procedure) Rules, 2015 (hereinafter referred to as the "Rules of 2015') were notified.

(vi)U.P. Rules of Business, 1975

Submissions

10. Sri Ashok Khare, learned Senior Counsel, assisted by Sri Siddharth Khare, learned counsel for the petitioners, submitted that request sent by the Hathkargha Evam Vastra Udyog department to the Commission for selection on Group 'C' posts was on basis of Rules of 1992 which only provided for interview. He further submitted that the State Government notified the Rules of 2002 on 29.06.2002 which was amended for the first time on 21.06.2003 and subsequently fourth amendment was notified on 29.01.2014 which came to be known as Rules of 2014, provided for both written examination and interview.

11. He further contended that the Commission was constituted pursuant to the Act of 2014 and Section 17 provides that the concerned department will intimate the vacancy to the Commission and further the Commission under Section 18 after receiving the requisition for the vacancies will as soon as possible start procedure for selection either through written examination or interview or both.

12. Sri Khare, learned Senior Counsel, pointed out that once the Commission was established it was in its wisdom in pursuance to Section 18 either to hold written examination or make selection on basis of interview or for both. He further contended that Section 15 (2) of the Act of 2014 further provide for rules and regulations to be framed in regard to appointment, and State Government on 11.05.2015 notified the Rules of 2015. According to Rule 8 of Rules of 2015 direct recruitment can be made either by written examination or interview.

13. Thus, in the present case, though the requisition was made by the department concerned on 07.01.2015 and advertisement was published on 21.01.2015, Rules of 2014 were applicable, but at the time when interview was held in month of June 2015, Rules of 2015 were already notified by the State Government, which only required that direct recruitment can be made either by written examination or on basis of interview, thus, the stand of the State Government that the selection process was faulted on the count that Rule 5 (3) (A) of Rules of 2014 were not followed and entire selection process stood vitiated as only interview was held by the Commission, cannot be sustained.

14. Sri Khare, learned Senior Counsel, further submitted that the order impugned dated 28.09.2017 is in teeth of the law laid down by the Apex Court and this Court, wherein it is found that certain candidates had not fulfilled the eligibility criteria the entire selection will not go and only selection of those candidates who have not complied the requirement of the advertisement, their candidature would be rejected. Reliance has been placed upon the decision of Apex Court in the case of **Union of India Vs. Rajesh P.U. Puthuvainikathu, 2003 (7) SCC 285, Inderpreet Singh Kahlon Vs. State of Punjab and others, 2006 (11) SCC 356** and **Jogendra Pal and others Vs. State of Punjab and others, 2014 (6) SCC 644.** Reliance has also been placed upon decision of Division Bench of this Court, writ petitions being **Writ-A No. 37143 of 2017 (Ajeet Singh Patel and others Vs.**

State of U.P. and others) decided on 28.11.2017.

15. The State contested the matter by filing counter affidavit in which it is stated that the advertisement published on 21.01.2015 categorically mentioned the fact that if application form was not on prescribed format, or was incomplete then the application shall be cancelled. It has been specifically mentioned in paragraph nos. 6 to 9 of the counter affidavit, filed in Writ Petition No. 49709 of 2017, that the form filled up by 31 candidates had not made proper disclosure in column no. 10, and their application form being defective was liable to be rejected. It has also been stated that direct recruitment should have been made following provisions of Rules and Regulations framed under Section 15 (2) of U.P. Act No. 20 of 2014 and not under the provisions of Rules of 1992. It is further stated that pursuant to Section 15 (2) of the Act of 2014, Rules of 2015 had been framed and notified on 11.05.2015, and the Commission has not complied the provisions of Rule 8 (1) of Rules of 2015, which provided for approval of selection process from the Government while conducting and completing selection proceedings. It is also mentioned that the Commission had intimated the respondent no. 2 on 21.01.2017 that application forms of 47 selected candidates did not fulfill the essential educational qualification/experience and other necessary formalities as required in terms of the advertisement. In paragraph 13 it has also been averred that in a meeting presided by the Principal Secretary on 09.09.2016 it was decided that since the Commission had not complied with provisions of Rule 8 (1) of the Rules of 2015 and there were certain irregularities in the selection, opinion was sought from the Department of Personnel as well as Law.

16. The State has also taken stand in their counter affidavit that provisions of Section 18 of the Act of 2014 provides that Commission after intimation of vacancies under Section 17 either hold examination or interview or both, and prepare a list of the candidates, who are found suitable. Further procedure for selection has been provided in Rule 8 (1), which required prior approval of the Government.

17. It has also been stated by the State that request was sent by the concerned department to the Commission on 07.01.2015 and Rules of 2014 was in existence, and selection of Group 'C' post was required to be made on basis of written examination and interview both, and Rules of 1992 was not applicable as the same was forwarded alongwith the request by the department to the Commission. Apart from relying upon provisions of Sections 17 and 18 of the Act of 2014, the State has also relied upon the statement of object and reason for promulgating the Act of 2014.

18. Sri Jagdish Singh Bundela, learned Standing Counsel, appearing for respondent nos. 1 to 3, has submitted that the vacancies which were notified by way of advertisement on 21.01.2015, at that relevant point of time Rule 5 (3) (A) of Rules of 2014 was in operation, which required that both written examination for 40 marks and interview for 25 marks was to be held, but the Commission proceeded to hold interview only, which was against the Rules of 2014. Learned Standing Counsel invited the attention of the Court to the various discrepancies in the application forms filled up by number of

candidates, who found place in the select list, as they failed to adhere to the requisite requirement of the advertisement, which is on record as Annexure No. 1 at page 45 of the paper book, the note appended categorically states that if the form was not in conformity with the format of the Commission or was inproperly filled or it did not bear the signature of the candidate at the right place, then the same could be rejected in a cursory manner.

19. Learned counsel for the State tried to impress upon the fact that 31 such candidates whose form were scrutinized and whose details have been furnished in paragraph nos. 6 to 9 of the counter affidavit was not in conformity with the advertisement and were liable to be rejected. He further pointed out that number of petitions are pending before the Lucknow Bench of this Court. Sri Bundela, further, stressed that the Commission proceeded to hold the selection process on basis of Rules of 1992 and Rules of 2015 which provided only for interview and not written examination, while Rule 5 (3) (A) of Rules of 2014, were amended in the year 2014, categorically provides for written examination of 40 marks and interview of 25 marks, thus, giving go by to the procedure laid down in the rules vitiated the entire selection procedure.

20. Reliance has been placed on a decision of the Apex Court in the case of **Sonia Vs. Oriental Insurance Company Limited, 2007 (10) SCC 627**, wherein the Apex Court has held that the selection will be governed and covered by rules prevailing on the date of which applications were invited and not to the subsequent rules or amendment.

He further submitted that in view of Section 18 of the Act of 2014 the Commission was not fully empowered to act on its own and proceedure for selection has been provided in Section 17 (1) and (2) of the Act. Reliance has also been placed upon the object and reason of promulgating the Act of 2014.

21. Sri Prabhakar Awasthi, learned counsel appearing for the Commission, has submitted that the Commission was a formal party and had acted only on basis of the requisition so received by it and after selection, so made, forwarded it to the Government. Apart from it, no other submissions were forwarded on behalf of the Commission neither any counter affidavit was filed.

Conclusion

22. I have heard learned counsel for the parties and perused the material on record.

23. The entire controversy hinges around the applicability of Rules of 2014, U.P. Act No. 2014 and the Rules of 2015.

24. The question for consideration before this Court is that whether the rules as amended in the year 2014, or Rules of 2015 notified after the formation of the Commission by the Act of 2014 would be applicable.

25. As it is not in dispute that a requisition for the appointment of 156 candidates for Group "C' posts were made by Hathkargha Evam Vastra Udyog department to the Commission on 07.01.2015. Acting on the request, the Commission proceeded to make advertisement inviting applications from eligible candidates on 21.01.2015. It is also not in dispute that at this relevant point of time the Rules of 2014 were in operation which mandated written

examination as well as interview. The advertisement did not provide for any examination or interview. It appears that as the Act of 2014 came into force on 04.12.2014, the Commission in exercise of its power provided under Section 18 had proceeded to make advertisement for selection on Group "C' posts. The State Government thereafter framed the Rules of 2015 exercising power under Section 2 of U.P. Act No. 20 of 2014 wherein in Rule 8 it was provided that Group "C' appointments can either be made by written examination or by interview.

26. While Rules of 2015 were notified on 11.05.2015 i.e. after the date of advertisement, which was published on 21.01.2015. The moot question is whether the Commission which was constituted after coming of amended Rules of 2014 by U.P. Act No. 20 of 2014 was to proceed in accordance with the Rules of 2014 as advertisement was made on 21.01.2015 while rules made pursuant to Act were notified on 11.05.2015, in view of the judgment of Apex Court in the case of **Sonia (supra)**, or the rules followed by the Commission proceeding to make selection on basis of interview, which were held in the month of June 2015 subsequently to the enforcement of the Rules of 2015.

27. It is no doubt true that at the time of publication of advertisement Rules of 2014 which was amended twice was in force, but it cannot be denied that the concerned department had requested the Commission for making selection on basis of the Rules of 1992 which provided for selection on basis of interview only. It is also correct that the Rules of 2015 were notified subsequent to the advertisement which were in place before interview took place.

28. The stand taken by the State is two fold. Firstly, it is relying upon the certain discrepancies in the form filled by 47 candidates and there being defect in filling up column no. 10 on basis of which the selection process has been set-aside. The State has also taken a stand in its counter affidavit that the Commission had not complied with the Rule 8 (1) of the Rules of 2015 by not taking prior approval of the State Government while conducting and completing the selection proceedings. The State cannot, at the same time, blow hot and cold by taking two stand, firstly that Rule 5 (3) (A) of Rules of 2014 provided written examination of 40 marks and interview of 25 marks and secondly that the Rules of 2015 were not followed as far as taking prior approval for selection process. It has to stick to one ground whether the Rules of 2014 are applicable on the Commission or Rules of 2015 are applicable.

29. From the reading of U.P. Act No. 20 of 2014, it is clear that once the Commission was established pursuant to the gazette notification, the Commission proceeded for selection for Group "C' posts. It was required under Section 15 (2) of the Act of 2014 to make selection in view of rules and regulations framed thereunder.

30. As the Rules of 2015 were notified on 11.05.2015 the Commission proceeded to make selection as per Rules of 2015 which required for either written examination or interview. Thus the action of the Commission cannot faulted on the count that it was to proceed on the basis of Rules of 2014, specifically Rule 5 (3) (A) which provided for written examination as well as interview. The statement of object and reason of promulgating the Act of

2014 also has relevance and same is extracted here as under;

"It is necessary to select able, worthy and hard working personnel for appointment to certain posts in administrative departments of the State. It is also necessary to ensure the quality of selection, its impartiality and transparency in their selection. Though the institution of Uttar Pradesh Public Service Commission is present at Constitutional Level but owing to increased pressure on its working, difficulty is being realized regarding selection on Group "C" posts. In near past, selection on Group "C" post was being done under the direct supervision of the State Government, but Head of Department had to devote much time for the above selections which is severely affecting the Government works as well as the works of public interest. Due to all these reasons, it is quite necessary to establish an independent Subordinate Service Selection Commission consisting of the Chairperson and Members similar to that of the Uttar Pradesh Public Service Commission for timely selection on certain Group "C" posts. It has therefore, been decided to make a law to provide for the establishment of a Commission by the name of the Uttar Pradesh Subordinate Service Selection Commission for the selection on certain Group "C" posts in the State "

31. Thus, from reading the object, it is clear that Commission has been established for making selection of certain Group "C" post in the State to select able, worthy and hardworking persons in administrative department of the State. Once the Commission was established, it was bound to follow the rules and regulations so framed under the act while making selection and to do away with the earlier procedure prescribed under the various rules and regulations. It is no doubt true that selection has to be made according to the rules applicable at the time of advertisement and not subsequently, but the present case is slightly different, as in case in hand the Rules of 2014 were not amended or aid of any other rules and regulations were taken into consideration, but after the Rules of 2014 were amended and notified on 29.01.2014, the U.P. Act No. 20 of 2014 came into force and gazette notification was made on 04.12.2014, pursuant to which Rules of 2015 were made which came into operation.

32. Had the Commission held the interview and prepared the select list before the date of notification of Rules of 2015 i.e. 11.05.2015 then the argument of the State could have been accepted to the extent that Rule 5 (3) (A) of Rules of 2014 were applicable and not Rules of 2015, but the Commission after advertisement proceeded to make selection on basis of interview after the notification of Rules of 2015 in the month of June 2015. Thus, relevant rule for consideration for selection would be Rules of 2015 and not the Rules of 2014.

33. The second argument of the State to the extent that prior approval of the State was not taken by the Commission in view of Rule 8 (1) of Rules of 2015 is also not founded on any strong ground, as plain and simple reading of the rule suggests that Commission while dealing with the process of direct recruitment either on basis of written examination or marks of interview shall advert to the rules which are from time to time approved by the State Government.

34. In the present case the rules were already notified on 11.05.2015 and Rule 8 categorically provided that the procedure for direct recruitment will either be held on basis of written examination or marks of interview. It is not in dispute that the State Government has power to amend or modify the said rules and any such amendment or modification is binding on the Commission. Thus, the argument of the State cannot be accepted by any stretch of imagination that prior to making selection, Commission was required to send for approval to the State Government.

35. As far as the argument made by learned Senior Counsel appearing for the petitioners that the entire selection process did not stood vitiated on the ground that there were certain discrepancies found by the Commission in the form of certain candidates and the entire selection could not be held to be tainted, finds support from the Division Bench judgment of this Court in the case of **Ajeet Singh Patel and others (supra)** as well as the law laid down by the Apex Court in the case of **Rajesh P.U. Puthuvainikathu (supra)** wherein Apex Court held that there was no justification to deny appointment to those selected candidates whose selection was not vitiated in any manner. In **Jogendra Pal and others (supra)** Apex Court considering its earlier judgment in the case of **Inderpreet Singh Kahlon (supra)** held that entire selection process cannot be vitiated unless finding was arrived that it was impossible to distinguish the case of tainted from non-tainted one.

36. As in the present case, the order impugned clearly mentions that out of 152 candidates selection of 47 candidates suffers from serious procedural irregularities. In the counter affidavit in paragraph nos. 6 to 9 candidate wise list has been given stating the discrepancies in their forms, so submitted, thus, the respondent State functionaries are well aware of the fact that who are tainted and non-tainted candidates and thus by a sweeping order the entire selection process cannot be set-aside in one go, which is against the mandate of Apex Court in the case of **Jogendra Pal and others (supra).**

37. Considering the facts of the case and keeping in mind the decisions of the Apex Court and Division Bench of this Court, I am of the view that the respondent State proceeded to set-aside the entire selection process merely on the ground that out of 152 selected candidates, candidature of 47 candidates was found to be not in accordance with the terms and conditions as mentioned in the advertisement, and non-submission of the requisite qualification by them in the form, which cannot be the basis for cancelling the entire selection, so made. As from the reading of order impugned, it is clear that those 47 candidates are easily identifiable and can be segregated from the list of 152 selected candidates. Thus, the orders impugned are not based on any sound and cogent reasons and same are hereby quashed.

38. It is expected that the State authorities shall issue necessary orders for the rest of the selected candidates whose candidature are in accordance with the law and the earlier order of State Government dated 25.04.2016 being modified to the extent that appointment order be issued to those validly selected candidates excluding those whose forms are not in proper format, as given in the order impugned dated 28.09.2017.

39. All the writ petitions stand **allowed.**

(2020)1ILR 1902

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2019

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 54270 of 2017

Ramakant ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prem Narayan Rai, Sri Bikash Kumar Mishra, Sri Himanshu Kumar, Sri Jafar Naiyar

Counsel for the Respondents:
A.S.G.I., Sri Rohan Gupta, Sri Shabha Jeet Singh, Sri Shivam Shukla

A. Challenging-impugned order-affirming-petitioner's dismissal-from the post of bus conductor-on the ground-obtaining appointment on the basis of forged caste certificate-wilfully & deliberately-suppressed-real social status-caste certificate-the very foundation of appointment-declared to be false-appointment rendered-void or non-est.

B. Held, once the social status certificate is declared false by the competent authority, the appointment would render void or non est. In that event, the employer would not be required to initiate regular departmental proceedings under the Rules for the reason that the certificate would bind the disciplinary authority. In such an event, the delinquent employee can be removed from service upon a show cause notice. The disciplinary authority would have no occasion to return a finding in a proceeding to a charge. The very foundation on which the services of the delinquent employee was based upon being demolished, the consequence would be automatic removal from service. In the instant case, admittedly, the District Collector being the competent authority upon verification had certified that the petitioner does not belong to the SC community, consequently, the appointment of the petitioner would render it void or non est. Even then IIT Kanpur got conducted a full-fledged departmental enquiry for imposition of major penalty in accordance with the Rules.

Writ Petition dismissed. (E-8)

List of cases cited: -

1. Kumari Madhuri Patil v. Additional Commissioner, Tribal Development

2. R. Vishwanath Pillai v. State of Kerala

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

1. Heard Sri Jafar Naiyar, learned Senior Counsel assisted by Sri Prem Narayan Rai and Sri Himanshu Kumar, learned counsels for the petitioner and Sri Rohan Gupta, learned counsel assisted by Sri Shivam Shukla, learned counsels for the respondent.

2. Petitioner, by the instant writ petition is assailing the order dated 6 November 2017, passed by the second respondent, Chairman, Board of Governors, Indian Institute of Technology, Kanpur1, District Kanpur Nagar, affirming the order of dismissal dated 20 April 2017, passed by the third respondent, Director, IIT Kanpur, District Kanpur Nagar.

3. The facts giving rise to the instant petition is that petitioner applied for the post of bus conductor pursuant to Advertisement No. 24 of 1982, under the Scheduled Caste (SC) category on the

strength of caste/social status certificate dated 14 July 1978, being member of 'Majhwar' community. The caste certificate was duly issued by the Tehsildar, Tehsil Kalpi, District Jalaun. Petitioner came to be appointed on the post of bus conductor on 28 May 1983, subsequently, was confirmed and made permanent on 30 March 1988, on the post of Bus Conductor Grade-II. On a complaint received by IIT Kanpur, alleging that petitioner obtained appointment on a forged caste certificate. Petitioner belongs to Other Backward Class (OBC), i.e. caste 'Kewat'. On the complaint, petitioner was subjected to notice dated 22 April 2014, calling upon him to show cause. Petitioner replied to the show cause notice denying the allegations levelled against him. The competent authority of the IIT Kanpur communicated with the District Magistrate, Jalaun, to enquire into the social status of the petitioner. No response was received, consequently, IIT Kanpur sought the intervention of the Ministry of Human Resources Development, Government of India. The Human Resources Department vide communication dated 11 March 2015, requested the Chief Secretary, Government of Uttar Pradesh, to direct the District Magistrate, Jalaun, to enquire into the matter. It appears, thereafter, the District Magistrate, Jalaun at Orai, vide communication dated 30 April 2015, informed IIT Kanpur that petitioner belongs to 'Kewat/Mallah/Nishad' community which is notified as OBC.

4. Petitioner came to be suspended on 22 June 2015, and was also served the articles of charge along with imputation of misconduct and the list of documents and witnesses in support of the charges. Three charges were leveled against the petitioner primarily alleging that petitioner had obtained appointment under the SC category, intentionally and deliberately misrepresenting his caste as "Majhwar', whereas, in fact, he belongs to 'Kewat' caste recognized as OBC notified by the Government of India. Petitioner filed written statement denying the charges, consequently, an enquiry officer came to be appointed. The IIT Kanpur sought to prove the charge on the statement of three witnesses, including, Tehsildar, Tehsil Kalpi, District Jalaun. The witnesses appeared and deposed in the presence of the petitioner, he was allowed to cross examine them. In defence, petitioner offered himself as a defence witness and Sri Munna Lal his cousin. Petitioner contended before the enquiry officer that he was born in "Majhwar' community which is recognized as SC. In support of his contention, he submitted copy of the family register, wherein, it has been shown that he belongs to hindu "Majhwar' caste. Reliance was placed on an order passed by this Court in a petition being Writ Petition No. 42794 of 2002 (Smt. Shashi Lata Versus Superintending Engineer and others), wherein, the niece of the petitioner Smt. Shashi Lata was held belonging to "Majhwar' community, accordingly, on the directions of this Court she came to be reinstated. It was further alleged that the proceedings initiated against the petitioner is malicious as it has been initiated on the complaint of the Secretary of the society against whom petitioner made complaint for encroaching the land and property belonging to IIT Kanpur.

5. The inquiry officer upon considering the evidences and rival written contentions noted in the enquiry report dated 18 April 2016, that the caste

certificate of the petitioner was duly verified from the competent authority i.e. Tehsildar Kalpi/District Magistrate, District Jalaun. They found that as per family register (2001-02) the caste of Munna Lal (D.W.-2) is recorded hindu "Kewat'. The documents/certificates relied upon by the petitioner to contend that he belongs to hindu "Majhwar' was not found supported by the entries made in the family register. A report was submitted by the Khand Vikash Adhikari, Maheva (Jalaun), upon verifying the records that the caste of D.W.-2 is hindu (Kewat). The Tehsildar, Kalpi, also submitted a report on reinquiring the matter that the caste of the petitioner is hindu (Kewat) and not "Majhwar' as he proclaimed. The order of the writ court pertaining to Smt. Shashi Lata was noticed by the inquiry officer. The order nowhere declares that Smt. Shashi Lata belongs to hindu (Majhwar) caste. The order of her reinstatement was passed on pure technical ground. Accordingly, the enquiry officer returned a finding that the petitioner willfully and deliberately suppressed his real social status and obtained appointment against the post reserved for SC category, whereas, petitioner, a resident of Village Gurhakhas, Tehsil Kalpi, District Jalaun, was fully aware of his caste being hindu (Kewat). The charges came to be proved.

6. The copy of the enquiry report was furnished by the third respondent, Disciplinary Authority to the petitioner vide communication dated 16 May 2016. Petitioner submitted his written objections on 30 May 2016, inter alia, stating therein that the caste certificate of the petitioner issued in 1978 has not been canceled by the competent Scrutiny Committee as mandated by the Supreme Court in **Kumari Madhuri Patil v. Additional Commissioner, Tribal Development**2. The inquiry officer though has noted in the enquiry report that petitioner had admitted during cross examination that the Tehsildar is competent authority to issue caste certificate. However, on the objection of the petitioner, IIT Kanpur vide communication dated 13 June 2016, addressed to the District Magistrate, Jalaun, sought clarification as to whether the social status of the petitioner was verified in accordance with the guidelines issued by the Supreme Court. The District Magistrate vide communication dated 19 September 2016, reaffirmed the report of the Tehsildar, Tehsil Kalpi, contending therein that the report is strictly in accordance with the guidelines. Thereafter, by the impugned order dated 20 April 2017, passed by the third respondent, Director, IIT Kanpur, District Kanpur Nagar/Disciplinary Authority, the services of the petitioner came to be dismissed. Aggrieved, petitioner preferred an appeal before the second respondent which was rejected on 16 November 2017.

7. In the aforementioned back drop, learned Senior Counsel appearing for the petitioner submits that the caste certificate (Majhwar) was issued by the competent district authority and there was no fraud or misrepresentation; reliance has been placed on the extracts of the family register to contend that petitioner belongs to caste (Majhwar); the caste certificate till date is intact and has not been cancelled; the social status of the niece of the petitioner, namely, Shashi Lata has been held by this Court being caste "Majhwar' and not "Kewat'. Extract of family register and school leaving certificate has been placed on record to contend that the petitioner belongs to caste "Majhwar'.

8. On specific query, learned counsel for the petitioner does not dispute that the

departmental proceedings against an employee of IIT Kanpur is governed by the Statutes framed in exercise of powers conferred under the Indian Institutes of Technology Act, 19613. Statute (13) governs the proceedings. The procedure prescribed therein was duly complied and petitioner was given opportunity at every stage of the proceedings as per the Rules/Statutes. In other words, there is no procedural irregularity.

9. Sri Rohan Gupta, learned counsel appearing for the respondent, submits that the procedure prescribed under the Statute read with Central Civil Services (Classification, Control & Appeal) Rules, 19654, was duly complied. It is further submitted that the social status of the petitioner was duly verified by the District Magistrate, Jalaun, in terms of the guidelines ennunciated in **Madhuri**2 case; the extract of the documents i.e. family register, school leaving certificate filed along with the writ petition are fabricated and forged documents; social status certificate of the niece of the petitioner has not been verified by any authority/forum including this Court; reliance has been placed on the report of the Principal, Sri Thakkar Bapa Inter College, Hindi Bhawan, Kalpi, (Jalaun), dated 15 February 2014, to contend that petitioner was admitted to class VI on 16 July 1966, his caste in the school register is recorded "Kewat'. The copy of the extract is duly certified; copy of the application form submitted on behalf of the petitioner was supplied by the Principal of the school; the documents has been placed on record. Further, it is urged that the extract of family register (2001-02) records that petitioner and his family members are recorded belonging to "Kewat' community. The report further certifies that Munna Lal (D.W.-2), cousin of the petitioner, is recorded hindu "Kewat' in the family register. Further, reliance has been placed on the revenue record of 1995 pertaining to transfer of land by Sri Munna Lal (D.W.-2), wherein, his caste is recorded "Nishad' under OBC category. The report of the Collector further records that the relatives and family members of the petitioner have been married into "Kewat/Mallah/Nishad' community and not "Majhwar'. The authorities verified the documentary evidence, the social status of relatives and family members of the petitioner, who are all recorded hindu "Kewat' and petitioner alone claims himself belonging to hindu "Majhwar'. Reliance has been placed on the office memorandum dated 10 January 2013, wherein, the departments of the Central Government were directed to take action against the government servants who got appointment on the basis of false SC/ST/OBC certificates and to initiate disciplinary proceedings against them; petitioner till date has not assailed the communications/report issued by the District Magistrate certifying that petitioner belongs to caste "Kewat' and not to "Majhwar' community. It is urged that it was incumbent upon the petitioner to have taken remedy before the State Level Scrutiny Committee by assailing the report of the Tehsildar/District Magistrate. The petition is devoid of merit.

10. Rival submission fall for consideration

11. It is not being disputed by learned counsel for the petitioner that the procedure for imposition of major penalty as contemplated and provided in the Rules governing the employees of IIT Kanpur was duly followed. It is further not

disputed that the petitioner has not assailed the communication/report issued by the District Magistrate certifying that the petitioner belongs to caste "Kewat' notified as OBC. The document placed on record by the respondents i.e. the extract of revenue record of D.W.-2, the family register and the application made on behalf of the petitioner while taking admission, records that petitioner belongs to caste hindu "Kewat' and not "Majhwar' as is being claimed. The Tehsildar, Tehsil Kalpi, District Jalaun, duly appeared and was cross examined by the petitioner. On objection raised by the petitioner that the procedure for verification of the social status certificate mandated in **Madhuri**2 case was not followed, was also rejected upon District Magistrate reaffirming that the guidelines for verification of the social status of the petitioner was duly complied. The entries in school register, family register, social status of the relatives of the petitioner was duly verified, revenue record entries etc. was also considered.

12. Learned Single Judge of this Court in **Sallu Baj Versus State of U.P. and others**5, wherein, the appointment was obtained by the petitioner on the S.T. caste certificate which he otherwise did not belong, the Court held that the very basis of the appointment obtained on misrepresentation and fraud was void ab initio. The argument of the learned counsel for the petitioner that petitioner had applied for the social status certificate disclosing his caste, and the authorities had duly issued the certificate, thus, there was no question of fraud having been committed by the petitioner was rejected.

13. It is further urged that petitioner had put in more than three decades of service and at the fag end of his career a lesser punishment would have sufficed instead of dismissing the petitioner.

14. It is common knowledge that in matters pertaining to employment, when information with regard to the antecedents of a candidate is called for, it is intended to verify and cross-check the suitability of the candidate for the job. If the candidate indulges in suppressio veri and suggestio falsi, he proves himself unfit to be employed. In the instant case, by producing a forged and fabricated certificate on misrepresentation not only did the petitioner secure a job but he was also responsible in depriving a genuine candidate to the post. The appointment of the petitioner is void and non est in the eyes of law. The punishment that has been awarded to the petitioner befits the misconduct committed by him, thus, any modification with respect to the quantum of punishment will only amount misplaced sympathy and perpetuate the fraud.

15. A similar plea about long years of service rendered on forged document was considered by the Supreme Court in **R. Vishwanath Pillai v. State of Kerala and others**6, it was held to be inconsequential. In paragraph 21, it was observed:

"The appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eye of law. The right to salary or pension after retirement flow from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where

the appointment was found to have been obtained fraudulently and rested on a false caste certificate. A person who entered the service by producing a false caste certificate meant for a Scheduled Caste, thus depriving a genuine Scheduled Caste candidate of appointment to that post, does not deserve any sympathy or indulgence of this Court. A person who seeks equity must come with clean hands. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of a false caste certificate by playing fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in case where the individual acquired a status by practising fraud."

16. The argument of the learned counsel for the petitioner for modification of the quantum of punishment lacks merit, accordingly, rejected.

17. It is, thereafter, vehemently urged on behalf of the petitioner that in view of dictum of law laid down by the Supreme court in the decisions reported as **Kumari Madhuri Patil v Additional Commissioner, Tribal Development7, Director of Tribal Welfare, Government of AP v Laveti Giri8, Lillykutty v Scrutiny Committee, SC & ST& Ors9 and Union of India v Dattatray**10, the only authority which is empowered under law to examine genuineness of the caste certificate is Caste Scrutiny Committee, it is therefore submitted that the inquiry officer committed jurisdictional error in returning a finding upon the validity of the caste certificate submitted by the petitioner.

18. The question therefore arises is as to whether the enquiry officer committed jurisdictional error in returning finding upon the social status of the petitioner.

19. In **Madhuri**2 case following guidelines were laid down by Supreme Court regarding procedure for issuance, scrutiny and approval of social status certificates:-

"13. The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled Tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. The ineligible or spurious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the Scrutiny Committee. It is true that the applications for admission to educational institutions are generally made by a parent, since on that date many a time the student may be a minor. It is the parent or the guardian who may play fraud claiming false status certificate. It is, therefore, necessary that the certificates issued are scrutinised at the earliest and with utmost expedition and promptitude. For that purpose, it is necessary to streamline the procedure for the issuance of social status certificates, their scrutiny and their approval, which may be the following:

1. The application for grant of social status certificate shall be made to the Revenue Sub- Divisional Officer and Deputy Collector or Deputy Commissioner and the certificate shall be issued by such

officer rather than at the Officer, Taluk or Mandal level.

2. The parent, guardian or the candidate, as the case may be, shall file an affidavit duly sworn and attested by a competent gazetted officer or non-gazetted officer with particulars of castes and sub- castes, tribe, tribal community, parts or groups of tribes or tribal communities, the place from which he originally hails from and other particulars as may be prescribed by the Directorate concerned.

3. Application for verification of the caste certificate by the Scrutiny Committee shall be filed at least six months in advance before seeking admission into educational institution or an appointment to a post.

4. All the State Governments shall constitute a Committee of three officers, namely, (I) an Additional or Joint Secretary or any officer higher in rank of the Director of the department concerned, (II) the Director, Social Welfare/Tribal Welfare/Backward Class Welfare, as the case may be, and (III) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates. In the case of the Scheduled Tribes, the Research Officer who has intimate knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.

5. Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over-all charge and such number of Police Inspectors to investigate into the social status claims. The Inspector would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc.

6. The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine" or ,,doubtful" or spurious or falsely or wrongly claimed, the Director concerned should issue show-cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the educational institution concerned in which the candidate is studying or employed. The notice should indicate that the representation or reply, if any, would be made within two weeks from the date of the receipt of the notice and in no case on request not more than 30 days from the date of the receiptof the notice. In case, the candidate seeks for an opportunity of hearing and claims an inquiry to be made in that behalf, the Director on receipt of such representation/reply shall convene the committee and the Joint/Additional Secretary as Chairperson who shall give reasonable opportunity to the

candidate/parent/guardian to adduce all evidence in support of their claim. A public notice by beat of drum or any other convenient mode may be published in the village or locality and if any person or association opposes such a claim, an opportunity to adduce evidence may be given to him/it. After giving such opportunity either in person or through counsel, the Committee may make such inquiry as it deems expedient and consider the claims vis-à-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.

7. In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.

8. Notice contemplated in para 6 should be issued to the parents/guardian also in case candidate is minor to appear before the Committee with all evidence in his or their support of the claim for the social status certificates.

9. The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the Caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

10. In case of any delay in finalising the proceedings, and in the meanwhile the last date for admission into an educational institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or appointed on the basis of the social status certificate already issued or an affidavit duly sworn by theparent/guardian/candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee.

11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.

12. No suit or other proceedings before any other authority should lie.

13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/miscellaneous petition/matter is disposed of by a Single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 227.

14. In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or offices under the State or the Union or elections to any local body, legislature or Parliament.

15. As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the educational institution concerned or

the appointing authority by registered post with acknowledgement due with a request to cancel the admission or the appointment. The Principal etc. of the educational institution responsible for making the admission or the appointing authority, should cancel the admission/appointment without any further notice to the candidate and debar the candidate from further study or continue in office in a post."

20. The guidelines was issued stipulating a fair and just procedure to shorten the undue delay. The endeavour was to give effect of the guidelines and ensure that the constitutional objectives intended for the benefit and advancement of the genuine SC/ST/OBC classes candidates, as the case may be are not defeated by unscrupulous persons.

21. From the aforesaid, it is crystal clear that the only decision which may have some relevance on the issue in hand is the decision of Supreme Court in **Madhuri** (supra) case. **Laveti Giri** (supra) merely reiterates the guidelines laid down by Supreme Court in **Madhuri**2 case. **Lillykutty and Dattatray** (supra) has no application whatsoever on the issue in hand.

22. Having examined the decision of **Madhuri**2 case, it cannot be said that **Madhuri** case lays down that the Inquiry Officer would commit an error in returning a finding upon the social status of the petitioner for the same was a matter which exclusively falls in the domain of Caste Scrutiny Committee. The guidelines issued in **Madhuri**2 case lays down the procedure to be followed for issuance of fresh caste certificates or verification of caste certificates already issued by the authorities. By no stretch of imagination, **Madhuri** case lays down that wherever the issue of correctness of a caste certificate comes up in question, no authority other than Caste Security Committee can enquire into the same.

23. In the facts of the instant case, it is not being disputed by the learned counsel for the petitioner that the finding on the social status of the petitioner returned by the inquiry officer is based upon the reports submitted by the competent authority i.e. Tehsildar/District Magistrate. The Tehsildar (P.W.-3) appeared as a witness before the enquiry officer and reiterated the social status of the petitioner relying upon the reports of various officers based on documents.

24. In the circumstances, the inquirty officer committed no jurisdictional error in returning a finding upon the social status of the petitioner based on the reports and certificates of the Collector. On the contrary, it was incumbent upon the petitioner as per the guideines in **Madhuri**2 case to assail the report either before the State Level Committee or before this Court in Article 226/227 of the Constitution of India.

25. Three Judge Bench of the Supreme Court recently in **Chairman and Managing Director, FCI and others Versus Jagdish Balaram Bahira and others**11, upon revisiting the law where the incumbent has obtained benefit of admissions/appointment based on false social status certificate held and declared, inter alia, as follows:

"1. Conclusion

57. For these reasons, we hold and declare that:-

(i) The directions which were issued by the Constitution Bench of this Court in paragraph 38 of the decision in Milind (AIR 2001 SC 393) were in pursuance of the powers vested in this Court under Article 142 of the Constitution;

(ii) Since the decision of this Court in Madhuri Patil (AIR 1995 SC 94) which was rendered on 2 September 1994, the regime which held the field in pursuance of those directions envisaged a detailed procedure for (a) the issuance of caste certificates; (b) scrutiny and verification of caste and tribe claims by Scrutiny Committees to be constituted by the State Government; (c) the procedure for the conduct of investigation into the authenticity of the claim; (d) Cancellation and confiscation of the caste certificate where the claim is found to be false or not genuine; (e) Withdrawal of benefits in terms of the termination of an appointment, cancellation of an admission to an educational institution or disqualification from an electoral office obtained on the basis that the candidate belongs to a reserved category; and (f) Prosecution for a criminal offence;

(iii) The decisions of this Court in R. Vishwanatha Pillai (AIR 2004 SC 1469) and in Dattatray (AIR 2008 SC 1678) which were ***rendered by benches of three Judges laid down the principle of law that where a benefit is secured by an individual - such as an appointment to a post or admission to an educational institution - on the basis that the candidate belongs to a reserved category for which the benefit is reserved, the invalidation of the caste or tribe claim upon verification would result in the appointment or, as the case may be, the admission being rendered void or non est.***

(iv) The exception to the above doctrine was in those cases where this Court exercised its power under Article 142 of the Constitution to render complete justice;"

26. In view of the principle laid down in **Jagdish Balaram Bahira** (supra), once the social status certificate is declared false by the competent authority, the appointment would render void or non est. In that event, the employer would not be required to initiate regular departmental proceedings under the Rules for the reason that the certificate would bind the disciplinary authority. In such an event, the delinquent employee can be removed from service upon a show cause notice. The disciplinary authority would have no occasion to return a finding in a proceedings to a charge. The very foundation on which the services of the delinquent employee was based upon being demolished, the consequence would be automatic removal from service. In the instant case, admittedly, the District Collector being the competent authority upon verification had certified that the petitioner does not belong to the SC community, consequently, the appointment of the petitioner would render it void or non est. Even then IIT Kanpur got conducted a full fledged departmental enquiry for imposition of major penalty in accordance with the Rules.

27. On specific query, learned Senior Counsel for the petitioner failed to point out any illegality, infirmity or jurisdictional error in the impugned order.

28. The writ petition being devoid of merit is, accordingly, dismissed.

29. No cost.

(2020)1ILR 1912

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2019

BEFORE
THE HON'BLE RAJAN ROY, J.

Consolidation No. 2141 of 1981

Heshamullah & Ors. ...Petitioners
Versus
The U.P. Sanchalak Chakbandi, Pratapgarh & Ors. ...Respondents

Counsel for the Petitioners:
S. Mirza, Anjum Ara, Jagdish Singh, Mohammad Aslam Khan, Shahid Raza

Counsel for the Respondents:
Jitendra Misra

A. Consolidation-Class-9 entry in favour of - then too, erstwhile tenure holder did not initiate any proceedings u/s 209 - S.O.C considered this fact- but DDC ignored-impugned order quashed.

Special Appeal allowed. (E-8)

(Delivered by Hon'ble Rajan Roy,J.)

1. None has appeared on behalf of the contesting opposite party no.3 to argue the matter.

2. Heard.

3. The dispute herein pertains to Gata No.1022. The consolidation operation started on 21.7.1973 on issuance of notification under section 4. In the Basic Year Khatauni the opposite party no.3 Mujibulla was recorded therein consequent to a sale-deed said to have been executed by the erstwhile tenure holder Habib Khan in his favour in the year 1968 which corresponds to 1375F. During *partal* a dispute arose with regard to Sirdari rights on the basis of adverse possession. The petitioners who are the sons of Abdul Majid were allegedly found to be in possession of the land in dispute during *partal*. When the dispute came up for consideration before the Consolidation Officer in the first round of litigation, the Consolidation Officer (C.O.) rejected the claim of the petitioners based on adverse possession vide order dated 8.2.1978, however, when an appeal was filed by the petitioners before the Settlement Officer, Consolidation (S.O.C.), the same was allowed on 19.9.1978 and the order of the Consolidation Officer was set aside and the claim of the petitioners was accepted. Against this the opposite party no.3 filed a revision before the Deputy Director Consolidation (D.D.C.) which was allowed on 10.2.1981. The order of the S.O.C. dated 19.9.1978 was set aside and the order of the C.O. dated 8.2.1978 was restored. The D.D.C. while deciding the revision was persuaded by the fact that the name of Abdul Majid, father of the petitioners came to be recorded in the revenue records for the first time in 1375F as being in possession under Class-9 entry. According to him, the limitation prescribed for perfection of title based on adverse possession became 12 years with effect from 14.11.2017 and, as, the name of Abdul Majid was recorded from 1375F till 1378F, for only 4 Fasli, therefore, the aforesaid period of prescription for perfection of title was not satisfied. He was also persuaded by the fact that the revenue parcha and receipts submitted by the petitioners herein as proof of their continuous and hostile adverse possession were found by him to be of suspect evidentiary value. Based on the aforesaid he declined the claim of the petitioners and

allowed the revision of the opposite party no.3.

4. The Court finds that the period of limitation for a suit under section 209 prescribed at Serial No.30 of Appendix III referred in Rule 338 of the U.P. Zamindari Abolition & Land Reforms Rules 1952 was initially two years. Thereafter it has undergone amendments, firstly, on 9.4.1955, when this limitation was extended to three years from the date of vesting, thereafter, it was further amended and extended to six years from the first of July following the date of occupation vide notification dated 27.3.1959 and thereafter it was again amended and extended to 12 years from the first of July following the date of occupation vide notification dated 14.11.1971.

5. On a perusal of the order of S.O.C. conjointly with the order of the D.D.C. this Court finds that the D.D.C. omitted to consider certain relevant aspects of the matter including certain documents which were on record. He did not consider the Khasra pertaining to 1363 Fasli wherein the name of Abdul Majid was recorded as a Class-9 entry as was taken note of by the S.O.C. This was a material fact. When this order is read conjointly with the order of the S.D.O. dated 25.7.1969 which was passed in proceedings for correction of the revenue records under section 33/39 of the U.P. Land Revenue Act 1901 initiated by Habib Khan, the vendor and predecessor in interest of Mujibullah- Oposite party no.3, wherein, the S.D.O. took note of the fact that the name of Abdul Majid was recorded as Class-9 entry and, considering the continuance of such entry, he observed that, proceedings are not maintainable and the appropriate course for him was to initiate proceedings under section 209 of the U.P. Zamindari Abolition and Land Reforms Act 1950 for eviction of the unauthorized occupant. The D.D.C. also failed to consider another fact which was taken note of by the S.O.C. in his judgment, that is the subsequent (second) proceedings initiated by Habib Khan himself under section 33/39 which culminated in the order dated 26.11.1970 vide which the S.D.O. ordered the earlier Class-9 entry in favour of Abdul Majid to be continued, obviously for the same reason as mentioned in the earlier order dated 25.7.1969. In spite of these two orders, Habib Khan, the erstwhile tenure holder, did not initiate any proceedings under section 209, a fact which was taken note of by the S.O.C., but has been lost sight of by the D.D.C. The effect of non-initiation of any proceedings under section 209 of the Act 1950 as is spelt out in section 210 of the Act 1950 has also not been considered by the D.D.C.

6. Furthermore, Class-9 entry in favour of the petitioner's father Abdul Majid and his alleged possession, whether this was to be considered on the basis of tagging in continuation of such entry, if any, in favour of the petitioners and their possession if any, has also not been considered by the D.D.C.

7. Most importantly the D.D.C. has been persuaded by the fact that the entry in the revenue record pertaining to 1375F allegedly for the first time in favour of Abdul Majid was not in accordance with the Land Record Manual as the requisite diary number at P.A.10 entry are not mentioned nor the process prescribed under the Rules had been followed, but, he failed to appreciate the fact that if the name of Abdul Majid was existing as a Class-9 entry in Khasra 1363F then at that time the provisions contained in paragraph A-

80 and A-81 of Chapter A-V of the Land Records Manual had not come into force and were inserted only subsequently vide notification dated 18.1.1958 nor did he consider as to what would be the effect of this aspect of the matter if there was a Khasra of 1363 F on record with a Class-9 entry in favour of petitioner's father Abdul Majid.

8. In this view of the matter and for the reasons aforesaid as the D.D.C. has not considered the findings and relevant aspects as have been noted hereinabove and as were considered by the S.O.C., therefore, based on such non-consideration, and as all this was considered by the S.O.C., therefore, the order of the D.D.C. is liable to be set aside and the matter is liable to be remanded back for consideration afresh in the light of what has been stated hereinabove.

9. It is, however, made clear that so far as the findings of the D.D.C. as to the veracity and evidentiary value of the irrigation receipts are concerned, they being based on appreciation of evidence which cannot be set aside by the Writ Court under Article 226 of the Constitution, the said findings pertaining to the irrigation receipts are not being interfered with and shall attain finality. Subject to this, reconsideration shall be made the D.D.C. as aforesaid.

10. The order impugned dated 10.2.1981 contained in Annexure No.13 is accordingly **set aside.**

11. The D.D.C. shall dispose off the proceedings aforesaid within eight months from the date a certified copy of this order is submitted, if necessary, by taking up the matter on day-to-day basis as far as possible.

12. The Court has also taken note of the interim order dated 5.5.1981 by which it was ordered that if the petitioners are in possession of the land in dispute, they shall not be disturbed. There is nothing on record to show as to who is in possession of the land in dispute as of now nor as to who is recorded in respect of the above at present.

13. Till disposal of the proceedings by the D.D.C. *status quo* with regard to possession of the land in dispute and entries in the revenue records shall be maintained and neither of the parties shall alienate the same.

14. The writ petition is **allowed** in part.

(2020)1ILR 1914

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-C No. 267 of 2019

Smt. Rajeshwari ...Petitioner
Versus
Commissioner/Additional Commissioner (J), 4th Division, Meerut & Ors. ...Respondents

Counsel for the Petitioner:
Sri Surendra Pratap Singh

Counsel for the Respondents:
C.S.C.

A. U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 157AA/166/167 – Restrictions on transfer by member of schedule castes becoming Bhumidhar under section 131-B - Section 157AA (4) - a person is entitled to execute a sale deed, etc. in favour of person(s) belonging to the Scheduled Caste, such transfer shall not

be without prior permission of the Assistant Collector. (Para 6)

The permission required under Section 157AA cannot be granted Ex Post Facto because the permission contemplated by Section 157AA is for sale by a member of scheduled caste to another scheduled caste only - amongst scheduled caste who can purchase land, whose vendor has become bhumidhar with transferable rights under Section 131 B, is to be determined in the order of preference provided by the section itself - In Amichandra Vs. State of U.P. and 2 others. it has been observed that Section, 157-AA of the Act permits transfers between two persons belonging to the Scheduled Castes only - The only exception carved out by sub-section (3) of this Section is that if transferee belonging to a Schedule Caste is not available. (Para 8)

Held: - The determination of order of preference etc. under Section 157-AA has to be made prior to the sale deed or at best on the date of sale deed. Such a determination being made subsequently, when circumstances might have undergone a change, would not be valid. (Para 9)

Writ Petition dismissed. (E-7)

List of cases cited: -

1. Amichandra Vs. State of U.P. and 2 others., Writ-C No. 4406 of 2015

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The petition arises out of proceedings under Section 157AA/166/167 of the U.P Z. A. and Land Reforms Act and seeks a writ of certiorari for quashing the orders dated 28.10.2016 passed by the respondent no.2 whereby certain land purchased by the petitioner has been ordered to vest in the State as the sale deed was executed by the vendor without having obtained prior permission contemplated under Section 157AA of the Act.

3. The order dated 17.10.2018 whereby the consequential appeal has been dismissed by the respondent no.1 is also impugned.

4. Admittedly one Roogan executed a registered sale deed on 05.03.2013 of 1/5th part of plot no. 429 situated in Village and Post Meerpurhindu, Tehsil & District Ghaziabad in favour of petitioner. It is also not in dispute that the vendor had obtained this land on patta and had become its bhumidhari with transferable rights, in accordance with Section 131 B of U.P. Z. A. and L. R. Act. It is also not in dispute that no prior permission have been obtained before executing the sale deed as is required by Section 157AA of the Act.

5. The contention of the petitioner before this Court as also before the Court below is that since both vendor and vendee belong to the scheduled caste, no permission was required for executing the sale deed.

6. This argument has been considered and repelled in the judgement dated 10.08.2015 passed in Writ-C No. 4406 of 2015, ***Amichandra Vs. State of U.P. and 2 others.*** The relevant portion of the said judgement is extracted herein below:-

"Sub-section (4) has been introduced which mandates that in case, a person is entitled to execute a sale deed, etc. in favour of person(s) belonging to the Scheduled Caste, such transfer shall not be without prior permission of the

Assistant Collector. If this is not the vaild and correct interpretation of sub-section (4) of Section 157-AA of the Act, sub-sections (1) and (2) would be rendered redundant."

7. The contention therefore raised by the counsel for the petitioner is without merit.

8. The second question is whether the permission required under Section 157AA can be granted Ex Post Facto. In my considered opinion, the permission cannot be granted Ex Post Facto because the permission contemplated by Section 157AA is for sale by a member of scheduled caste to another scheduled caste only. However, amongst scheduled caste who can purchase land, whose vendor has become bhumidhar with transferable rights under Section 131 B, is to be determined in the order of preference provided by the section itself. In this regard, again it would be relevant to refer to the judgement of Amichandra (supra) wherein it has been observed:-

"Moreover this Section, 157-AA of the Act permits transfers between two persons belonging to the Scheduled Castes only. The only exception carved out by sub-section (3) of this Section is that if transferee belonging to a Schedule Caste is not available. Then a transfer in favour of a member of a Scheduled tribe may be permitted in accordance with the conditions and order of preference specified in the section itself. Even otherwise, the section provides for various categories of persons who are entitled to purchase the land in the order of preference given. A person in a higher category shall have preference over a person in the lower category mentioned.

.....

It therefore necessarily follows that before a transfer is effected, it has to be determined as to the category under which the prospective vendee falls and whether another person of the Scheduled Caste, who is in a higher preferential category is available or not. This determination has to be made and duly recorded prior to the transfer itself.

It is in this context that sub-section (4) has been introduced which mandates that in case, a person is entitled to execute a sale-deed, etc. in favour of person(s) belonging to the Scheduled Caste, such transfer shall not be without prior permission of the Assistant Collector. If this is not the valid and correct interpretation of sub-section (4) of Section 157-AA of the Act sub-sections (1) and (2) would be rendered redundant. Moreover, there appears no justification for obtaining the said permission once a transfer has already been made."

9. The determination of order of preference etc. under Section 157-AA has to be made prior to the sale deed or at best on the date of sale deed. Such a determination being made subsequently, when circumstances might have undergone a change, would not be valid. Therefore, even the second contention of counsel for the petitioner has no merit.

10. In view of the forgoing, the writ petition is without merit and is accordingly, dismissed.

(2020)1ILR 1916

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 1295 of 2008

Dharmendra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri O.P. Rai

Counsel for the Respondents:
C.S.C., Sri V.K. Singh

A. U.P. Zamindari Abolition & Land Reforms Act, 1950 - Land in question - public utility land u/s 132 of the Act- allotment cannot be made of such land- Additional Collector has the power to cancel the allotment-when he acts and discharges the duties and functions of the Collector-power would be deemed to have been exercised by him as the Collector.

Writ Petition dismissed. (E-9)

Cases cited: -

1. Braahm Singh vs. Board of Revenue & other, AIR 2008 All 144

2. Seetla vs. St. Of U.P. & ors. (Writ C no. 11406/2012)

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

1. Heard Sri O.P.Rai, learned counsel for the petitioner and Sri Naushad Siddiqui, learned Standing Counsel appearing for the State respondents.

2. The present petition seeks to challenge the order dated 04.08.2006 passed by the respondent no. 3 in proceedings under Section 198 (4) of the U.P.Zamindari Abolition and Land Reforms Act, 19501 and also the order dated 13.11.2007 passed by the respondent no. 2 in Revision No. 97 of 2006/07 whereby the order cancelling the allotment has been affirmed.

3. Counsel for the petitioner has not disputed the fact that the land in question was a public utility land of the nature as described under Section 132 of the 1950 Act. That being the position, the allotment of the said land could not have been made and there is no illegality in the proceedings which have been initiated for cancellation of the allotment.

4. As regards the other contention that the order of cancellation of allotment could have been made only by the Collector and not by the Additional Collector, this Court may take notice of the fact that the aforesaid question has been settled by a Full Bench of this Court in the case of **Brahm Singh Vs. Board of Revenue and others**2.

5. The Full Bench in the case of **Brahm Singh** (supra) while considering the question as to whether the powers of the Collector under Section 198 (4) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 can be exercised by the Additional Collector held that the Additional Collector when he acts and discharges the duties and functions or exercises such powers of a Collector either under the 1901 Act or under any other Act for the time being in force, the powers would be deemed to have been exercised by him as Collector of the district under that Act. The relevant observations made in this regard are as follows :-

"14. It is the above provision under which the Additional Collector is

appointed by the State Government. Sub-sections (3) and (4) of Section 14A in the present form were enacted by U.P. Act No. 21 of 1962. Under Sub-section (3) of Section 14A, the Additional Collector exercises all such powers and discharges such duties of Collector in such cases or class of cases as the Collector concerned directs. Sub-section (4) of Section 14A further provides that the Additional Collector while exercising power and discharging duties under Sub-section (3) under this Act, i.e 1901 Act and under any other law for the time being applicable to the Collector, acts as a Collector of the district. In other words, the Additional Collector exercises powers and discharges duties under Sub-section (3) of Section 14A as Collector of the district. Therefore, by legal fiction the order passed and the jurisdiction exercised by the Additional Collector by virtue of Sub-section (3) of Section 14A would be deemed to be that of a Collector of the district because of Sub-section (4) of Section 14A of 1901 Act. Thus, the Additional Collector when acts and discharges duties and functions or exercises such powers of a Collector either under 1901 Act or under any other Act for the time being in force, that would be deemed to have been exercised by him as Collector of the district under that Act. Thus, the Additional Collector has all the powers of a Collector under Sub-section (4) of Section 14A when he exercises power under Sub-section (3) of Section 14A."

6. The aforementioned position with regard to the Additional Collector exercising powers of the Collector has been considered by this Court in the context of the provisions of Section 28 of the U.P. Land Revenue Act, 1901 in a recent judgment in the case of **Seetla Vs. State of U.P. and others**3.

7. It may therefore be reiterated that Additional Collector when he acts and discharges the duties and functions or exercises such powers of a Collector either under the 1901 Act or under any other Act for the time being in force, the powers would be deemed to have been exercised by him as Collector of the district under that Act.

8. The argument raised by the petitioner with regard to the Additional Collector not having jurisdiction to pass the order impugned is thus legally not tenable.

9. No other point has been urged.

10. Counsel for the petitioner has not been able to point out any material error or irregularity in the orders which are sought to be challenged so as to warrant interference of this Court in exercise of powers under Article 226 of the Constitution of India.

11. The writ petition lacks merit and is accordingly dismissed.

(2020)1ILR 1918

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ-C No. 4844 of 2019

M/S Auto Service ...Petitioner
Versus
Indian Oil Corporation & Anr. ...Respondents

Counsel for the Petitioner:
Sri M.D. Singh Shekhar, Sri Ram Dayal Tiwari, Sri Ashwani Srivastava

Counsel for the Respondents:
Sri Tarun Varma, Sri J.S. Pandey

A. Hiring services of transporters to provide trucks for transporting petroleum products - Advertisement (11st October, 2018) for service providing in the State of U.P - conjoint reading of the three clauses 9 (i), 12 (b), 12 (i) (7) and 12 (i)(9) of NIT(Notice Inviting Tender) - tender in all categories was open to the candidates belonging to all the States of the country and not specific to the State of U.P. - in matters of selection the Tank Trucks(TTs) registered in the State of U.P. specific, were given preferential rights over and above the applicants of the other State - Circular issued by the Government of India dated 18th August, 1994 *vide* clause (iv) - if the quota has remained unfilled, it will be carried forward to the next tender - even in that tender it has remained unfilled then it will be deserved to be applicable to open category - No illegality or perversity in the impugned order - it stands answered against the petitioner. (Para 3, 13, 28 & 31)

The petitioner has challenged the order whereby the petitioner's objection against the rejection of his candidature has come to be rejected by the General Manager of the Indian Oil Corporation as well as the order rejecting the candidature of the petitioner for the grant of contract of the transport trucks for movement of petroleum products - The petitioner applied under open category - The legal point raised is that tender applicants of SC/ ST category of other State cannot be permitted to apply against the SC/ ST category if the services are offered for the State of U.P. and requirement is State specific. (Para 2, 6 & 30)

Held: - Since it is not a State sponsored scheme or State owned employment by the Central Government owned Corporation has floated tender inviting applications from all over the country, all SC and ST category truck owners/ transporters having their registered Tank Trucks (TTs) in State of U.P. thus registered in other States are all eligible to apply and are to be considered in that special reserved category, however, consideration of their applications will be subject to preference in respect of state registered Tank Trucks (TTs). (Para 30)

Writ Petition dismissed. (E-7)

List of cases cited: -

1. State of Maharashtra and another v. Union of India and another, (1994) 5 SCC 244

2. Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College and others, (1990) 3 SCC 130

3. Bir Singh v. Delhi Jal Board and others, (2018) 10 SCC 312

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

1. Heard Sri M.D. Singh Shekhar, learned Senior Advocate assisted by Sri Ashwani Kumar Srivastava, learned counsel for the petitioner, Sri J.S. Pandey, learned Advocate holding brief of Sri Tarun Varma, learned counsel for the respondents and perused the record.

2. By means of the present writ petition under Article 226 of the Constitution, the petitioner has challenged the order dated 22nd December, 2018, whereby the petitioner's objection against the rejection of his candidature has come to be rejected by the General Manager of the Indian Oil Corporation as well as the order dated 21st January, 2019 rejecting the candidature of the petitioner for the grant of contract of the transport trucks for movement of petroleum products.

3. Briefly stated facts of the case are that pursuant to the advertisement issued on 11st October, 2018 for hiring services of transporters to provide trucks for transporting petroleum products, the

petitioner applied for the same in the open category. Since the candidates in SC/ ST category were not available in the state of U.P. the area of the work, the respondents accepted the applications of the transporters whose trucks were registered within the State and also outside the State in the said SC/ ST category.

4. The petitioner pleaded before the Corporation that in the light of the conditions provided in the notice inviting tender applications issued by the respondent Corporation, in the absence of candidates being available in the reserved category the quota should have been diverted to the open category. However, when nothing was done in the matter, he moved a writ petition before the Court which was disposed of vide order dated 18th December, 2018 that the petitioner shall make comprehensive representation raising his grievance and in the event such representation is filed, the same shall be considered. The petitioner, accordingly, submitted representation on 18th January, 2019 before the competent authority of Indian Oil Corporation making two complaints:-

(A). For the purposes of the reserved category in the SC/ ST, the caste that are of the reserved category in the State of U.P. only should have been considered and respondents were not justified in accepting caste certificates of the said category from those who did not belong to the State of U.P.; and

(B). Since the provision was that if requirement of 20% under MSME is not made from the bidders under the MESE category then only MESE applicants of the other State having trucks registered outside of the State of U.P. should have been considered to fulfill the said requirement, and thus according to him it amounted to a preference over the applicants of the general category with the trucks registered in U.P.

5. It was also part of the second complaint that those who did not fulfill the eligibility criteria under MESE category were still considered by the respondents. However, both the complaints were considered by the authority of Indian Oil Corporation and vide order dated 21st January, 2019 the representation of the petitioner has been rejected.

6. Assailing the order impugned dated 21st January, 2019 in the present writ petition, the basic grounds raised by the petitioner is that since it was advertisement for service providing in the State of U.P., under the reservation laws the caste certificates that were admissible and recognized in State of U.P. for SC/ ST only should have been considered and those of outside of the State, may be having their trucks registered in U.P. but since their caste as SC/ ST is not recognized in the State of U.P. were not liable to be considered.

7. The logic behind the argument is that scheduled caste of another State may not be a scheduled caste in this State and since the business was relating to the State of U.P. and for the State of U.P., therefore, applying the reservation laws the caste certificate of SC/ ST candidates of U.P. only should have taken into consideration. Accordingly, he submits that in case if the candidates of the reserved category were not available, as per the clause (9) of the notice inviting tender, the trucks of the said category should have been allocated to the general category bidders. In support of his argument learned counsel for the

petitioner has placed reliance upon the judgments of the Supreme Court in the case of **Action Committee On Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another v. Union of India and another (1994) 5 SCC 244; Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College and others (1990) 3 SCC 130; and Bir Singh v. Delhi Jal Board and others (2018) 10 SCC 312.**

8. *Per contra*, the argument advanced by the learned counsel for the respondent- Corporation is that the advertisement though was for the work in the State of U.P. but it was open for the applicants of all over India and any person resident of any State could have applied. He submits that for the purposes of Central Government assignments and job, the caste certificate of every State is recognized as a caste belonging to SC/ ST under the Central Legislation recognizing the State caste. In support of his arguments learned counsel for the petitioner has relied upon the relevant provisions of the clauses of the notice inviting tender particularly sub-clause (b) of Clause 12 which provides for only preferential right to the State registered Tank Trucks (for short 'TTs').

9. He has further argued that the authorities cited by the learned counsel for the respondents are not applicable in the case in hand. He submits that there is no quarrel about the proposition placed by the learned counsel for the petitioners before the Court but says that it is not a case of a particular State sponsored scheme or tender. He, therefore, argues that the authorities cited by the learned counsel for the petitioner are quite distinguishable on facts.

10. In order to appreciate the arguments advanced by the learned Senior Advocate appearing for the petitioner, it is necessary to examine the relevant provisions of the Notice Inviting Tender (for short 'NIT') dated 22th January, 2018 with its corrigendum dated 9th April, 2018. On the top of the NIT, it has been provided that the tender applications were invited for award of contract for transport of bulk LPG by road for a period of 5 years from the companies, partnership and proprietorship firm and even the co-operative society meeting the minimum pre-qualification criteria. A tender is also prescribed for state-wise requirement of TTs for three oil marketing companies, namely, Indian Oil Corporation, Bharat Petroleum Corporation and Hindustan Petroleum Corporation. However, the applications were invited from all over India. The earnest money deposit was required for each tenderer, however, the SC/ ST category bidders, participating under the stand-up India scheme of Government of India, were exempted from payment of EMD. Clause 9 of the NIT provides for reservation. Clause 9 is reproduced hereunder in its entirety:-

9. RESERVATION:

a. The provision of reservation is 15% (fifteen percent) & 7.5 % (seven and a half percent) for Scheduled Castes and Scheduled Tribes respectively for this Tender and the unfulfilled reserved numbers from the previous Tender for Scheduled castes and scheduled tribes.

b. The members of SC/ST desirous of operating the trucks will have to participate in the Tenders floated by the

Corporation. The SC/ST bidder/s operating under

i. Proprietorship - The proprietor should be of SC/ST and caste certificate should be enclosed.

ii. Partnership firm - All partners should be of SC/ST as the case may be and caste certificate should be enclosed for all the partners.

iii. Private Ltd. Co. - All Promoters/ Directors of the firm should be of SC/ST as the case may be and caste certificate should be enclosed for all the promoters/ directors.

iv. Cooperative Society - Certificate issued by the registrar of co - operative societies mentioning the registration category (SC/ST) of the society should be enclosed.

c. In the event of any party failing to submit the caste certificate as detailed above along with the Technical Bid, the bid will be treated as a General Category bid.

d. The registered owner/s of the trucks (owned and attached) offered by the SC or ST bidder/s must also belong to the same category, either SC or ST, as the case may be. In other words, if the bidder offers trucks under SC category, all the registered owners of the trucks offered against the bid must also belong to SC.

e. If any of the attached trucks offered do not belong to a member of the category concerned, i.e. SC or ST, as the case may be, such trucks will be rejected and EMD against such trucks will be refunded after finalization of Tender.

f. The SC/ST members should fulfill all Tender conditions, and will not be eligible for any price preference or relaxation of standards.

g. SC/ST bidders can offer attached trucks provided such trucks also belong to same category.

h. SC/ST bidders may offer additional trucks, which will only be considered in case NIT requirement is not fulfilled as per evaluation criteria and subject to meeting the criteria/ requirement for SC/ST.

i. ***If adequate number of trucks offered by SC/ST candidates are not available in any particular year of Tender, the unfilled quota may be allotted to the General category in that year of Tender. However, the unfilled quota may be carried forward to the next Tender."***

(emphasis added)

11. From the perusal of the sub-clause i of clause 9, it is clear that if requirements of the trucks by the SC/ ST category candidates are not fulfilled, then that quota may be allotted to the general category in that very year of the tender. But the quota if has remained unfilled, the same may be carried forward to the next tender as well. Meaning thereby that in the year of tender the requirement will be fulfilled anyhow may be adjusting unfilled quota with the open category but that percentage of quota that remained unfilled on account of some adjustment, will be added to the next tender. Thus, the unfilled quota is treated to have remained unfilled for the purposes of carrying forward the same to the next tender process.

12. Now, the next important clause is clause 12 of the NIT which talks about the valuation of bidders under SC/ST. For better appreciation clause 12 is reproduced in its entirety hereunder:-

12. Evaluation of bidders under SC/ST:

a. As per Govt. guidelines, there is a reservation of 15 % for SC & 7.5 % for ST category. Requirement of trucks for

bidders under SC/ST category shall be limited to the aforesaid number as per Govt. guidelines provided such bidders quote at Floor rates/ L1 rates or accept finalized L1 rates.

b. State Registered TTs would be given preference over other State registered TTs subject to their quoting bids at floor rates. This preferential induction of State registered TTs would however be limited to the requirement of particular State for only those transporters whose bids are received at floor rates.

c. If the no. of Trucks qualified under SC/ST category is less than the reserved number, then all the qualified trucks will be considered for allocation.

d. If the number of Trucks qualified under SC/ST category is more than the reserved number, then allocation of trucks will be as under:

i. Bidders quoting at Floor rates:

1. All owned and attached trucks registered under same State will be listed separately as per ascending order of their age.

2. All owned trucks, as listed above, will be considered for allocation first as per age, i.e. latest model will be considered first.

3. If the requirement is not fulfilled from owned trucks then balance requirement will be fulfilled from attached trucks as per age limiting the ratio of own to attach as 1:1.

4. In case of shortfall based on allocation from State specific registered trucks, further allocation will be made to the proposed trucks offered by the respective SC/ST bidders.

5. In case of more number of offered proposed trucks then at least one truck will be allocated to bidders offering proposed trucks followed by allocating trucks on proportionate basis. In case it is not possible to allocate trucks on proportionate basis then balance trucks will be allocated through draw of lots.

6. In case it is not possible to allocate even one truck to any bidder then trucks will be allocated through draw of lots.

7. Further shortfall in trucks will be met from bidders offering ready trucks registered in other State quoted at floor rate and the evaluation will be made as per the condition from (1) to (3) as mentioned above.

8. Further shortfall will be met from the balance SC/ST bidders in the order of their financial ranking subject to accepting the Floor price. In case of multiple bidders in the same financial ranking then further sub- ranking of bidders will be followed as per "Ranking Procedure" mentioned in clause- 5 above for fulfilling balance requirement.

9. In case requirement of trucks is not met from the bidders under SC/ST category, the unfulfilled requirement of trucks will be allocated to the general category bidders.

ii. Bidders quoting at other than Floor rates :

1. SC/ST bidders quoted at L1 rates, will be further sub-ranked as per "Ranking Procedure" mentioned in clause- 5 for induction of trucks subject to accepting finalized L1 rates.

2. 2. In case of shortfall, further allocation will be made to the proposed trucks offered by the respective SC/ST bidders subject to accepting finalized L1 rates.

3. In case of more number of offered proposed trucks then at least one truck will be allocated to bidders offering proposed trucks followed by allocating trucks on proportionate basis. In case it is

not possible to allocate trucks on proportionate basis then balance trucks will be allocated through draw of lots.

4. In case it is not possible to allocate even one truck to any bidder then trucks will be allocated through draw of lots.

5. Further shortfall will be met from the balance SC/ST bidders in the order of their financial ranking subject to accepting the finalized L1 rates. In case of multiple bidders in the same financial ranking then further sub- ranking of bidders will be followed as per "Ranking Procedure" mentioned in clause- 5 above for fulfilling balance requirement.

6. In case requirement of trucks is not met from the bidders under SC/ST category, the unfulfilled requirement of trucks will be allocated to the general category bidders."

(emphasis added)

13. From the perusal of the various sub-clauses of clause 12, it becomes quite explicit that TTs belonging to the State where the requirement of TTs is, are given preferential rights for the purposes of selection. Thus, according to this sub-clause b it clearly transpires that tender applications were invited from all over the country with preferential rights to State registered transporters. Sub-clause i (7) of Clause 12 clearly provides that the shortfall in trucks will be met from the bidders offering ready trucks registered in other State quoted at floor rate and the evaluation will be made as per the condition enumerated in points 1 to 3 of sub-clause d (i). Sub-clause 9 of clause 12 also speaks about transferring the unfilled requirement of trucks in the SC/ ST category to the general category bidders. A conjoint reading of the three clauses 9 (i), 12 (b), 12 (i) (7) and 12 (i)(9) leads to the only conclusion that tender in all categories was open to the candidates belonging to all the States of the country and not specific to the State of U.P. However, in matters of selection the TTs registered in the State of U.P. specific, were given preferential rights over and above the applicants of the other State. There is yet another conclusion that can be drawn is that if the shortfall occurs in TTs on account of SC/ ST category candidates not available, the same will be adjusted against the general category so as to fulfill the shortfall but the unfilled quota, to be statistically assessed, would stand carried forward to the next tender notice.

14. The argument, therefore, of the learned counsel for the petitioner that the bidders of the SC/ ST category of other State were not eligible to apply against the NIT because their caste may not be recognized as SC/ ST in the State, does not have any merit. It is all India advertisement though for the purposes of requirement of a particular State but the Corporation is the Central Government Public Sector Corporation and, therefore, the SC/ ST castes recognized in all other States will be eligible to apply in the said category.

15. Now, coming to the authorities cited by the learned counsel for the petitioner in the case of **Marri Chandra Shekhar Rao** *(supra)*, paragraphs 21, 22, 23 and 24 has been heavily relied upon. These paragraphs are reproduced hereunder:-

"21. We have reached the aforesaid conclusion on the interpretation of the relevant provisions. In this connection, it may not be inappropriate to refer to the views of Dr. B.R. Ambedkar as

to the prospects of the problem that might arise, who stated in the Constituent Assembly Debates in reply to the question which was raised by Mr. Jai Pal Singh ("Safeguards for Scheduled Caste and Tribes-Founding Father's view" by H.S. Saksena, at p. 60) which are to the following effect:

"He asked me another question and it was this. Supposing a member of a scheduled tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local government, within whose jurisdiction he may be residing: the same privileges which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in this Constitution. But, so far as the present Constitution stands, a member of a scheduled tribe going outside the scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practically impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them ..... "

22. In that view of the matter, we are of the opinion that the petitioner is not entitled to be admitted to the medical college on the basis of Scheduled Tribe Certificate in Maharashtra. In the view we have taken, the question of petitioner's right to be admitted as being domicile does not fall for consideration.

23. Having construed the provisions of Article 341 and 342 of the Constitution in the manner we have done, the next question that falls for consideration, is, the question of the fate of those scheduled caste and scheduled tribe students who get the protection of being classed as scheduled caste or scheduled tribes in 'the States of origin when, because of transfer or movement of their father or guardian's business or service, they move to other States as a matter of voluntary transfer, will they be entitled to some sort of protective treatment so that they may continue or pursue their education. Having considered the facts and circumstances of such situation, it appears to us that where the migration from one State to other is involuntary, by force of circumstances either of employment or of profession, in such cases if students or persons apply in the migrated State where without affecting prejudicially the rights of the scheduled castes or scheduled tribes in those States or areas, any facility or protection for continuance of study or admission can be given to one who has so migrated then some consideration is desirable to be made on that ground. It would, therefore, be necessary and perhaps desirable for the legislatures or the Parliament to consider appropriate legislations bearing this aspect in mind so that proper effect is given to the rights given to scheduled castes and scheduled tribes by virtue of the provisions under Articles 341 and 342 of the Constitution, This is a matter which the State legislatures or the Parliament may appropriately take into consideration.

24. Having so held, now the question is, as to what is to happen to the petitioner in this case. As we have held, the petitioner is not entitled to be admitted to the Medical College on the basis that he

belongs to scheduled tribe in his original State. The petitioner has, however, been admitted. He has progressed in his studies. But he had given an undertaking that he will not insist on the basis of the admission. If we allow him to continue with his studies in Maharashtra's College where he has been admitted on the undertaking given after he has not succeeded in this application, it would be a bad precedent. We must, however, do justice. The boy's educational prospects should not be jeopardised since he has progressed to a certain extent and disqualifying him at this stage or this year on the ground that he is not entitled to the protection of Scheduled Caste or Scheduled Tribe, would not confer any commensurate benefit to scheduled castes or scheduled tribes in Maharashtra or for that matter on anybody else. It is, therefore, desirable that the question whether he is genuinely belonging to Gouda community and whether this community is a scheduled caste or scheduled tribe, should be first properly and appropriately determined. As mentioned hereinbefore, we have not examined this question. After determining that whether after making provisions for the scheduled castes and scheduled tribes of Maharashtra, if any facility of admission or continuance of study can be given in the Medical College in Maharashtra to the petitioner herein, the authorities incharge of the Institution should consider the same and if on that considering they find it justified in allowing the petitioner to continue in his studies, they may do so. The authorities should consider the same and take action accordingly, as expeditiously as possible. In considering the question of the petitioner continuing his medical education, the appropriate authorities should bear in mind the justice of the situation.' We, therefore, leave it to the authorities to take appropriate action about the continuance or discontinuance of the petitioner in his studies on the basis of the aforesaid consideration. We order accordingly. We do so only in the background of the peculiar facts and circumstances of this case. and the aforesaid observations should not be treated as a precedent for other situations."

16. In order to appreciate the *ratio* of the judgment, it is necessary to refer the controversy involved in the said case. In the said case, the petitioner was born on 6th October, 1969 in the State of Andhra Pradesh and belongs to the Gouda community known as "Goudu". The said community was recognized as 'Scheduled Tribe' under the Constitution (Scheduled Tribes) Order, 1950. The father of the petitioner in that case was issued with the Scheduled Tribe certificate by the concerned competent authorities of the State of Andhra Pradesh and it is on the said basis, the father of the petitioner was appointed in Fertilizer Corporation of India (for short 'FCI') on 17th October, 1977 under the Scheduled Tribes quota. He joined at Rashtriya Chemicals and Fertilizers Ltd. in the then known city of Bombay of the State of Maharashtra. The petitioner in that case became domicile of Maharashtra as he attained all his education in Bombay and after passing 12th standard examination, he applied for three medical colleges which were under the management of Bombay Municipal Corporation. As per the advertisement then issued for the medical seats, the total number of vacancies were 400 and 7% of those vacancies, namely, 28 seats were reserved for scheduled caste candidates

and 200 colleges were run by the State of Maharashtra and out of that 14 seats accounting to 7% of the total seats were reserved for the scheduled tribes. The petitioner in the said case applied in the category of scheduled tribe but was not accorded admission as S.T. category candidate either in the colleges run by the Bombay Municipal Corporation or those run by the State of Maharashtra. The petitioner in the said case raised the issue taking the plea of discrimination as those who had scored lesser marks were granted admission in scheduled tribe category. He took the plea that his community was specified as scheduled tribe in the Constitution (Scheduled Tribe) Order, 1950. The Government of India as discussed in the said case and had issued some Circular letter dated 22nd February, 1985 which provided thus:-

"It is also clarified that a Scheduled Caste/Tribe person who has migrated from the State of origin to some other State for the purpose of seeking education, employment etc. will be deemed to be a Scheduled Caste/Tribe of the State of his origin and will be entitled to derive benefits from the State of origin and not from the State to which he has migrated."

17. The petitioner took the plea that he had the citizenship of Maharashtra by domicile as he resided for more than 10 years since 1978. However, this issue was neither raised nor, discussed either in the writ petition or before the High Court. The legal and constitutional issue in the said case centres around the interpretation of Article 342 of the Constitution. While interpreting the provisions as contained under Article 341 and 342 of the Constitution, the Apex Court framed the question as to what the expression *"in relation to that state"* in conjunction with the purpose as occurring in the Articles, it seeks to convey. So, virtually the Apex Court was dealing with the rights of the State in matters of reservation policy, keeping in tune with the principles enshrined under Article 14 of the Constitution, even while caste of different states is recognized in the special SC/ ST category under the presidential order. The Court discussed the principle of equality and equal protection of laws as prescribed for under Article 14 of the Constitution in the light of the socio-economic condition of the people who in a state may be put to disadvantageous position if the benefit of reservation is not offered and this would amount to denuding them of the right of equality. The Court observes that *the social condition of a caste, however, varies from state to state and it will not be proper to generalize any caste or any tribe as SC/ ST for the whole country. This, however, is a different problem whether a member of scheduled caste in one part of the country who migrates to another State or any other union territory should continue to be treated as a scheduled caste and scheduled tribe in which he has migrated.*

18. The Court, therefore, proceeded to judge the question from the angle of interest of well being of the SC/ ST in the country as a whole. The Court further proceeded to discuss the issue in order to strike a balance in the *mosaic of countries integrity* so that one community is not benefited to the undue disadvantage to the other community. The Court was virtually proceeding to achieve the aim of minimizing the detrimental effect of one community gaining advantage over and above the other community bringing discontentment in the society and it is in

this background the Court proceeded to hold that when a constitutional provision uses the expression *"in relation to that state"* it means that a special privilege was confined to that state alone meant especially for the SC/ ST category". The Court observed that one community in a State especially recognized and if so socially and economically backward to have fallen as an entry in the presidential order as SC/ ST category should not be given advantage over and above of such category men of the other State. This above *ratio*, in our considered opinion, is in relation to the employment and services that are of the States and sponsored by the State. For the purposes of services and employment of the Union of India or sponsored by a public sector company of Central Government for all India candidates would certainly include all the SC/ ST category candidates of different States as special category candidates but then the principles that has been outlined in the judgment of the Apex Court, in our considered opinion, have been fully taken care of under the relevant clause 12 of NIT which talks of preferential induction of State registered TTs. We do not find any quarrel with the principle laid down in the judgment *(supra)* by the Apex Court but in so far as the present case is concerned, the principle laid down while interpreting the expression *"in relation to that State"* occurring in Article 342 (1) of the Constitution would be of no help to the petitioner.

19. The petitioner has further relied upon a judgment of the Apex Court in the case of **Action Committee** *(supra)* and has put emphasis on paragraph Nos. 3, 4, 8, 15 and 16 of the judgment which are reproduced hereunder:-

3. On a plain reading of clause (1) of Articles 341 and 342 it is manifest that the power of the President is limited to specifying the castes or tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or a Union Territory, as the case may be. Once a notification is issued under clause (1) of Articles 341 and 342 of the Constitution, Parliament can by law include in or exclude from the list of Scheduled Castes or Scheduled Tribes, specified in the notification, any caste or tribe but save for that limited purpose the notification issued under clause (1), shall not be varied by any subsequent notification. What is important to notice is that the castes or tribes have to be specified in relation to a given State or Union Territory. That means a given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to the State or Union Territory for which it is specified. These are the relevant provisions with which we shall be concerned while dealing with the grievance made in this petition.

4. The petitioners herein are aggrieved because the State of Maharashtra has denied the benefits and privileges available to Scheduled Castes and Scheduled Tribes specified in relation to that State to members of the Scheduled Castes and Scheduled Tribes belonging to other States who have migrated from other States to the State of Maharashtra. These benefits and privileges are denied on the basis of certain circulars and letters issued by the Government of India and consequential instructions issued by the State of Maharashtra indicating that members belonging to the Scheduled Castes and Scheduled Tribes specified in relation to any other State shall not be entitled to the benefits and privileges accorded by The State of Maharashtra unless the person concerned is shown to

be a permanent resident of the State of Maharashtra on 10-8-1950 in the case of Scheduled Castes and 6-9-1950 in the case of Scheduled Tribes. These are the dates on which the President first promulgated the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. The petitioners, therefore, contend that the denial of the benefits and the privileges by the State of Maharashtra is violative of the fundamental rights conferred on citizens by Articles 14, 15(1), 16(2) and 19 of the Constitution, besides being contrary to the letter and spirit of Articles 341 and 342 of the Constitution. The petitioners contend that a bare perusal of the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950 as amended by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 would show the same castes and tribes specified in respect of more than one State. Those belonging to the Scheduled Castes and the Scheduled Tribes, wherever situate, are economically backward. Besides on account of social and economic backwardness they have to suffer a host of indignities and atrocities and are very often compelled to migrate from one State to another in search of livelihood or to escape the wrath of their oppressors. Earlier they did not experience any difficulty in obtaining caste/tribe certificates to secure benefits available to the Scheduled Castes and Scheduled Tribes in the State of Maharashtra. The situation, however, changed drastically after the Government of India issued a communication addressed to Chief Secretaries to all State Governments/Union Territories on 22-3-1977.

8. In course of time persons belonging to Scheduled Castes/Scheduled Tribes who had migrated from one State to another in search of employment or for education purposes and the like, experienced great difficulty in obtaining Caste/Tribe Certificates from the State from which they had migrated. To remove this difficulty experienced by them the earlier instructions contained in the letter of 22-3-1977, and the subsequent letter of 29-3-1982, were modified, in that, the prescribed authority of a State/Union Territory was permitted to issue the Scheduled Caste/Scheduled Tribe Certificate to a person who had migrated from another State on production of a genuine certificate issued to his father by the prescribed authority of the State of the father's origin except where the prescribed authority considered a detailed enquiry necessary through the State of origin before issue of certificate. It was further stated that the certificate will be issued irrespective of whether the Caste/Tribe in question is scheduled or not in relation to the State/Union Territory to which the person has migrated. Of course, this facility did not alter the Scheduled Caste/Tribe status of the person in relation to the one or the other State. The revised form of the certificate was circulated. Further, it was clarified that a Scheduled Caste/Tribe person who has migrated from the State of origin to some other State for the purpose of education, employment, etc., will be deemed to be Scheduled Caste/Tribe of the State of his origin only and will be entitled to derive benefits from that State and not from the State to which he had migrated. By this clarificatory order forwarded to Chief Secretaries of all States/Union Territories, the only facility extended was that the prescribed authority of the State/Union Territory to which a person had migrated was permitted to issue the certificate to the migrant on

production of the genuine certificate issued to his father by the prescribed authority of the State of the father's origin provided that the prescribed authority could always enquire into the matter through the State of origin if he entertained any doubt. The certificate to be so issued would be in relation to the State/Union Territory from which the person concerned had migrated and not in relation to the State/Union Territory to which he had migrated. Therefore, the migrant would not be entitled to derive benefits in the State to which he. had migrated on the strength of such a certificate, This was reiterated in a subsequent letter dated 15-10-1987 addressed to Smt Shashi Misra, Secretary, Social Welfare, etc., in the State of Maharashtra. In paragraph 4 of that letter it was specifically stated :

"Further, a Scheduled Caste person, who has migrated from the State of his origin, which is considered to be his ordinary place of residence after the issue of the first Presidential Order, 1950, can get benefit from the State of his origin and not from the State to which he has migrated."

So stating the proposal regarding reduction in the period of cut-off point of 1950 for migration was spurned. It was stated that the proposal could have been taken care of only if the lists of Scheduled Castes and Scheduled Tribes were made on all-India basis which, it was said, was not feasible in view of the provisions of Articles 341 and 342 of the Constitution. It will thus, be seen that so far as the Government of India is concerned, since the date of issuance of the communication dated 22-3-1977, it has firmly held the view that a Scheduled Caste/Scheduled Tribe person who migrates from the State of his origin to another State in search of employment or for educational purposes or the like, cannot be treated as a person belonging to the Scheduled Caste/Scheduled Tribe of the State to which he migrates and hence he cannot claim benefit as such in the latter State.

*15. Marri Chandra was born in Tenali in the State of Andhra Pradesh and belonged to Gouda community, popularly known as 'Goudi'. This community was specified as a Scheduled Tribe in the Constitution (Scheduled Tribes) Order, 1950 as amended till then. His father had obtained a Scheduled Tribe certificate from the Tehsildar on the basis whereof he secured employment in the quota reserved for Scheduled Tribes in a Government of India Undertaking and was posted in Bombay, State of Maharashtra. The petitioner was then aged about 9 years. He prosecuted his studies in Bombay and passed the 12th standard examination held by the Maharashtra State Secondary and Higher Secondary Examination Board. Thereafter he sought admission to the respondent-college claiming benefit of reservation as one belonging to the Scheduled Tribe. He was, however, denied admission in that quota though Scheduled Tribe candidates who had secured lesser marks than him but whose State of origin was Maharashtra were admitted. The denial of admission *as based on the circular dated 22-2-1985 issued by the Government of, India which has already been referred to by us. Having failed to secure admission in any medical college in the quota reserved for Scheduled Tribe candidates, he questioned the denial before this Court under Article 32 of the Constitution. A Constitution Bench headed by Sabyasachi Mukharji, C.J., as he then was, examined the question whether one who is recognised as a Scheduled Tribe in*

the State of his origin continues to have the benefits or privileges or rights in the State to which he migrates. In paragraph 6 of the judgment the precise question was formulated as follows:

"This question, therefore, that arises in this case is whether the petitioner can claim the benefit of being a Scheduled Tribe in the State of Maharashtra though he had, as he states, a Scheduled Caste certificate in the State of Andhra Pradesh?"

In answering this question the Constitution Bench was called upon to interpret Articles 341 and 342 of the Constitution and determine what the expression "in relation to that State" read in conjunction with "for the purposes of this Constitution" seeks to convey. After referring to the provisions of Articles 14, 15 and 16 and the decision of this Court in Pradeep Jain (Dr) v. Union of India9 the Constitution Bench took notice of the fact that Scheduled Castes and Scheduled Tribes had to suffer social disadvantages and were denied facilities for development and growth in certain States. To grant equality in those States where they suffered and were denied facilities for development and growth certain protective preferences, facilities and benefits in the form of reservation, etc., had to be provided to them to enable them to compete on equal terms with the more advantageous and developed sections of the community. It is not necessary to dilate on this point as the Constitution itself recognises that members belonging to the Scheduled Castes and Scheduled Tribes and other backward classes have to be given certain incentives, preferences and benefits to put them on an even keel with others who have hitherto enjoyed a major share of the facilities for development and growth offered by the State, so that the former may, in course of time, be able to overcome the handicap caused on account of denial of opportunities. The interpretation that the Court must put on the relevant constitutional provisions in regard to Scheduled Castes/Scheduled Tribes and other backward classes must be aimed at achieving the objective of equality promised to all citizens by the Preamble of our Constitution. At the same time it must also be realised that the language of clause (1) of both the Articles 341 and 342 is quite plain and unambiguous. It clearly states that the President may specify the castes or tribes, as the case may be, in relation each State or Union Territory for the purposes of the Constitution. It must also be realised that before specifying the castes or tribes under either of the two articles the President is, in the case of a State, obliged to consult Governor of that State. Therefore, when a class is specified by the President, after consulting the Governor of State A, it is difficult to understand how that specification made "in relation to that State" can be treated as specification in relation to any other State whose Governor the President has not consulted. True it is that this specification is not only in relation to a given State whose Governor has been consulted but is "for the purposes of this Constitution" meaning thereby the various provisions of the Constitution which deal with Scheduled Castes/Scheduled Tribes. The Constitution Bench has, after referring to the debates in the Constituent Assembly relating to these articles, observed that while it is true that a person does not cease to belong to his caste/tribe by migration he has a better and more socially free and liberal atmosphere and if sufficiently long time is spent in socially advanced. areas, the inhibitions and handicaps suffered by

belonging to a socially disadvantageous community do not truncate his growth and the natural talents of an individual gets full scope to blossom and flourish. Realising that these are problems of social adjustment it was observed that they must be so balanced in the mosaic of the country's integrity that no section or community should cause detriment or discontentment to the other community. Therefore, said the Constitution Bench, the Scheduled Castes and Scheduled Tribes belonging to a particular area of the country must be given protection so long as and to the extent they are entitled to in order to 9 (1984) 3 SCC 654 become equals with others but those who go to other areas should ensure that they make way for the disadvantaged and disabled of that part of the community who suffer from disabilities in those areas. The Constitution Bench summed up as under:

"In other words, Scheduled Castes and Scheduled Tribes say of Andhra Pradesh do require necessary protection as balanced between other communities. But equally the Scheduled Castes and Scheduled Tribes say of Maharashtra in the instant case, do require protection in the State of Maharashtra, which will have to be in balance to other communities. This must be the basic approach to the problem. If one bears this basic approach in mind, then the determination of the controversy in the instant case does not become difficult."

16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the fights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution". This is an aspect which has to be kept in mind and which was very much in the minds of the Constitution-makers as is evident from the choice of language of Articles 341 and 342 of the Constitution. That is why in answer to a question by Mr Jaipal Singh, Dr Ambedkar answered as under:

"He asked me another question and it was this. Supposing a member of a Scheduled Tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local Government, within whose jurisdiction he may be residing the same privileges which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in this Constitution. But so far as

the present Constitution stands, a member of a Scheduled Tribe going outside the scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practicably impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them....."

Relying on this statement the Constitution Bench ruled that the petitioner was not entitled to admission to the medical college on the basis that he belonged to a Scheduled Tribe in the State of his origin."

20. In the said case we again find that it was State of Maharashtra which was considering the applications in particular category *qua* the reservations of SC/ ST in the House of People in that particular State. Both the seats of membership as well as the applicants are special to that State and, therefore, on the principle as discussed hereinabove in the matter of **Marri Chandra Shekhar Rao** *(supra)*, was made applicable in this as well. The said judgment has been discussed in paragraph 10 of the judgment of the **Action Committee** *(supra)*. So on facts also this judgment is distinguishable.

21. The petitioner has relied upon yet another judgment in the case of **Bir Singh** *(supra)* and has emphasised upon paragraph Nos. 20, 34 and 36 of the judgment. The relevant paragraphs relied upon are reproduced hereunder:-

"20. There are various parameters by which a caste/race is recognized as 'Scheduled Caste/Scheduled Tribe' in a State/Union Territory or a particular part thereof. There is no doubt that before the Presidential Orders were issued under Article 341(1) or under Article 342(1), elaborate enquiries were made and only after such enquiries that the Presidential Orders were issued. While doing so, the Presidential Orders not only provided that even specified parts or groups of castes, races or tribes/tribal community could be Scheduled Castes/Tribes in a particular State/Union Territory but also made it clear that certain castes or tribes or parts/groups thereof could be Scheduled Castes/Tribes only in specified/particular areas/districts of a State/Union Territory. The reason for such an exercise by reference to specific areas of a State is that judged by standards of educational, social backwardness, etc. races or tribes may not stand on the same footing throughout the State. The consideration for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes and Scheduled Tribes or Backward Classes in any given State depends on the nature and extent of the disadvantages and social hardships 22 suffered by the concerned members of the class in that State. These may be absent in another State to which the persons belonging to some other State may migrate.

34. Unhesitatingly, therefore, it can be said that a person belonging to a Scheduled Caste in one State cannot be deemed to be a Scheduled Caste person in relation to any other State to which he migrates for the purpose of employment or education. The expressions "in relation to that State or Union Territory" and "for the purpose of this Constitution" used in Articles 341 and 342 of the Constitution of India would mean that the benefits of reservation provided for by the Constitution would stand 38 confined to

the geographical territories of a State/Union Territory in respect of which the lists of Scheduled Castes/Scheduled Tribes have been notified by the Presidential Orders issued from time to time. A person notified as a Scheduled Caste in State 'A' cannot claim the same status in another State on the basis that he is declared as a Scheduled Caste in State 'A'.

36. The upshot of the aforesaid discussion would lead us to the conclusion that the Presidential Orders issued under Article 341 in regard to Scheduled Castes and under Article 342 in regard to Scheduled Tribes cannot be varied or altered by any authority including the Court. It is the Parliament alone which has been vested with the power to so act, that too, by laws made. Scheduled Castes and Scheduled Tribes thus specified in relation to a State or a Union Territory does not carry the same status in another State or Union Territory. Any expansion/deletion of the list of Scheduled Castes/Scheduled Tribes by any authority except Parliament would be against the constitutional mandate under Articles 341 and 342 of the Constitution of India."

22. On facts we again find this judgment to be quite distinguishable as it was considering the reservation in the said case for the purposes of employment and education of that particular State by the said State.

23. One must distinguish the employment of the Union from the employment of State and Union Territories that have Legislative Assemblies. The schemes that are floated by the Central Government and whereunder applications are invited on all India basis, one must remember that for the purposes of Central Government the caste falling in the category of SC/ ST under the Presidential Order for different States would fall in the same category, whereas, in cases of employment or scheme sponsored by that State and thus 'State specific' in that sense that it should not recognize the SC/ ST of other State in the said category. Thus, under that situation/ condition alone those recognized in other States in the said category will not fall in that special category. The case in hand is one such case where the Corporation invited applications for providing services of TTs to carry petroleum products within the State of U.P., but from all over the country. Since the services to be provided within the territory of the Uttar Pradesh, preference was given to the State registered TTs.

24. The question whether the State registered TTs are owned by the SC/ ST people or not will depend upon the entries of the preferential rights of the different State and there is no preference in the matter of SC/ ST men of State of U.P. alone. The law is that one can have all India permit. The question is whether it is registered in the State of U.P. or outside of the State as a transport truck. If it is registered in the State of U.P. as a tank truck, it is enough. A residence of outside U.P. can also have his truck registered in the State of U.P. and that person may be belonging to SC/ ST category of another State then in the matter of such registered TTs the preferential rights will be given to such transporters who may be resident of another State if he is of SC/ ST of that State. From the interpretation of the relevant clause 12(b) it cannot be inferred that a truck owner has to be resident of State of U.P.

25. In support of above such view, it is necessary to examine the relevant

provisions of the Motor Vehicles Act, 1988 amended in the year 2016 which is a Central Act as it provides for registration of the commercial vehicles in the State. The registration is provided under Section 41 by the owner of motor vehicle for registration by fulfilling a form and providing particulars as required. Nowhere under Section 41 it is provided that a person who wants his vehicle to be registered with the transport authority which is a Central Authority in a particular State, is also required to be resident of that State. Then we find that Section 66 of Motor Vehicles Act provide for control of the transport vehicles. Section 68 defines transport authorities whereas Section 69 provides for applications for permits. Section 77 provides for goods carriage permit. Section 78 provides for consideration of application of goods carriage permit and Section 79 authorizes Regional Transport Authority to grant permit or refuse the same on an application made under Section 77. Section 84 deals with conditions attaching to All India Permit. All these sections which are referred hereinabove do not lay down any condition that owner of the vehicle should be resident of that particular State where the vehicle is registered or the permit is granted.

26. In view of the above, therefore, we do not see anything wrong in case if vehicle is registered in a State owned by the residents of outside the State who are of SC/ ST category of that other State. There seems to be no justifiable reason as to why their TTs be not given preferential rights and then again if trucks are not registered in the State specific, of such residents of outside the State and if they belong to SC/ ST category of that State, why their tender applications may not be granted in the category reserved for SC/ ST in the event the State registered TTs are not available to meet the requirement, which is State specific.

27. In so far the issue relating to the quota if the number of trucks of the category is not available why it not be adjusted against the open category, is concerned, this situation would come only when no candidate is available in the SC/ ST category on all India basis. It is in such an event only the open category candidate will be given opportunity and will be selected against the shortfall. Even the Circular letter which has been referred to in the impugned order issued by the Government of India dated 18th August, 1994 *vide* clause (iv) provides thus:-

"(iv). The adequate number of SC/ST candidates are not available in any particular year the unfilled quota, may be allotted to the unreserved categories in that year. However, the unfilled quota may be carried forward to the next tender also and offered to SC/ST candidates. If, the quota of the previous tender is not filled even in the next tender, the unfilled quota of the previous tender may be deserved and allotted to general categories.

28. From bare reading of clause (iv) of the Circular issued by the Central Government *(supra)*, it is clearly revealed that if the quota has remained unfilled, it will be carried forward to the next tender and even in that tender it has remained unfilled then it will be deserved to be applicable to open category.

29. The question whether this contingency is referable to the very year of tender or the second tender will be dependent upon the conditions provided for under the Notice Invited Tender as in the present case it was provided that unfilled quota will be adjusted against the general open category in that very year of tender. However, the issue whether the quota will be carried forward or will get exhausted against the general category is not an issue before this Court and should

not detain us any long for the simple reason that the legal issue stands already answered that if applications have been invited on all India basis and only preference will be given to the TTs registered in U.P. and in the event if the TTs registered in the State of U.P. do not fulfill the requirement then those applicants who are of the SC/ ST category of the other State with their TTs registered in other State will be considered the unfilled quota will be adjusted with them.

30. Here it is not a case that whether the quota has remained unfilled. The legal point raised is that tender applicants of SC/ ST category of other State cannot be permitted to apply against the SC/ ST category if the services are offered for the State of U.P. and requirement is State specific. Since it is not a State sponsored scheme or State owned employment by the Central Government owned Corporation has floated tender inviting applications from all over the country, all SC and ST category truck owners/ transporters having their registered TTs in State of U.P. thus registered in other States are all eligible to apply and are to be considered in that special reserved category, however, consideration of their applications will be subject to preference in respect of state registered TTs.

31. In view of the above discussions made herenabove in this judgment referring to various authorities, the legal argument raised by the learned counsels for the respective parties and conclusion drawn, we do not find any illegality or perversity in the order impugned so far as the first point is concerned and it stands answered against the petitioner.

32. The second point has not been argued at all but even otherwise we do not find that the findings of fact that have been recorded with regard to the second complaint leave any scope of interference by this Court in exercise of power under Article 226 of the Constitution.

33. The writ petition lacks merit and is, accordingly, dismissed with no order as to cost.

(2020)1ILR 1936

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2019

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

Writ-C No. 5641 of 2019

Umaraw Singh Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri P.K. Upadhyay, Sri Manoj Kumar Dubey, Sri Vipul Kumar Dubey

Counsel for the Respondents:
C.S.C., Sri A.P. Singh, Sri Sriprakash Singh

A. U.P. Urban Planning and Development Act, 1973 - Section 15 - The Development Authority cancelled the sanctioned map-on the direction of the District magistrate-bad-District magistrate have no jurisdiction -to issue order in property matter under the garb of law and order situation-appropriate remedy-under provisions of Criminal Procedure Code-before the Magistrate and not District Magistrate-Development Authority also cancelled the map without opportunity of hearing.

Held, an administrative officer has no authority to issue direction in the property dispute, on the ground of apprehension of breach of

peace. In case there is any apprehension of breach of peace in respect of the property dispute, the appropriate remedy has been provided under the provisions of the Criminal Procedure Code where the power has been conferred upon the Magistrate and not the District Magistrate. Moreover, in the present case the provisions of the Criminal Procedure Code have not been followed. (Para 20)

Writ Petition allowed. (E-9)

List of cases cited: -

1. Madan Kumar and others v. District Magistrate, Auraiya and others, 2013 (10) ADJ 606

2.Dipak Babaria And Another v. State of Gujarat And Others, (2014) 3 SCC 502

3. M/s Travancore Rayon Ltd. v. Union of India, 1969 (3) SCC 868

4. S.N.Mukherjee v. Union of India, AIR 1990 SC 1984

5. Union of India Vs. Mohan Lal Capoor, AIR 1974 SC 87

6. Raj Kishore Jha Vs. State of Bihar, (2003) 11 SCC 519

7.Kranti Associates Private Limited Vs. Masood Ahmed Khan, (2010) 9 SCC 496

8. Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336

9. J. Ashoka v. University of Agricultural Science and others, (2017) 2 SCC 609

10.Devmani v. State of U.P. and others, 2019 (1) ADJ 870 (DB)

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

1. The petitioner has instituted this writ proceedings challenging the order dated 02.11.2018 passed by the Secretary, Azamgarh Development Authority, respondent no.5 and the order passed by the District Magistrate dated 06.12.2018.

2. The facts are these:

The petitioner claims that he is owner and bhumidhar of araji no.491 situated in Village Narauli, Tappa Harvanshpur, Pargana Nizamabad, District Azamgarh and araji nos. 486 and 490 are adjacent to the petitioner's plot, which he has no concern. In support of the said averment the petitioner has brought on record a copy of the Khatauni of the Fasli year 1423-1428. The said plot has been purchased by the petitioner from Kailash Chauhan through registered sale deed dated 19.05.2016. Demarcation report dated 23.07.2017 submitted by the Lekhpal and Revenue Inspector in respect of the aforesaid three plots is brought on record. The said map is said to have been approved by the Sub-Divisional Magistrate, Sadar vide order dated 31.07.2017.

3. The petitioner intended to raise construction of the house over the plot no.491. Accordingly, he moved an application before the Azamgarh Development Authority for sanction of the map. On 01.11.2017, the Azamgarh Development Authority sanctioned the map, which is on the record.

4. The grievance of the petitioner is that the District Magistrate without any authority is interfering in the matter to help the private respondents. It is stated that the District Magistrate has taken undue interest in the matter to provide benefit to the respondent nos.5 and 6. He has got a report dated 10.09.2018, which was submitted by the Sub-Divisional

Magistrate, Sadar, Azamgarh in compliance of the endorsement made by the District magistrate on 20.07.2018. When the petitioner came to know about the *ex-parte* report dated 10.09.2018, submitted Secretary by the Sub-Divisional Magistrate, Sadar, Azamgarh, he moved an application to the Commissioner, Azamgarh to bring the illegal action to his notice. On 14.09.2018, the Commissioner directed the District Magistrate, Azamgarh to get an enquriy in the matter at the level of the Additional District Magistrate and submit a report. The said order is on the record. It is averred in the writ petition that the Chief Revenue Officer, Azamgarh, without conducting any enquiry at his level, on the basis of the report dated 14.09.2018 submitted by the Sub-Divisional Magistrate, Sadar, Azamgarh, submitted an *ex-parte* report dated 26.10.2018 to the District Magistrate. The District Magistrate while forwarding the report to the Commissioner made an endorsement dated 26.10.2018 directing to lodge a criminal case against the petitioner. It is stated that the said order is *ex-parte* and without jurisdiction.

5. Dissatisfied with the said order passed by the District Magistrate, the petitioner filed Writ Petition No.37328 of 2018 before this Court, wherein an interim order has been granted by this Court. It is averred that when a counter affidavit was filed in the said writ petition then the petitioner came to know that by order dated 02.11.2018 the Secretary, Azamgarh Development Authority has cancelled the order dated 01.11.2017 whereby the petitioner's map was sanctioned. The said order is under challenge in the present proceedings. The said order records that the order has been passed on the instruction of the District Magistrate. It is stated that no opportunity of hearing has been Secretary given by the respondent no.5 before passing the impugned order dated 02.11.2018 and the order is also without jurisdiction as the authority is not vested with the power of review. It is also averred in the writ petition that the order has been passed at the dictate of the District Magistrate, Azamgarh, who has no jurisdiction under the U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'the Act'). It is stated that only the Vice-Chairman has power under Section 15(9) of the Act to cancel the permission granted under Section 15(3) of the Act.

6. Since a serious issue was raised by the petitioner that the order of the District Magistrate is without jurisdiction as he has no power under the provisions of the Act to issue any direction to the Development Authority to cancel the map, we had furnished opportunity to the District Magistrate to file an affidavit sworn by him indicating under which provisions of law he has issued direction to the Secretary of the Development Authority to cancel the map. In compliance thereof the District Magistrate has filed his personal affidavit. The respondent nos. 5 and 6 have also filed their counter affidavit.

7. The District Magistrate in the counter affidavit has justified his order on the ground that he has passed the order dated 06.12.2018, in a routine administrative work to maintain the law and order. The relevant part of the paragraph is extracted:

"That the respondent Secretary no.6 gave an application dated 06.12.2018 during Jan Sunwai before the deponent, stating that some anti social elements are

interfering in his possession over his plot no.490 and requested for a direction to the S.H.O. Sidhari, Azamgarh to ensure that no interference be made in construction over his plot by the anti social elements. The deponent on this application passed his order dated 06.12.2018 in a routine administrative manner directing the S.O.Sidhari to take necessary action to ensure law and order in accordance with law and to do needful against the anti social elements, if any, who creates hindrance in construction of work of the respondent no.6 . It is further submitted that no such direction is given with regard to facilitate the applicant in his construction."

8. It is also stated by the District Magistrate that he is Vice-Chairman of the Development Authority and even in this capacity he has not issued any direction to the Secretary of the Azamgarh Development Authority with regard to the cancellation of the order dated 01.11.2017. The private respondents have also filed counter affidavits. In the counter affidavit they have raised the issue regarding the title. Hence, we are not recording the stand taken by the private respondents in detail as in the proposed order we are adverting to the merit of the case. We are confining ourself only to the issue with regard to the violation of principles of natural justice and the jurisdiction of Administrative Officer in passing the administrative order in the property dispute.

9. We have heard the learned counsel for the parties and perused the materials on record.

10. Concededly, the Development Authority has sanctioned the map of the petitioner vide order dated 01.11.2017 under Section 15 of the Act. It is alleged that the private respondents have made a complaint to the District Magistrate regarding the illegality in sanctioning the map.

11. From the personal affidavit of the District Magistrate it is evident that the District Magistrate has examined the issue on merit and has perused the report dated 23.07.2017 submitted by the revenue team to the Sub-Divisional Magistrate, Sadar and on his direction the Sub-Divisional Magistrate, Sadar has initiated a fresh enquiry. The Sub-Divisional Magistrate in compliance of the direction of the District Magistrate directed the revenue team constituted under the Chairmanship of Naib Tehsildar to make fresh survey (paimaish) of the plot nos. 486 and 490 of the respondent no.6 and plot no.491 of the petitioner. The revenue team submitted its paimaish report dated 12.11.2017. The Sub-Divisional Magistrate, Sadar approved the same and submitted it to the District Magistrate, Azamgarh.

12. When the petitioner came to know about the said survey, he also made a complaint to the District Magistrate, Azamgarh. The District Magistrate, Azamgarh directed the Sub-Divisional Magistrate, Sadar to make an enquiry and submit a report. The Sub-Divisional Magistrate, Sadar submitted another report dated 23.04.2018 and affirmed its earlier report dated 12.11.2017.

13. The District Magistrate in his counter affidavit has not denied the fact that the order of the Development Authority sanctioning the map of the petitioner dated 01.11.2017 has been cancelled without furnishing opportunity to the petitioner. It has also not been

denied in the counter affidavit that the plot no.491 was purchased by the petitioner through a registered sale deed dated 19.05.2016 and after survey a report dated 23.07.2017 was submitted by the Lekhpal and the Revenue Inspector, which was approved by the Sub-Divisional Magistrate vide order dated 31.07.2017. A copy of the order of the Sub-Divisional Magistrate dated 31.07.2017 is on the record.

14. The order of the Sub-Divisional Magistrate, Sadar was not challenged by the respondent nos. 5 and 6 and they directly approached the District Magistrate after a fresh Paimaish. In the counter affidavit of the District Magistrate or the private respondents it has not been averred that the order of the Sub-Divisional Magistrate dated 31.07.2017 was challenged. There is discrepancy in the counter affidavit filed by the District Magistrate and the respondent no.6. The District Magistrate has mentioned in his affidavit that the respondent no.6 has made an application to him and on the said application he has directed to the Sub-Divisional Magistrate, Sadar to make a fresh survey. However, this fact has not been mentioned by the respondent no.6 in his counter affidavit and he has stated that he has moved an application before the Sub-Divisional Magistrate, Azamgarh. In fact, he has not mentioned that the District Magistrate, Azamgarh has directed the Sub-Divisional Magistrate, Sadar to make a fresh enquiry. In view of the said contradiction in the affidavits of respondent no.6 and the District Magistrate, Azamgarh, it is difficult to believe the statement of the respondent no.6 in the counter affidavit.

15. The U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as the Act, 1973) is a complete Code in respect of the plan development in the development area notified under the said Act. Section 14 and 15 of the Act, 1973 deals with the sanction of the map. In the present case the Development Authority exercising its statutory power under Section 15 of the Act, 1973 has sanctioned the map. Once the map has been sanctioned, the District Magistrate has no power to issue direction to the Secretary of the Development Authority to cancel the map.

16. Pertinently, in the impugned order, the Secretary of the Development Authority has clearly mentioned that the order cancelling the map is passed in compliance of the direction of the District Magistrate. Moreover, the order is cryptic and bereft of reason. It is well settled law that the statutory authority has to pass an order applying his mind. If he takes a decision on the dictate of some statutory authority, the order stands vitiated. This Court in the case of **Madan Kumar and others v. District Magistrate, Auraiya and others, 2013 (10) ADJ 606** had occasion to deal with similar issue. The Court has quoted with approval Professor De Smith and Professor Wade in following terms:

"21. Professor De Smith, in his Principles of Judicial Review 1999 Edition, page 240 has aptly said :

"an authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. In at least two Commonwealth cases, licensing bodies were found to have taken decision on the instructions of the heads of Government who were prompted by extraneous motives. But, as less colourful

cases illustrate, it is enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide, although it remains a question of fact whether the repository of discretion abdicated it in the face of external pressure."

Professor Wade in his Administrative Law, 7th Edition has dealt with "Surrender, Abdication, Dictation" and "Power in the wrong hands" in the following words:-

"Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the Courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them….

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise…."

22. This paragraph of Professor Wade has been applied by the Supreme Court in the case of Anirudhsinhji Karansinhji Jadeja v. State of Gujarat, (1995) 5 SCC 302."

Broad principle that emerges is that if a power conferred upon an authority is not exercised by him independently within the framework of the Statute/ law and the decision is taken by him under the "dictation" of a superior authority or a Minister, it shows that he has abdicated his power.

Yet there is another aspect of the matter which cannot be lost sight. From the material on record we find that contention of learned counsel for the petitioner that the action of the respondents suffers from legal malice also. "Malice in law" or "Legal Malice" can vitiate a decision if it established that something has been done without lawful excuse. In such cases it need not to be proved, where the malice is alleged against the State that there was some personal ill-will on the part of the State. If the action of the State shows that there is a conscious violation of law to cause some prejudice to a citizen or rights. Such an order for an unauthorized purpose constitutes malice in law. In the case of Kranti Associates Private Limited and another v. Masood Ahmed Khan and others, (2010) 9 SCC 496 the Supreme Court has considered the legal malice in the following terms:

"25. In Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597, which is a decision of great jurisprudential significance in our constitutional law, Beg, C.J. in a concurring but different opinion held that an order impounding a passport is a quasi-judicial decision (SCC p. 311, para 34 : AIR p. 612, para 34). The learned Chief Justice also held, when an administrative action involving any deprivation of or restriction on fundamental rights is taken, the authorities must see that justice is not only done but manifestly appears to be done as well. This principle would obviously demand disclosure of reasons for the decision."

17. In **Dipak Babaria And Another v. State of Gujarat And Others, (2014) 3 SCC 502,** the Supreme Court has reiterated the principle that if power

conferred upon the authority under the statute is not exercised by him independently and decision is taken by him under the instruction (dictation) of a superior authority, it goes to show that he has not applied his mind and abdicated his power.

18. In the present case the Development Authority has categorically mentioned that the order has been passed on the direction of the District Magistrate. The District Magistrate in his personal affidavit has also stated that he has issued the direction in a routine administrative work.

19. Applying the principles laid down in the above cases, we find that the order passed by the Secretary, Development Authority cancelling the map of the petitioner is vitiated on the ground that it has been passed on the direction of the District Magistrate. The said order is also illegal as it is not supported by any reason. The Secretary, Azamgarh Development Authority has recorded only his conclusion without assigning any reason. The Supreme Court in the long line of the judgment has held that if quasi judicial or administrative order is not supported by any reason, the order becomes lifeless. A reference may be made to the Supreme Court judgments in the case of **M/s Travancore Rayon Ltd. v. Union of India, 1969 (3) SCC 868, S.N.Mukherjee v. Union of India, AIR 1990 SC 1984, Union of India Vs. Mohan Lal Capoor, AIR 1974 SC 87, Raj Kishore Jha Vs. State of Bihar, (2003) 11 SCC 519, Kranti Associates Private Limited Vs. Masood Ahmed Khan, (2010) 9 SCC 496, Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336 and J. Ashoka v. University of Agricultural Science and others, (2017) 2 SCC 609.**

20. In addition to above, in a property matter the District Magistrate has no jurisdiction to issue order under the garb of law and order situation. An administrative officer has no authority to issue direction in the property dispute, on the ground of apprehension of breach of peace. In case there is any apprehension of breach of peace in respect of the property dispute, the appropriate remedy has been provided under the provisions of the Criminal Procedure Code where the power has been conferred upon the Magistrate and not the District Magistrate. Moreover, in the present case the provisions of the Criminal Procedure Code has not been followed.

21. The question whether an administrative officer can exercise his administrative power in the matter of the property dispute fell for consideration before a Division Bench in the case of **Devmani v. State of U.P. and others, 2019 (1) ADJ 870 (DB)**. The Division Bench has held as under:

"6. In addition to above, we find that the Sub Divisional Magistrate being an administrative Officer has no power to issue any injunction order against any private person to interfere in the possession of the other person. In case an application was filed before the Sub Divisional Magistrate in respect of the property dispute, the appropriate course open to him was ask to the parties to approach the appropriate Court to resolve their dispute. The Sub Divisional magistrate has assumed the jurisdiction of

a Civil/Revenue Court and has passed the restrain order. To our repeated query to the learned counsel for the petitioner to point out the authority of law under which the Sub Divisional Magistrate has passed the order but he failed to point out any provision of the law which cloth the administrative officer to pass the injunction order.

7. The experience reveals that the Sub Divisional Magistrates are passing such type of order in a large number of cases. We find that the orders passed by the Administrative Officer interfering in the matter of property dispute where title dispute is involved are wholly without jurisdiction. An administrative officer cannot direct the Police to help a party in title dispute."

22. In the present case also the District Magistrate admittedly has passed the administrative order in respect of the property dispute on the ground that there was apprehension of breach of peace.

23. As discussed above, in such situation the District Magistrate has no jurisdiction to pass any order. Only recourse to the provisions under Cr.P.C can be taken. On this ground also the order of the District Magistrate is vitiated.

24. Lastly, the petitioner in paragraph nos. 20, 21 and 22 of the writ petition has averred that the Secretary of the Azamgarh Development Authority has cancelled the map without any notice or opportunity. This averment has not been denied by the District Magistrate in his personal affidavit or by the private respondent. Moreover, from the impugned order itself it is evident that the order has been passed without furnishing any opportunity to the petitioner. It is well settled law that an order which has civil consequences must be passed after furnishing opportunity to the affected persons. In this case no opportunity has been afforded to the petitioner and thus, the order stands vitiated on this ground also.

25. In view of the above, the impugned order dated 02.11.2018 is set aside. The matter is remitted back to the Secretary, Azamgarh Development Authority to pass a fresh order after furnishing opportunity to the petitioner and the private respondents herein. The said exercise be undertaken expeditiously preferably within three months from the date of communication of this order.

26. The writ petition stands allowed.

(2020)1ILR 1943

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.11.2019

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ-C No. 13347 of 2018

Smt. Nanhi Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Praveen Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Pankaj Kumar Gupta, Sri Pradeep Kumar Rai

A. Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 - Rule 2 (c) and Rule 4 – Suspension – ground of challenge - serious irregularities committed in

constitution of committee - it is merely reiteration of the description of the members of the enquiry committee already constituted by the District Magistrate - the District Magistrate himself has constituted the enquiry committee - the contention of petitioner that the District Magistrate himself has not constituted the enquiry committee or that the District Development Officer has no authority to do the same is baseless- Held - the petitioner has been rightly suspended from the post of Gram Pradhan. (Para 11)

Writ Petition dismissed. (E-7)

List of cases cited: -

1.Vijay Kumar vs. District Magistrate, 2015 (2) ADJ 145

2.Vivekanand Yadav vs. State of U.P. and others ,2011 (1) AWC 488 (FB)

3.Narendra Kumar vs. State of U.P. and Others, 2013 (2) AWC 1663

4. Shashi Kant vs. State of U.P. and Others, 2018 (3) AWC 2674

5. (Mohd. Arif vs. State of U.P. and 2 Others), Writ- C No. 11594 of 2018

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the petitioner and Sri Rajeev Kumar Shukla, learned Standing Counsel appearing for the State-authorities. Sri Pankaj Kumar Gupta, learned counsel for the complainant is present.

2. Present petition has been filed with following prayers:-

"(i) Issue a writ, order or direction in the nature of certiorari for quashing the impugned order dated 23.3.2018 passed by District Magistrate, Moradabad.

(ii) Issue a writ, order or directing in the nature of mandamus commanding the respondents to allow this writ petition and to operate the account not to cease the financial and administrative power of the petitioner in pursuance to the impugned order dated 23.3.2018 passed by District Magistrate, Moradabad.

(iii) Issue a writ, order or direction in the nature of mandamus directing the respondents not to give effect of the impugned order dated 23.3.2018 passed by District Magistrate, Moradabad.

(iv) To pass any other suitable order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(v) To award the cost of the petition from the respondent."

3. By the impugned order, the petitioner has been suspended from the post of Gram Pradhan of Village Mundia Raja, Block Vikas Khand Bilari, District Moradabad by the District Magistrate, Moradabad on the ground that an enquiry was conducted by a Committee of three members constituted for this purpose and she was found guilty. One of the charge against the petitioner was that she had taken away the old bricks of 'kharanja' in the village which were replaced, for her own use in her residence. This fact that she has taken away the old bricks was admitted by her in her reply. However, the explanation for taking away the bricks was that it is only for the security of the old bricks she has taken away the old bricks and they are still with her and she has not misused the same and she is willing to compensate the same in terms of money. The petitioner was found guilty and was suspended pending final enquiry as per the Uttar Pradesh Panchayat Raj (Removal of

Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as the Enquiry Rules, 1997).

4. Challenging the same, submission of learned counsel for the petitioner is that the District Magistrate himself has not constituted the enquiry committee and therefore, the same is not in accordance with the Enquiry Rules, 1997 particularly, Rule 2 (c) and Rule 4 of the Enquiry Rules, 1997.

5. He submits that on perusal of the order dated 21.9.2017 passed by the District Development Officer, Moradabad, it is clear that in fact, he has constituted the Committee (Annexure 1 to the counter affidavit filed by the State-authorities). He submits that the District Development Officer is not the authority to appoint the committee. Drawing attention to Enquiry Rules, 1997, he submits that such power to constitute a committee is delegated by State Government to the District Magistrate and it cannot be further delegated by District Magistrate to District Development Officer, therefore, such enquiry committee cannot be constituted by the District Development Officer and the enquiry report submitted by such committee is vitiated in the eye of law.

6. Learned counsel for the petitioner has also drawn attention of this Court to the various orders annexed with the supplementary affidavit as Annexure No.4 to indicate that the District Magistrate, as a matter of fact, himself has constituted committee and in the present case this has not been done and therefore, entire inquiry proceedings are vitiated. He submits, therefore, the order based on such inquiry is not sustainable in the eyes of law and is liable to be quashed. In support of his arguments learned counsel for the petitioner has placed reliance on following judgments:- (i) **Narendra Kumar vs. State of U.P. and Others 2013** (2) **AWC 1663, (ii) Shashi Kant vs. State of U.P. and Others 2018** (3) **AWC 2674** (iii) **judgment dated 30.3.2018** passed in **Writ- C No. 11594 of 2018 (Mohd. Arif vs. State of U.P. and 2 Others).**

7. Learned counsel for the petitioner also sought to argue the merits of the petition that her explanation submitted by the petitioner has not been correctly appreciated. He submits that it is only in public interest the old bricks were removed and she had expressed her clear and categorical stand that she is willing to compensate the same in terms of money.

8. The crux of the arguments is that the District Magistrate himself has not constituted the three members enquiry committee and thus, it is violation of the Enquiry Rules, 1997 and therefore, impugned order based on such enquiry report submitted by the enquiry committee so constructed is not sustainable in the eye of law.

9. Per contra, learned Standing Counsel drawing attention to the Annexure-1 to the counter affidavit, which is a letter dated 21.9.2017, which is being highlighted by learned counsel for the petitioner as an order constituting enquiry committee and by drawing attention to Annexure no-3 to the supplementary affidavit, which is an order dated an 14.9.2017, submitted that at serial no.5 for Block Baharia, which is admittedly, the relevant block for the concerned village i.e Mundaiya Raja, Vikas Khand Bilari, District Moradabad, a committee of three members, namely, the District Panchayat

Raj Officer, Moradabad, District Basic Education Officer, Moradabad and Assistant Engineer, Pradhanmantri Sadak Yojna (PIU), had been constituted in the District Moradabad for the reason that there were large numbers complaints of irregularities in constitution of enquiry committees, a committee of three members, which includes two district level officers, has been constituted. He submits that it is therefore, clear and as also highlighted in the letter dated 21.9.2017 issued by the District Development Officer with a clear reference to this order dated 14.9.2017 that it is only a communication and as per the directions of the District Magistrate that this committee has been constituted to submits its joint enquiry report. He, therefore, submits that there is no violation of Rule 2(c) or Rule 4 to the Enquiry Rules, 1997. He submits that admittedly, final inquiry is still pending, therefore, no interference is required in the impugned order.

10. I have considered the rival submissions and perused the record.

11. On perusal of the order dated 14.9.2017 I find that it is only because the complaints are being received at Chief Minister level, Commissioner level and Chief Development Officer level as well as in his own office that serious irregularities are being committed in constitution of committee, therefore, for the purpose of conducting impartial and technically sound inquiry, the committees for different blocks have been constituted. It is not in dispute that for eight different blocks different committees have been constituted, which undisputably included the District Level Officers. I find that in fact, in all the committees constituted for different eight blocks, at least two District Level Officers have been appointed and the third member appears to be the technical hand for the purpose of providing the assistance on the technical aspect of the enquiry. Coming to the various other orders passed by the District Magistrate annexed as Annexure No.-4 to the Supplementary Affidavit dated 16.4.2018, I find that all such orders that have been passed by the District Magistrate are of the dates prior to the issuance of the order dated 14.9.2017. The order at page no. 16 is the order dated 13.9.2017, the order at page no. 17 is the order dated 17.7.2017 and the order at page no. 18 is the order dated 19.7.2017. There is nothing on record to indicate that after constitution of all such eight committees for different blocks vide order dated 14.9.2017 any other order has been passed by the District Magistrate himself for constituting the committee. The reason is obvious as the District Magistrate himself has constituted the enquiry committee in the light of the various complaints received at the State level, Commissioner level and at his own level. Therefore, it is very much clear and as also reflected in the letter dated 21.9.2017 that it is nothing but reiteration of the designation of the officers who have already been made members of the committee for inquiry purposes by the District Magistrate in his own order dated 14.9.2017. There is a clear reference to the aforesaid order dated 14.9.2017 in the order/letter dated 21.9.2017. There is no deviation in the same. Therefore, the arguments made by learned counsel for the petitioner that the District Magistrate himself has not constituted the enquiry committee or that the District Development Officer has no authority to do the same is baseless, inasmuch as, the District Development Officer has not

exercised any power independently and it is merely reiteration of the description of the members of the enquiry committee already constituted by the District Magistrate.

12. The order dated 21.9.2017 further reflects that copy of this order has been sent to the members of the committee only for compliance. It is, therefore, only an order regarding communication of constitution of committee done by the District Magistrate vide order dated 14.9.2017 and nothing further. This cannot be considered as an order constituting the enquiry committee independently.

13. A reference may also be made to the judgment of Hon'ble Full Bench in the case of ***Vivekanand Yadav vs. State of U.P. and others 2011 (1) AWC 488 (FB)***. Apart from that in case of ***Vijay Kumar vs. District Magistrate 2015 (2) ADJ 145***, placing reliance on ***Vivekanand Yadav (supra)*** it has been held that if the enquiry has been conducted by a District Level Officer, the same is valid even if the enquiry officer is not appointed by the District Magistrate. Paragraphs 6, 7, 8, 11, and 12 of ***Vijay Kumar (supra)*** are quoted as under:-

"6. It is contended that no preliminary enquiry was ordered by District Magistrate and he did not appoint any Enquiry Officer to conduct preliminary enquiry or fact finding enquiry, therefore, aforesaid reports could not have been relied upon for the purpose of passing order under Proviso to Section 95(1)(g) of Act, 1947. It is also said that no Enquiry Officer was appointed by District Magistrate and therefore, any preliminary enquiry report submitted by another person could not have been acted upon and in this regard reliance is placed on a Single Judge judgment of this Court in Rais Ahmad Vs. State of U.P. & Ors., 2009(1) CRC 139.

7. However, I find that issue, up for consideration, is squarely answered by a Full Bench of this Court in Vivekanand Yadav Vs. State of U.P. & Anr., 2010 (10) ADJ 1 (FB).

8. The law laid down by Full Bench in Vivekanand Yadav (supra) can be summarised as under:

(I) Section 95(1)(g) contemplates removal of Pradhan while Proviso to Section 95(1)(g) talks of enquiry before ceasing financial and administrative powers during pendency of a removal proceeding. If Pradhan is prima facie found to have committed financial and other irregularities, preliminary/fact finding enquiry under Section 95(1)(g) proviso is necessary, which has to be conducted under Rule 4 of Rules, 1997.

(II) Proviso to Section 95(1) would apply to Section 95(1)(g) contemplating removal but not to any other provision like Proviso to Section 95(1)(g).

(III) The proviso to Section 95(1) provides for reasonable opportunity in removal proceedings of a Pradhan under Section 95(1)(g) but it does not apply to Proviso to Section 95(1)(g) providing for preliminary or fact finding enquiry: the purpose of this enquiry is to find out if there is any prima facie case against Pradhan or not.

(IV) Proviso to Section 95(1)(g) providing cessation of financial and administrative powers does contemplate a preliminary enquiry by a person and procedure is to be prescribed: the Rules have to be framed for the same. Rules, 1997 thus have been framed because it is so mandated in the Proviso to Section

95(1)(g) of Act, 1947 and not because of 95(1)(g) or the Proviso to Section 95(1).

(V) The District Magistrate can order a preliminary enquiry on the complaint or report or otherwise. The word 'complaint' or 'report' refers to the complaint by a private person or to the report made by a public servant under Rule 3.

(VI) The District Magistrate has power to refer a case for preliminary enquiry even if there is no complaint or report. In other words, he has power to act suo moto.

(VII) Even if a complaint made is not entertainable in view of Rule 3(5) of Rules, 1997 yet District Magistrate can always refer the matter for preliminary enquiry, if he consider that it should be so enquired; since he can act suo moto.

(VIII) The word "otherwise" in Rule 4 means that District Magistrate has suo motu powers to order a preliminary enquiry, and, he may order a preliminary enquiry even if there is no complaint or report; or a defective complaint, not in accordance with Rules 3(1) to 3(4).

(IX) A Pradhan has no right to object that a complaint is not in accordance with Rules 3(1) to 3(4) of Rules, 1997 and hence no inquiry can be ordered.

(X) A Pradhan is neither entitled to be associated in preliminary enquiry nor entitled to get copy of preliminary enquiry report. His only right is to have his explanation or point of view or version to the charges considered before the order for ceasing his financial and administrative power is passed.

(XI) It is not only necessary that explanation or point of view or version of affected pradhan should be obtained but should also be considered before being prima facie satisfied of his being guilty of financial and other irregularities and ceasing his powers. The consideration of explanation does not have to be a detailed one but there should be indication that mind has been applied.

(XII) The proceeding for removal has to be conducted in accordance with Rules 6 onwards of Rules, 1997, irrespective of the fact whether right to exercise financial and administrative power was ceased or not. However, where right to exercise financial and administrative power is also to be ceased then procedure in Rules 3 to 5 has to be followed, otherwise there is no necessity to follow them.

(XIII) In other words, preliminary enquiry may not be necessary if the proceeding for removal is to be undertaken without ceasing power of pradhan in respect to administrative and financial matters.

(XIV) In order to exercise power under Rule 5, to cease administrative and financial powers of Pradhan under Proviso to Section 95(1)(g) of Act, 1947, District Magistrate can pass order in the following contingencies:

(i) A complaint can be made directly to the District Magistrate who may ask the enquiry officer as defined under Rule 2 (c) to conduct a preliminary inquiry under Rule 4 ; or

(ii) A complaint can be made directly to the enquiry officer defined under Section 2 (c), who may submit a report without the District Magistrate asking for it ; or

(iii) A complaint can be made to the District Magistrate with a copy to enquiry officer, who may submit a report, without the District Magistrate asking for it ; or

(iv) A District Magistrate can himself conduct a preliminary enquiry.

(XV) Any other report can be considered by District Magistrate under Rule 3(6) of Rules, 1997 for ordering preliminary enquiry but final enquiry with cessation of power cannot be ordered on its basis. In other words, action under Proviso to Section 95(1) (g) can also be taken on the preliminary report of District Magistrate as well as on a report of a person defined as enquiry officer under Rule 2(c) of Rules, 1997. Only these reports would be covered in the word 'otherwise' of Rule 5.

11. Though, in Rais Ahmad (supra) also, the order under Proviso to Section 95(1)(g) was passed on 30.6.2008 i.e. after the said amendment but it appears that Hon'ble Court was not apprised of the fact that Rule 2(c), as was initially framed, has already undergone an amendment in 2001 and this amended rule was not considered by this Court. Apparently judgment in Rais Ahmad (supra) is per incurium. The amended definition has been considered in Full Bench judgment in Vivekanand Yadav (supra) and exposition of law laid down therein has already been noted above. Therefore, even if District Magistrate has not appointed Enquiry Officer, report submitted by District Basic Education Officer and District Panchayat Raj Officer can be acted upon by treating it to be a preliminary enquiry report since they were all "district level officer" and do satisfy definition of "Enquiry Officer" under the Rules.

12. This Court has also said that even if enquiry has not been ordered by District Magistrate but if such a preliminary report is available, it can be acted upon for the purpose of passing an order under Proviso to Section 95(1)(g) of Act, 1947. Moreover, powers exercisable by State Government under Section 95(1)(g) have been delegated upon District Magistrate vide notification No.1684/XXXIII-1-1997-123-97, dated 30.4.1997 issued under Section 96-A of Act, 1947, which reads as under:

"96-A. Delegation of powers by State Government.- The State Government may delegate all or any of its powers under this Act to any officer or authority subordinate to it subject to such conditions and restrictions as it may deem fit to impose." (emphasis supplied)

14. In such view of the matter, I do not find any substance in the argument of learned counsel for the petitioner insofar as it relates to the formation of the enquiry committee being without authority is concerned.

15. Coming to the merits of the order, suffice it to note that in her reply the petitioner has clearly admitted that she has taken away the old bricks to his residence, although, it has been explained that the old bricks were removed and were kept in her residence from security point of view only and she has not misused the same. However, it is further reflected from the reply that there is no averment that such bricks are still lying in her residence and the same can be recovered. On the contrary, she has offered to refund the amount of the old bricks. This clearly indicates the admission on the part of the petitioner that the bricks were removed and kept by her in her residence.

16. It is not in dispute that final inquiry is still pending, therefore, additionally for this reason also I am not inclined to interfere in the matter.

17. Petition is devoid of merits and is accordingly, dismissed.

18. In view of the discussion made hereinabove the judgments on which the reliance has been placed by the learned counsel for the petitioner are of no help to him.

19. In the facts and circumstances of the case, it is provided that in fact the final inquiry has not been concluded till date, the same shall be concluded as per the Rule 6 of the Rules, 1997 within time bound period and, if possible, within a period of three months.

(2020)1ILR 1950

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 21892 of 2016
Connected With
Writ-C No. 21801 of 2016 & Writ-C No. 21847 of 2016 & Writ-C No. 21891 of 2016

Alchemist Ltd. ...Petitioner
Versus
Dinesh Chandra Tripahthi & Anr. ...Respondents

Counsel for the Petitioner:
Sri Shashwat Kishore Chaturvedi

Counsel for the Respondents:
C.S.C., Sri Krishan Chandra Tripathi

A. Payment of Wages Act, 1936 - Section 15 (2) - Claims arising out of deductions from wages or delay in payment of wages - the authority under Section 15 of the Act, 1936 is a tribunal of limited jurisdiction - mere denial of existence of relationship of employer and employee may not be sufficient to oust the jurisdiction of the authority under the Act, 1936 – it would only be in a case where a serious dispute is raised with regard to the existence of the contract of employment that the authority would cease to have jurisdiction to entertain the claim as the same may involve adjudication upon complicated questions of law and fact – orders passed by the Prescribed Authority set aside. (Para 4, 12, 30, 33 & 38)

The Industrial Tribunals while deciding matters relating to labour disputes in proceedings which are summary in nature are to dispose of the issues, whether preliminary or otherwise, at the same - where the claim had been made under Section 15 of the Act, 1936 raising a grievance with regard to delay in payment of wages and as per terms of the first proviso to sub-section (3) of Section 15 the authority under the Act, 1936 is enjoined to dispose of the claim as far as applicable within a period of three months from the date of registration of the claim by authority - The second proviso to sub-section (3) mandates that the period of three months may be extended if both parties to the dispute agree for any bonafide reason to be recorded by the authority that the said period of three month may be extended to such period as may be necessary to dispose of the application in a just manner. (Para 36)

Held: - In a claim filed under Section 15 of the Act, 1936 arising out of deductions from wages or delay in payment of wages time is of essence and the matter cannot be lingered on the pretext of deciding preliminary issues. (Para 37)

Writ Petitions allowed. (E-7)

List of cases cited: -

1. A.V.D'costa Vs. B.C. Patel and Ors.,2

2. Shri Ambica Mills Co. Ltd. Vs. Shri S.B.Bhatt and another3

3. Payment of Wages Inspector Vs. Surajmal Mehta and Ors.,4

4. M/s E.Hill & Company (P) Ltd., Mirzapur Vs. City Magistrate Mirzapur & Anr5

5. D.C.M. Limited, New Delhi Vs. Prescribed Authority, Meerut and others6

6. M/s. Upper Doab Sugar Mills Muzaffarnagar Vs. Prescribed Authority and others7

7. D.P. Maheshwari Vs. Delhi Administration and others8

8. National Council for Cement & Building Materials Vs. State of Haryana and others9

9. Cooper Engineering Ltd. Vs. P.P. Mundhe10

10. S.K. Verma Vs. Mahesh Chandra11

11.D.P. Maheshwari Vs. Delhi Administration12 (supra)

12.Workmen Vs. Hindustan Lever Ltd.13

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

1. Heard Sri S.K.Chaturvedi, learned counsel for the petitioner, Sri K.C.Tripathi, learned counsel appearing for the first respondent and Sri Shreeprakash Singh, learned Standing Counsel appearing for the second respondent in the present petition along with connected matters.

2. Challenge in Writ-C No. 21892 of 2016 is to an order dated 07.04.2016 passed by the Prescribed Authority under the Payment of Wages Act, 1936/Deputy Labour Commissioner, U.P., Jhansi Region, Jhansi in Case No. P.W. 35 of 2009 (Dinesh Chandra Tripathi Vs. Director Alchemist and others) whereby certain issues were framed and the matter was posted for hearing the parties on merits. The other three writ petitions (Writ-C Nos. 21801/2016, 21847/2016 and 21891/2016) seek to challenge similar orders of the same date i.e. 07.04.2016 which had been passed by the Prescribed Authority in Case Nos. P.W. 42/2010, P.W. 16/2012 and P.W. 18/2011.

3. All the four writ petitions are based on a similar set of facts and as such with the consent of the counsel for the parties the matters are being taken up for disposal together.

4. The records of the case reflect that an application under Section 15 (2) of the Payment of the Wages Act, 19361 was filed by the first respondent claiming wages for the period 16.01.2009 to 30.11.2009. The first respondent also filed similar applications under Section 15 (2) of the Act, 1936 claiming wages for the period 1.12.2009 to 30.10.2010, 1.11.2010 to 3.9.2011 and 1.10.2011 to 30.9.2012, registered as Case Nos. 42/2010, 16/2012 and 18/2011 respectively.

5. The aforementioned cases were contested by the petitioner by filing detailed written reply/objections dated 20.3.2010 stating that the applicant (first respondent herein) had abandoned his services and as such he was discontinued from the rolls of the petitioner-company with effect from 13.2.2008. It was accordingly submitted that the applications filed under Section 15 of the Act, 1936 were not maintainable and as such the question of jurisdiction and maintainability be decided as a preliminary issue.

6. Taking into consideration the application filed by the first respondent and also the reply/preliminary objections submitted by the petitioner as also its rejoinder the Prescribed Authority passed the order dated 07.04.2016 wherein it was stated that in the light of the facts which had been presented before it, it was necessary to decide the issues with regard

to the jurisdiction of the Prescribed Authority under the Act, 1936, the question with regard to existence of employer-employee relationship during the period in question, and as to whether the applicant was entitled to the reliefs prayed for. The matter was fixed for 25.04.2016 for hearing the parties on merits.

7. Identical orders were passed on the same date i.e. 07.04.2016 in all the four cases which had been filed by the first respondent before the Prescribed Authority, and the said orders have been challenged by filing these writ petitions which are being decided together.

8. The grounds of challenge in these writ petitions are that the services of the first respondent having stood terminated on 13.02.2008, unless the order of termination was not declared illegal the applications filed under the Act, 1936 were not maintainable and that the Prescribed Authority ought to have decided the question of maintainability of the claim petitions before proceeding further with the matter.

9. The counsel for the petitioner has contended that the question of employer-employee relationship which would involve adjudicating upon complicated questions of fact and law was beyond the scope and jurisdiction of the Prescribed Authority under the Act, 1936 and accordingly the Prescribed Authority was proceeding beyond its jurisdiction.

10. Per contra, learned counsel appearing for the first respondent has submitted that the issue of employer-employee relationship was incidental to the main question involved in the claims petitions and therefore there was no error in the order passed by the Prescribed Authority and proceeding further with the matters.

11. On the basis of the rival contentions raised by the parties the question which falls for consideration is regarding the scope and jurisdiction of the Prescribed Authority under the Act, 1936 and to what extent the issue of employer-employee relationship can be considered in such proceedings.

12. In order to appreciate the controversy involved in the present writ petitions the relevant provisions under the Act, 1936 may be adverted to. The provisions contained under Section 15 of the Act, 1936 which relate to claims arising out of deductions from wages or delay in payment of wages, are being extracted below :-

"15. Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims- (1) The appropriate Government may, by notification in the Official Gazette, appoint -

(a) any Commissioner for workmen's Compensation; or

(b) any officer of the Central Government exercising functions as,--

(i) Regional Labour Commissioner; or

(ii) Assistant Labour Commissioner with at least two years' experience; or

(c) any officer of the State Government not below the rank of Assistant Labour Commissioner with at least two year's experience; or

(d) a presiding officer of any Labour Court or Industrial Tribunal,

constituted under the Industrial Disputes Act, 1947 (14 of 1947) or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State; or

(e) any other officer with experience as a Judge of a Civil Court or a Judicial Magistrate,

as the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, including all matters incidental to such claims:"

Provided that where the appropriate Government considers it necessary so to do, it may appoint more than one authority for any specified area and may, by general or special order, provide for the distribution or allocation of work to be performed by them under this Act.

(2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered trade union authorized in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under sub-section (1), may apply to such authority for a direction under sub-section (3):

Provided that every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be :

Provided further that any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-section (2) is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of wages under Section 3, or give them an opportunity of being heard, and, after such further enquiry, if any, as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding three thousand rupees but not less than one thousand five hundred rupees in the latter, and even if the amount deducted or delayed wages are paid before the disposal of the application, direct the payment of such compensation, as the authority may think fit,not exceeding two thousand rupees :

Provided that a claim under this Act shall be disposed of as far as practicable within a period of three months from the date of registration of the claim by the authority :

Provided further that the period of three months may be extended if both parties to the dispute agree for any bona fide reason to be recorded by the authority that the said period of three months may be extended to such period as may be necessary to dispose of the application in a just manner:

Provided also that no direction for the payment of compensation shall be made in the case of delayed wages if the

authority is satisfied that the delay was due to -

(a) a bona fide error or bona fide dispute as to the amount payable to the employed person; or

(b) the occurrence of an emergency, or the existence of exceptional circumstances, the person responsible for the payment of the wages was unable, in spite of exercising reasonable diligence; or

(c) the failure of the employed person to apply for or accept payment.

(4) If the authority hearing an application under this section is satisfied-

(a) that the application was either malicious, or vexatious, the authority may direct that a penalty not exceeding three hundred seventy-five rupees be paid to the employer or other responsible for the payment of wages by the person presenting the application; or

(b) that in any case in which compensation is directed to be paid under sub-section (3), the applicant ought not to have been compelled to seek redress under this section, the authority may direct that a penalty not exceeding three hundred seventy five rupees be paid to Appropriate Government by the employer or other person responsible for the payment of wages.

(4-A) Where there is any dispute as to the person or persons being the legal representative or representatives of the employer or of the employed person, the decision of the authority on such dispute shall be final.

(4-B) Any inquiry under this section shall be deemed to be a judicial proceeding within the meaning of Sections 193, 219 and 228 of the Indian Penal Code (45 of 1860).

(5) Any amount directed to be paid under this section may be recovered-

(a) if the authority is a Magistrate, by the authority as if it were a fine imposed by him as Magistrate, and

(b) if the authority is not a Magistrate, by any Magistrate to whom the authority makes application in this behalf, as if it were a fine imposed by such Magistrate."

13. This Court may take note of the fact that the Payment of Wages Act, 1936 was enacted to ensure that the wages payable to employees covered by the Act are disbursed by the employers within the prescribed time limit and that no deductions other than those authorised by law are made by the employers.

14. The term wages has been defined under Section 2 (vi). Under Section 3 a general responsibility is cast upon every employer for payment to persons employed by him of all wages required to be paid under the Act. The time schedule for payment of wages is prescribed under Section 5. Section 7 enumerates the deductions which may be made from the wages. The fines which can be imposed on any employed persons are specified under Section 8. Deductions for reason of absence from duty, for damage or loss, for services rendered, for recovery of advances and for recovery of loans are provided for under Sections 9, 10, 11, 12, 12-A respectively.

15. Section 15 of the Act, 1936 provides for filing of claims arising out of deductions from wages or delay in payment of wages. This section not only provides the forum but also provides the remedy for non-payment of wages, whether by way of deductions or delay. The authority under the Act for the purposes of hearing and deciding the

claims under Section 15 is appointed by the appropriate Government by notification in the Official Gazette. The authority so appointed is empowered to hear all claims arising out of deductions from wages or delay in payment of wages and all incidental matters.

16. Upon an application being filed under Section 15 (2), the authority appointed for the purpose is required to hear the applicant and the employer or other person responsible for the payment of wages under section 3, or give them an opportunity of being heard, and, after such further inquiry, if any, as may be necessary, may, without prejudice to any other penalty to which such employer or other persons are liable under the Act, direct the refund to the employed persons of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as it may think fit, not exceeding ten times the amount deducted in the former case and not exceeding three thousand rupees but not less than one thousand five hundred rupees in the latter, and even if the amount deducted or delayed wages are paid before the disposal of the application, it may direct the payment of such compensation, as it may think fit, not exceeding two thousand rupees.

17. The proviso to sub-section (3) lays down that a claim under the Act shall be disposed of as far as practicable within a period of three months from the date of registration of the claim by the authority. It has also been provided that no direction for payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to - (a) a bona fide error or bona fide dispute as to the amount payable to the employed person, or (b) the occurrence of an emergency, or the existence of exceptional circumstances, the person responsible for the payment of the wages was unable, in spite of exercising reasonable diligence, or (c) the failure of the employed person to apply for or accept payment.

18. The scope of jurisdiction of the authority under Section 15 of the Act, 1936 fell for consideration in the case of **A.V.D'costa Vs. B.C. Patel and Ors.,**2 and it was held that the authority set up under Section 15 is a tribunal of limited jurisdiction which could decide only what actual terms of the contract between the parties were in order to determine the actual wages. The observations made in the judgment are being extracted below :-

"7. The Authority set up under section 15 of the statute in question is undisputably a tribunal of limited jurisdiction. Its power to hear and determine disputes must necessarily be found in the provisions of the Act. Such a tribunal, it is undoubted, cannot determine any controversy which is not within the ambit of those provisions. On examining the relevant provisions of the Act it will be noticed that it aims at regulating the payment of wages to certain classes of persons employed in industry. It applies in the first instance to the payment of wages to persons employed in any factory or employed by a railway administration; but the State Government has the power after giving three months' notice to extend the provisions of the Act or any of them to the payment of wages to any class of persons employed in any class or group of industrial establishments. "Wages means -

"all remuneration, capable of being expressed in terms of money, which

would, if the terms of the contract of employment, express or implied, were fulfilled, be payable..... to a person employed in respect of his employment or of work done in such employment....." (omitting words not necessary for our present purpose).

Section 3 lays down that every employer or his representative or nominee shall be responsible for the payment to persons employed by him of all wages. Section 3 provides for fixation of "wage-periods" which shall not exceed one month in any case. Section 5 indicates the last date within which, with reference to the particular wage-period, wages shall be paid.

Section 7 lays down that the wages of an employed person shall be paid to him without deductions of any kind except those authorized by or under the Act. Section 7(2) in cls. (a) to (k) specifies the heads under which deductions from wages may be made, namely, fines; deductions for absence from duty; deductions for damage to or loss of goods of the employer; deductions for house accommodation supplied by the employer; deductions for amenities and services supplied by the employer; deductions for recovery of advances or for adjustment of over payments of wages; deductions of income-tax payable by the employee; deductions to be made under orders of a Court or other competent authority; deductions for subscriptions to, and for repayment of advances from any provident fund; deductions for payments to co-operative societies, etc.; and finally, deductions made with the concurrence of the employed person in furtherance of certain schemes approved by Government. No other deductions are permissible. It is also laid down that every payment made by the employed person to the employer or his agent shall be deemed to be deduction from wages. Each of the several heads of deductions aforesaid is dealt with in detail in sections 8 to 13.

Section 8 lays down the conditions and limits subject to which fines may be imposed and the procedure for imposing such fines. It also requires a register of such fines to be maintained by the person responsible for the payment of wages. Section 9 deals with deductions on account of absence from duty and prescribes the limits and the proportion thereof to wages. Section 10 similarly deals with deductions for damage or loss to the employer and the procedure for determining the same. Like S. 8, this section also requires a register of such deductions and realizations to be maintained by the person responsible for the payment of wages.

Section 11 lays down the limits of deductions for house accommodation and other amenities or services which may have been accepted by the employee, subject to such conditions as the State Government may impose. Section 12 lays down the conditions subject to which deductions for recovery of advances may be made from wages. Finally S.13 provides that the deductions for payment to co-operative societies and insurance schemes shall be subject to such conditions as the State Government may prescribe.

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We then come to S.15 which makes provision for the appointment of the Authority "to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages of persons employed or paid in that area". Where the Authority finds that any deduction has been made from the wages of an employed

person or the payment of any wages had been delayed, he may at the instance of the wage-earner himself or any legal practitioner or any official of a registered trade union authorized in writing to act on his behalf, or any Inspector under the Act or any other person acting with the permission of the Authority, after making such enquiry as he thinks fit and after giving an opportunity to the person responsible for the payment of wages under S.3 to show cause, direct the refund to the employed person of the amount deducted or the payment of delayed wages together with such compensation as he may determine.

The section also lays down the limits and conditions of his power to direct payment of compensation to the employed person or of penalty to the employer, if he is satisfied that the application made on behalf of an employee was either malicious or vexatious. His determination is final subject to a very limited right of appeal under S.17. Section 18 vests the Authority with all the powers of a civil Court under the Code of Civil Procedure, for the purpose of taking evidence, of enforcing the attendance of witnesses and of compelling the production of documents. Section 22 lays down that no Court shall entertain any suit in respect of wages or of deduction from wages in so far as the claim forms the subject matter of a pending proceeding under the Act or has formed the subject of a direction in favour of or against the plaintiff under Section 15, or which could have been recovered by the application under that section.

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10. In our opinion, the scheme of the Act as set forth above shows that if an employee were to state that his wages were, say Rs. 100 per month, and that Rs. 10 had been wrongly deducted by the authority responsible for the payment of wages, that is to say, that the deductions could not come under any one of the categories laid down in S.7(2), that would be a straight case within the purview of the Act and the authority appointed under S.15 could entertain the dispute. But it is said on behalf of the respondent that the authority has the jurisdiction not only to make directions contemplated by sub-s.(3) of S.15 to refund to the employed person any amount unlawfully deducted but also to find out what the terms of the contract were so as to determine what the wages of the employed person were.

There is no difficulty in accepting that proposition. If the parties entered into the contract of service, say by correspondence and the contract is to be determined with reference to the letters that passed between them, it may be open to the authority to decide the controversy and find out what the terms of the contract with reference to those letters were. But if an employee were to say that his wages were Rs. 100 per month which he actually received as and when they fell due,but that he would be entitled to higher wages if his claims to be placed on the higher wages scheme had been recognized and given effect to, that would not, in our opinion, be a matter within the ambit of his jurisdiction.

The authority has the jurisdiction to decide what actually the terms of the contract between the parties were, that is to say, to determine the actual wages; but the authority has no jurisdiction to determine the question of potential wages. The respondent's complaint in the present case comes within the latter illustration. If the respondent's claim to be placed on the scheme of higher wages had been unduly passed over by the appellant, if indeed he had the power to do so, the obvious

remedy of the respondent was to approach the higher authorities of the railway administration by way of departmental appeal or revision; but instead of doing that, he has sought his redress by making his claim before the authority under the Act.

The question is, has the authority the power to direct the appellant or his superior officers who may have been responsible for the classification, to revise the classification so as to upgrade him from the category of a daily wage-earner to that of an employee on the monthly wages scheme. If the respondent had been on the cadre of monthly wages and if the appellant had withheld his rise in wages to which he was automatically entitled, without any orders of his superior officers, he might justly have claimed the redress of his grievance from the authority under the Act, as it would have amounted to an under payment.

But in the present case, on the case as made on behalf of the respondent, orders of the superior officers were necessary to upgrade him from a daily wage-earner to a higher cadre. The authority under the Act has not been empowered under S.15 to make any such direction to those superior officers. The appellant is responsible to pay the respondent only such wages as are shown in the relevant register of wages presumably maintained by the department under the provisions of the Act, but he cannot be directed to pay the respondent higher wages on the determination by the authority that he should have been placed on the monthly wages scheme.

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15. The jurisdiction of the Tribunal arises under S.15 of the Payment of Wages Act, 1936 (Act IV of 1936) (hereinafter referred to as the Act). The Tribunal is set up to decide "all claims arising out of deductions from the wages or delay in payment of wages". The relief which it is authorised to award is to direct "the refund of the amount deducted, or the payment of the wages delayed". Such a direction made by the Tribunal is final, under S.17 of the Act, subject to the right of appeal provided therein. Under S.22, no suit lies in any Court for the recovery of wages or of any deduction there from which could have been recovered by an application under S.15.

However limited this jurisdiction of the Tribunal, and however elaborate the provisions in the Act for the preparation and display by the employer of the table of wages payable to the employees, and for the inspection thereof by the Factory Inspectors, it cannot be supposed that the jurisdiction of the Tribunal is only to enforce the wages so displayed or otherwise admitted. Such a narrow construction would rob the machinery of the Act of a great deal of its utility and would confine its application to cases which are not likely to arise often, in a well-ordered administration like the Railways. Indeed, I do not gather that such a construction was pressed for, before us, in the arguments.

Even a Tribunal of limited jurisdiction, like the one under consideration, must necessarily have the jurisdiction to decide, for itself, the preliminary facts on which the claim or dispute before it depends. In the instant case, it must have jurisdiction to decide what the wages payable are and, for that purpose, what the contract of employment and the terms thereof are. The judgment of my learned brothers in this case apparently recognizes the jurisdiction of the Tribunal as above stated, when it said that the Tribunal has the power "to find out what

the terms of the contract were to determine what the wages of the employed person were". Whether the Tribunal's decision in this behalf is conclusive or not is a matter that does not arise for decision in this case.

16. But, it is said that the Tribunal has no authority to determine the question of "potential wages". Undoubtedly a claim to a higher potential wage cannot be brought in under the category of "claims arising out of deduction from the wages or delay in payment of the wages" if that wage depended on the determination by a superior departmental or other authority as to whether or not a particular employee is entitled to the higher wage-a determination which involves the exercise of administrative judgment or discretion or certification, and which would, in such a situation, be a condition of the payability of the wage.

But where the higher wage does not depend upon such determination but depends on the application of, and giving effect to, certain rules and orders which, for this purpose, must be deemed to be incorporated in the contract of employment, such a wage is, in my view, not a prospective wage, merely because the paying authority concerned makes default or commits error in working out the application of the rules. In this context it is relevant to notice that the definition of "wages" in the Act is "all remuneration which would if the terms of the contract, express or implied, 'were' fulfilled, be payable". The word "were" in this definition which I have underlined, seems to indicate that even a "prospective wage" which would be payable on the proper 'application' of the rules in the sense which I have explained above may well fall within its scope. The wage under the Act is not, necessarily, the immediately pre-existing wage but the presently-payable wage."

19. The scope of jurisdiction of the authority under Section 15 again came to be considered in the case of **Shri Ambica Mills Co. Ltd. Vs. Shri S.B.Bhatt and another**3, and it was held that the only claims which can be entertained by the authority are claims arising out of deductions made in payment of wages. It was stated in the judgment as follows :-

"11. The scheme of the Act is clear. The Act was intended to regulate the payment of wages to certain classes of persons employed in industry, and its object is to provide for a speedy and effective remedy to the employees in respect of their claims arising out of illegal deductions or unjustified delay made in paying wages to them. With that object S. 2(vi) of the Act has defined wages. Section 4 fixes the wage period. Section 5 prescribes the time of payment of wages; and S. 7 allows certain specified deductions to be made. Section 15 confers jurisdiction on the authority appointed under the said section to hear and decide for any specified area claims arising out of deductions from wages, or delay in payment of wages, of persons employed or paid in that area. It is thus clear that the only claims which can be entertained by the authority are claims arising out of deductions or delay made in payment of wages. The jurisdiction thus conferred on the authority to deal with these two categories of claims is exclusive; for S. 22 of the Act provides that matters which lie within the jurisdiction of the authority are excluded from the jurisdiction of ordinary civil courts. Thus in one sense the jurisdiction conferred on the authority is limited by S. 15, and in another sense it is exclusive as prescribed by S. 22."

20. While considering the ambit and scope of the expression "claims arising out of deductions or delay made in payment of wages" it was held that in dealing with

claims arising out of deductions or delay made in payment of wages the authority inevitably would have to consider questions incidental to the said matters. In determining the scope of these incidental questions care must be taken to see that under the guise of deciding incidental matters the limited jurisdiction is not unreasonably or unduly extended. Care must also be taken to see that the scope of these incidental questions is not unduly limited so as to affect or impair the limited jurisdiction conferred on the authority. The observations made in the judgment are as follows:-

"12. In dealing with claims arising out of deductions or delay made in payment of wages the authority inevitably would have to consider questions incidental to the said matters. In determining the scope of these incidental questions care must be taken to see that under the guise of deciding incidental matters the limited jurisdiction is not unreasonably or unduly extended. Care must also be taken to see that the scope of these incidental questions is not unduly limited so as to affect or impair the limited jurisdiction conferred on the authority. While considering the question as to what could be reasonably regarded as incidental questions let us revert to the definition of wages prescribed by S. 2(vi). Section 2(vi) as it then stood provided, inter alia, that 'wages' means all remuneration capable of being expressed in terms of money which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and it includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment. It also provided that the word "wages" did not include five kinds of payments specified in clauses (a) to (e). Now, if a claim is made by an employee on the ground of alleged illegal deduction or alleged delay in payment of wages several relevant facts would fall to be considered. Is the applicant an employee of the opponent?; and that refers to the subsistence of the relation between the employer and the employee. If the said fact is admitted, then the next question would be: what are the terms of employment? Is there any contract of employment in writing or is the contract oral? If that is not a point of dispute between the parties then it would be necessary to enquire what are the terms of the admitted contract. In some cases a question may arise whether the contract which was subsisting at one time had ceased to subsist and the relationship of employer and employee had come to an end at the relevant period. In regard to an illegal deduction a question may arise whether the lock-out declared by the employer is legal or illegal. In regard to contracts of service some times parties may be at variance and may set up rival contracts, and in such a case it may be necessary to enquire which contract was in existence at the relevant time.…"

21. While considering the question as to what could be reasonably regarded as incidental questions, it was stated in the aforementioned case of **Shri Ambica Mills** that it would be inexpedient to lay down any hard and fast or general rule which would afford a determining test to demarcate the field of incidental facts which can be legitimately considered by the authority and those which cannot be so considered. The observations made in this regard in the judgment are as follows :-

"....we do not propose to consider these possible questions in the present appeal, because, in our opinion, it would be inexpedient to lay down any hard and fast or general rule which would afford a determining test to demarcate the field of incidental facts which can be legitimately considered by the authority and those which cannot be so considered…"

22. The provisions under sub-section (1) of Section 15 may again be referred to at this stage and the same are being extracted below :-

"15. Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims- (1) The appropriate Government may, by notification in the Official Gazette, appoint -

(a) any Commissioner for workmen's Compensation; or

(b) any officer of the Central Government exercising functions as,--

(i) Regional Labour Commissioner; or

(ii) Assistant Labour Commissioner with at least two years' experience; or

(c) any officer of the State Government not below the rank of Assistant Labour Commissioner with at least two year's experience; or

(d) a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Disputes Act, 1947 (14 of 1947) or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State; or

(e) any other officer with experience as a Judge of a Civil Court or a Judicial Magistrate,

as the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, *including all matters incidental to such claims*:"
(emphasis supplied)

23. The expression *"including all matters incidental to such claims"* was introduced by the Payment of Wages (Amendment) Act, 1964 [Act No. 53 of 1964], and it appears to have been introduced for the purposes of clarifying the position of law which had already been laid down in terms of the judgment in the case of **Shri Ambica Mills.**

24. In the case at hand the petitioner while filing his written reply/objections had contended that the applications filed under Section 15 of the Act, 1936 were not maintainable and as such the question of jurisdiction and maintainability be decided as a preliminary issue and the Prescribed Authority passed an order dated 07.04.2016 wherein it was stated that it was necessary to decide the issues with regard to the jurisdiction of the authority under the Act, 1936, and the question with regard to existence of employer-employee relationship during the period in question and the matter was fixed for 25.04.2016 for hearing the parties on merits. It is against the aforesaid order that the present writ petition has been filed.

25. The scope of Section 15 again came up for consideration in the case of **Payment of Wages Inspector Vs. Surajmal Mehta and Ors.,**4 and it was held that as per the terms of sub-section (2) the authority appointed under sub-section (1) has jurisdiction to entertain

applications only in two classes of cases, namely, of deductions and fines not authorised under Sections 7 to 13 and of delay in payment of wages beyond the wage periods fixed under Section 4 and the time of payment laid down in Section 5 and further that incidental questions could be considered without unduly expanding or curtailing the jurisdiction of the authority. The relevant observations made in the judgment are as follows :-

"8. It is explicit from the terms of Section 15(2) that the Authority appointed under sub-section (1) has jurisdiction to entertain applications only in two classes of cases, namely, of deductions and fines not authorised under Sections 7 to 13 and of delay in payment of wages beyond the wage periods fixed under Section 4 and the time of payment laid down in Section 5. This is clear from the opening words of sub-section (2) of Section 15, namely, "where contrary to the provisions of this Act" any deduction has been made or any payment of wages has been delayed. These being the governing words in the sub-Section the only applications which the Authority can entertain are those where deductions unauthorised under the Act are made from wages or there has been delay in payment beyond the wage period and the time of payment of wages fixed or prescribed under Sections 4 and 5 of the Act. Section 15(2) postulates that the wages payable by the person responsible for payment under Section 3 are certain and such that they cannot be disputed.

9. In D'Costa v. B.C. Patel, AIR 1955 SC 412 this Court held after considering the scheme of the Act that the jurisdiction of the Authority under Section 15 was confined to deductions and delay in payment of the actual wages to which the workman was entitled and that the Authority under the Act had no jurisdiction to enter into a question of potential wages, i.e., where the workman pleads that he ought to have been up-graded as persons junior to him were up-graded and that he ought to have been paid wages on a scale paid to those so up-graded. This Court held that the Authority had jurisdiction to interpret the terms of a contract of employment to find out the actual wages payable to the workmen where deduction from or delay in payment of such wages is alleged, but not to enter into the question whether the workman should have been up-graded from being a daily rated worker to a monthly rated workman. In Shri Ambica Mills Co. Ltd. v. S.B. Bhatt, AIR 1961 970 this Court again examined the scheme of the Act and held that the only claims which could be entertained by the Authority were claims arising out of deductions or delay made in the payment of wages. The Court, however, observed that in dealing with claims arising out of deductions or delay made in payment of wages the Authority inevitably would have to consider questions incidental to these matters, but in determining the scope of these incidental matters care must be taken to see that under the guise of deciding incidental matters the limited jurisdiction was not unreasonably or unduly expanded. Equally, care must also be taken to see that the scope of these incidental matters was not unduly curtailed so as to affect or impair the limited jurisdiction conferred on the Authority. The Court declined to lay down any hard and fast rule which would afford a determining test to demarcate the field of incidental facts which could be legitimately considered by the Authority and those which could not be so considered.

10. It is true, as stated above, that the Authority has the jurisdiction to try matters which are incidental to the claim in question. Indeed Section 15(1) itself provides that the Authority has the power to determine all matters incidental to the claim arising from deductions from or delay in payment of wages. It is also true that while deciding whether a particular matter is incidental to claim or not care should be taken neither to unduly expand nor curtail the jurisdiction of the Authority. But it has at the same time to be kept in mind that the jurisdiction under Section 15 is a special jurisdiction. The Authority is conferred with the power to award compensation over and above the liability for penalty of fine which an employer is liable to incur under Section 20."

26. The question as to whether a dispute regarding existence of relationship of employer and employee between the contending parties is a matter incidental to the claim arising out of deductions from the wages or delay in payment of the wages in a proceeding under Section 15 of the Act, 1936 was taken up for consideration before a Division Bench of this Court in the case of **M/s E.Hill & Company (P) Ltd., Mirzapur Vs. City Magistrate Mirzapur & Anr**5, and it was held that the matters incidental to claims arising out of deductions from the wages or delay in payment of the wages must be matters which follow these claims or are subordinate or attendant in position or significance to such claims and only such matters can be gone into by the authority while trying the claim made by the employee relating to deductions from his wages or delay in payment of his wages.

27. It was also stated that a mere denial of existence of the relationship of employer and employee may not oust the jurisdiction of the authority but where a serious controversy is raised about the existence, continuance or emergence of a fresh contract of employment the authority would have no jurisdiction to entertain and try the claim as the dispute may involve decisions on complicated questions of law and fact. The relevant observations made in the judgment are as follows.

"It is thus obvious that matters incidental to claims arising out of deductions from the wages or delay in payment of the wages must be matters which follow these claims or are subordinate or attendant in position or significance to such claims. It is only such matters that can be gone into by the Authority while trying the claim made by the employee relating to deductions from his wages or delay in payment of his wages.

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A mere denial of existence of the relationship of employer and employee may not oust the jurisdiction of the Authority under the Payment of Wages Act but where a serious controversy is raised about the existence, continuance or emergence of a fresh contract of employment, the Authority would have no jurisdiction to entertain and try the claim as the dispute may involve decisions of complicated questions of law and fact…"

28. The issue as to whether Section 15 of the Act, 1936 would cover the question of relationship of employer-employee between the claimant and the opposite party to the claim was taken up before this Court in the case of **D.C.M. Limited, New Delhi Vs. Prescribed Authority, Meerut and others**6, and following the judgments in the case of

Suraj Mal Mehta and Ambica Mill Company Ltd. (supra), it was held that the said question cannot be decided in summary proceedings under Section 15. The observations made in the judgment are as follows :-

"7. A perusal of the provisions of Section 15 of the Payment of Wages Act would go to show that it confers jurisdiction on the prescribed authority to hear and decide the claims arising out of deduction from wages or delay in payment of wages, including all matters incidental to such claims. In its very nature exercise of jurisdiction under Section 15 envisages the existence of relationship of employer and employees between the parties and consequent entitlement to the wages claimed having been deducted from the same, or delayed payment thereof by the employer.

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11. In the instant case as already settled above there is a serious dispute between the parties as to whether the respondents are employees of the petitioner of the contractor. The prescribed authority, the respondent No. 1 has decided the question of existence of relationship of employer and employee in the affirmative in favour of respondents by referring to the evidence led before him, but since it was not merely an incidental question rather went to the very root of the matter, and required in depth enquiry and consideration of questions of law and facts, the same could not be decided in summary proceedings under Section 15 of the Payment of Wages Act, rather could validly be a subject of reference to a Labour Court under the provisions of the Industrial Dispute Act, such Court possessing wider powers for deciding the contentious question of the nature raised in this case."

29. The limited scope of adjudication under Section 15 was reiterated in **M/s. Upper Doab Sugar Mills Muzaffarnagar Vs. Prescribed Authority and others**7, wherein it was held that in order to attract the provisions under Section 15 (2) two things must exist namely a person 'employee' and another person who had employed such person namely 'employer' and that in a case where the issue of relationship of employer-employee is under a serious cloud the matter would be beyond the jurisdiction of the authority under Section 15. The observations made in the judgment in this regard are as follows:-

"9. This definition of 'wages' is pari materia with the similar definition of "wages" in Section 2(h) of the Contract Labour (Regulation and Abolition) Act, 1970. Section 3 of Act 1936 provides that, every employer is under an obligation for payment of all wages to persons employed by him. Section 15(2) of Act 1936 entitles a person employed but not paid his wages or when there is any unauthorized deduction or delay in payment, to make an application before the Prescribed Authority i.e. authority notified under sub section (1) of Section 15 for claiming such wages. A reading of sub-sections (2) and (3) of Section 15 makes it clear that the application can be moved not only against the employer but if there is any other person responsible for payment of wages of such employed person, application can be filed under Section 15(2) against such person also. To attract Section 15(2) of Act 1936, two things therefore must exist namely a person 'employee' and another person who had employed such person, namely the "employer" or other person responsible for payment of wages under Section 3 i.e. to whom the employer has authorized.

10. The limited scope of adjudication under Section 15 is regarding

the claim arising out of deduction or delayed payment and not any other issue namely, the very existence of relationship of employer and employee or the question whether the claimant was a person employed or not or that the person against whom such a claim is raised whether he is an employer or the person authorized for payment or not. If in a given case an issue other than that of alleged deduction or delay in payment arises and the competent authority finds that such an issue has been raised only to defeat an otherwise bona fide claim and in its view the incidental issue raised is bogus, fictitious, superfluous or fanciful, it can continue to proceed to decide the matter but where a serious, bona fide, genuine dispute of relationship arises, this Court is also of the view that such an issue cannot be adjudicated by the authorities under Sections 15(1) and (2) of the Act, 1936, lacking inherent jurisdiction to entertain such a dispute.

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16. To my mind, this issue is not incidental to the question of deduction or delayed payment but a condition precedent to attract the very provisions of Act 1936. Therefore, in a case where the very relationship is under a serious cloud, and needs a detailed but exclusive discussion, it is beyond the jurisdiction of Prescribed Authority under Section 15(1) and (2) of the Act 1936 and has to be adjudicated in appropriate regular proceedings by raising an industrial dispute. It could not have been decided by an authority under Sections 15(1) while entering a claim under Section 15(2) and assuming jurisdiction upon itself to decide the said issue. It is infact not an incidental but a substantial jurisdictional issue relating to very applicability of Act 1936. Hence this could not have been decided by Prescribed Authority under Section 15 of Act 1936. The impugned orders passed in both the writ petitions are thus wholly without jurisdiction."

30. From the foregoing discussions it follows that the authority under Section 15 of the Act, 1936 is a tribunal of limited jurisdiction. Its power to hear and determine the disputes must necessarily be found in terms of the provisions of the Act, and it cannot determine any controversy which is not within the ambit of those provisions.

31. The jurisdiction of the authority can be invoked in respect of claims arising out of deductions from wages or delay in payment of wages. In order to exercise the aforesaid jurisdiction dealing with claims arising out of deductions or delay in payment of wages the authority may have to consider questions incidental to such matters including the issue as to whether there existed or exists, during the relevant period, any relationship of employer or employee between the parties.

32. In determining the scope of the incidental questions which may arise out of the claims in respect of deductions or delay in payment of wages the authority would have no jurisdiction to enter into and decide complicated questions of fact and law. Due care is required to be exercised to see that while dealing with incidental matters the limited jurisdiction is not unreasonably extended so as to travel beyond the scope of its jurisdiction nor is unduly limited so as to affect or impair the powers and jurisdiction conferred upon the authority. It may not be desirable to lay down any hard and fast rule as to what questions can be decided or provide a test so as to demarcate the field

of the incidental factors which can be considered while entertaining claims under Section 15 of the Act, 1936.

33. It may be however stated that a mere denial of existence of relationship of employer and employee may not be sufficient to oust the jurisdiction of the authority under the Act, 1936 and it would only be in a case where a serious dispute is raised with regard to the existence of the contract of employment that the authority would cease to have jurisdiction to entertain the claim as the same may involve adjudication upon complicated questions of law and fact.

34. As regards the orders passed by the Prescribed Authority dated 07.04.2016 whereunder the matters were directed to be posted for decision on certain preliminary issues, this Court may take notice of the fact that the practice of raising preliminary issues in labour and industrial disputes and the situation created by raising such preliminary issues which take long years to settle was viewed with concern in the case of **D.P. Maheshwari Vs. Delhi Administration and others**8, wherein it was observed as follows:-

"1.It was just the other day that we were bemoaning the unbecoming devices adopted by certain employers to avoid decision of industrial disputes on merits. We noticed how they would raise various preliminary objections, invite decision on those objections in the first instance, carry the matter to the High Court under Article 226 of the Constitution and to this Court under Article 136 of the Constitution and delay a decision of the real dispute for years, sometimes for over a decade. Industrial peace, one presumes, hangs in the balance in the meanwhile. We have now before us a case where a dispute originating in 1969 and referred for adjudication by the Government to the Labour Court in 1970 is still at the stage of decision on a preliminary objection. There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Article 226 of the Constitution stop proceedings before a tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from court to court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and Article 136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all tribunals like industrial tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections journeyings up and down. It is also worth while remembering

that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues."

35. The delay in decision of industrial disputes due to raising preliminary issues was again noticed in the case of **National Council for Cement & Building Materials Vs. State of Haryana and others**9 and the decision of the High Court refusing to interfere with the order passed by the Industrial Tribunal to hear the preliminary issue with other issues on merits, was upheld by the Supreme Court. Referring to the earlier judgments in **Cooper Engineering Ltd. Vs. P.P. Mundhe**10, **S.K. Verma Vs. Mahesh Chandra**11 **D.P. Maheshwari Vs. Delhi Administration**12 **(supra)** and **Workmen Vs. Hindustan Lever Ltd.**13 the following observations were made:-

"12. We, however, cannot shut our eyes to the appalling situation created by such preliminary issues which take long years to settle as the decision of the Tribunal on the preliminary issue is immediately challenged in one or the other forum including the High Court and proceedings in the reference are stayed which continue to lie dormant till, the matter relating to the preliminary issue is finally disposed of.

13. This Court in Cooper Engineering Ltd. v. P.P.Mundhe, in order to obviate undue delay in the adjudication of the real dispute, observed that the Industrial Tribunals should decide the preliminary issues as also the main issues on merits altogether so that there may not be any further litigation at the interlocutory stage. It was further observed that there was no justification for a party to the proceedings to stall the final adjudication of the dispute referred to the Tribunal by questioning the decision of the Tribunal on the preliminary issue before the High Court.

14. Again in S.K.Verma v. Mahesh Chandra, this Court strongly disapproved the practice of raising frivolous preliminary objections at the instance of the employer to delay and defeat the purpose of adjudication on merits.

15. In D.P.Maheshwari v. Delhi Administration, this Court speaking through O,Chinnappa Reddy, J. observed that the policy to decide the preliminary issue required a reversal in view of the "unhealthy and injudicious practices resorted to for unduly delaying the adjudication of industrial disputes for the resolution of which an informal forum and simple procedure were devised with avowed object of keeping them from the dilatory practices of civil courts". The Court observed that all issues whether preliminary or otherwise, should be decided together so as to rule out the possibility of any litigation at the interlocutory stage. To the same effect is the decision in Workmen v. Hindustan Lever Ltd.

16. The facts in the instant case indicate that the appellant adopted the old tactics of raising a preliminary dispute so as to prolong the adjudication of industrial dispute on merits. It raised the question whether its activities constituted an 'Industry' within the meaning of the

Industrial Disputes Act and succeeded in getting a preliminary issue framed on that question. The Tribunal was wiser. It first passed an order that it would be heard as a preliminary issue, but subsequently, by change of mind, and we think rightly, it decided to hear the issue along with other issues on merits at a later stage of the proceedings. It was at this stage that the High Court was approached by the appellant with the grievance that the Industrial Tribunal, having once decided to hear the matter as a preliminary issue, could not change its mind and decide to hear that issue along with other issues on merits. The High Court rightly refused to intervene in the proceedings pending before the Industrial Tribunal at an interlocutory stage and dismissed the petition filed under Article 226 of the Constitution. The decision of the High Court is fully in consonance with the law laid down by this Court in its various decisions referred to above and we do not see any occasion to interfere with the order passed by the High Court. The appeal is dismissed, but without any order as to costs."

36. It is therefore seen that the Industrial Tribunals while deciding matters relating to labour disputes in proceedings which are summary in nature are to dispose of the issues, whether preliminary or otherwise, at the same. This would be all the more necessary in the present case where the claim had been made under Section 15 of the Act, 1936 raising a grievance with regard to delay in payment of wages and as per terms of the first proviso to sub-section (3) of Section 15 the authority under the Act, 1936 is enjoined to dispose of the claim as far as applicable within a period of three months from the date of registration of the claim by authority. The second proviso to sub-section (3) mandates that the period of three months may be extended if both parties to the dispute agree for any bonafide reason to be recorded by the authority that the said period of three month may be extended to such period as may be necessary to dispose of the application in a just manner.

37. It may therefore be inferred that in a claim filed under Section 15 of the Act, 1936 arising out of deductions from wages or delay in payment of wages time is of essence and the matter cannot be lingered on the pretext of deciding preliminary issues.

38. In view of the aforestated reasons the orders dated 07.04.2016 passed by the Prescribed Authority in Case Nos. P.W. 35/2009, 42/2010, 16/2012 and 18/2011 which are subject matter of challenge in these writ petitions, are held to be legally unsustainable and are therefore set aside.

39. Having regard to the facts of the case, and in particular, that the claims filed by the workman was registered before the authority under the Act, 1936 more than a decade ago, this Court deems it appropriate while setting aside the orders dated 07.04.2016 passed by respondent no.2/Prescribed Authority under the Act, 1936, to remit the matters to the Prescribed Authority under the Act, 1936 with a direction to endeavour to decide the claims, including all the issues raised by the parties, preliminary or otherwise, together and make an endeavour to pass final orders expeditiously, preferably within a period of three months from the date of presentation of a certified copy of this order before the authority. Parties are directed to appear before the authority under the Act, 1936 and not to seek any unnecessary adjournments.

40. The writ petitions are allowed to the extent indicated above.

(2020)1ILR 1969
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE PIYUSH AGRAWAL, J.

Writ-C No. 24535 of 2010

M/s G.T.M. Builders & Promoters Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders, Sri Rahul Sripat, Sri Vipin Sinha, Sri Ishir Sripat

Counsel for the Respondents:
C.S.C.

A. Indian Stamp Act, 1899 - Section 17, 33 - Petitioner entered into an Agreement to purchase land -agreement was executed-possession was not delivered-photocopy of deed submitted for levy of stamp duty-Petitioner failed to produce original agreement-duty imposed with penalty for late payment-rightly made-as soon as agreement executed-section 17 comes into picture-agreement to be duly stamped-proceedings duly initiated.

Held, as soon as the petitioner accepted the execution of the agreement, section 17 of the Indian Stamp Act comes into picture and is pressed to service for getting the agreement duly stamped. It is immaterial as to whether, on the basis of the agreement dated 19.01.2006, the performance, as contemplated therein, was done or not done. Once, there is no denied of the execution of the agreement, at any stage, then the liability of stamp duty does arise. (Para 20)

In the case in hand, the original agreement was directed to be produced by the petitioner vide notice dated 17.06.2007 and the petitioner failed to produce the same. Therefore, the proceedings under section 33(4) & (5) were rightly initiated. (Para 24)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Hariom Agrawal Vs. Prakash Chand Malviya reported in 2007 (6) ALD 105 (SC) **(distinguished)**

2. Som Dutt Builders Limited Vs. State of U.P. & Others **(distinguished)**

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Shri Rahul Sripat, learned Senior Counsel, assisted by Shri Ishir Sripat, learned counsel for the petitioner and Ms. Archana Tyagi, learned standing counsel for the State – respondents.

2. The present writ petition has been filed for the following, amongst other, relief:-

"i) issue a writ, order or direction in the nature of certiorari quashing the order dated 28.01.2010 passed by Chief Controlling Revenue Authority, U.P., Allahabad (Circuit Court at Meerut) in Stamp Appeal No. 09 of 2007-08; M/s G.T.M. Builders & Promoters (P) Ltd. Versus State of U.P. (Annexure No. 8)."

3. It is averred in the writ petition that M/s Modipon Fibres Company (a division of Modipon Limited) claimed to have held land measuring 201 bighas, 6 biswas situated in Village - Bishokher, Aurangabad, Gadana and Begumabad Gadana in the District - Ghaziabad. The said land was alleged to have been transferred to M/s Modipon Fibres Company by the State Government vide transfer deed dated 01.08.1994. The petitioner entered into an agreement dated 19.01.2006 to purchase the land in

question from M/s Modipon Fibres Company. M/s Modipon Fibres Company was permitted to sell the land vide order dated 10.08.2001 by the State Government. It is further averred that some dispute arose between the parties and the possession of the land was never delivered to the petitioner. It is further averred that a photocopy of the deed dated 19.01.2006 was submitted by the Assistant Commissioner of Stamps to the Collector, Ghaziabad on 21.04.2006 for levy of stamp duty. Consequently, the Collector registered a case under section 33 of the Indian Stamp Act, 1899 (registered as Case No. 17 of 2006-07) and was transferred to the Assistant Commissioner of Stamps, Ghaziabad vide order dated 03.06.2007.

4. It is further stated that on 16.06.2006, a notice under sections 17, 27, 33, 40, 47-A & 64 of the Indian Stamp Act read with rules 7, 8, 9 & 10 of the U.P. Stamp (Valuation of Property) Rules, 1997 was issued by the Assistant Commissioner of Stamps to the petitioner. Pursuant to the notice, the petitioner submitted its reply/objection.

5 The Assistant Commissioner of Stamps, vide order dated 27.09.2007, held that the petitioner is liable to pay the stamp duty in accordance with the Schedule I-B at Serial No. 5 of the Indian Stamp Act and also imposed penalty. Aggrieved by the order of the Assistant Commissioner of Stamps, the petitioner preferred Stamp Appeal No. 9 of 2007 before the Chief Controlling Revenue Authority, U.P. (CCRA) under section 56(I-A) of the Indian Stamp Act. During the pendency of the appeal, recovery citation dated 20.11.2007 was issued against the petitioner. Aggrieved petitioner, filed Writ Petition No. 483 of 2008 before this Court, which was disposed of vide order dated 05.11.2009 directing the appellate authority to decide the stamp appeal within three months.

6. Pursuant to the order of this Court, the appellate authority has passed an order dated 28.01.2010 dismissing the stamp appeal of the petitioner. Hence, this writ petition.

7. Learned counsel for the petitioner submits that the petitioner entered into Memorandum of Understanding with M/s Modipon Fibres Company, which was never acted upon as M/s Modipon Fibres Company was not vested with the right to transfer the property. It is further submitted that against M/s Modipon Fibres Company, Original Suit No. 150 of 2001 was pending before the Debt Recovery Tribunal and therefore, the Company cannot sell the land without the permission of the Debt Recovery Tribunal, Delhi. It is further submitted that within 15 days from the date of Memorandum of Understanding dated 19.01.2006, the petitioner and M/s Modipon Fibres Company were to jointly measure the land and required to record the exact measurements in the Memorandum to be signed by them.

8. Learned counsel for the petitioner further submits that the notice, which has been issued on 17.06.2007, never called for the original deed, failing which section 33 of the Indian Stamp Act cannot be pressed into service as no original deed was with M/s Modipon Fibres Company and therefore, it cannot be said that there is any deficiency of stamp duty. It is further submitted that the authorities below have failed to consider the fact as to whether

photocopy, in absence of original instrument, can be subjected to the proceedings for imposition of deficiency in stamp duty. It is further submitted that the entire proceedings are wholly illegal and in contravention with the provisions of the Indian Stamp Act as the proceedings were initiated on the basis of the photocopy of the deed dated 19.01.2006.

9. Learned counsel for the petitioner has placed reliance upon the judgement of the apex Court in the case of ***Hariom Agrawal Vs. Prakash Chand Malviya*** reported in 2007 (6) ALD 105 (SC) (paragraph nos. 5 & 13) as well as the judgement of this Court in ***Som Dutt Builders Limited Vs. State of U.P. & Others*** reported in AIR 2005 (Alld) 234 (paragraph nos. 8 & 9).

10. *Per contra*, learned standing counsel submits that the petitioner has never denied the execution of the Memorandum of Understanding. He further submits that the notices were issued directing the petitioner to submit the original deed, but the petitioner never submitted the original deed and therefore, the proceedings under section 33 of the Indian Stamp Act were rightly initiated against the petitioner. Learned standing counsel further submits that the instrument, as per section 17 of the Indian Stamp Act, is chargeable to stamp duty as soon as the same is executed by the person. It is immaterial as to whether the conditions of the agreement were fulfilled or not, as as soon as the agreement is executed, the liability for payment of stamp duty arises. It is further submitted that in the case in hand, part payment was made by the petitioner to M/s Modipon Fibres Company, which itself shows execution of the agreement and part performance thereof. Learned standing counsel further submits that the judgements cited by the petitioner are not applicable in the facts and circumstances of the present case. He further submits that the orders passed by the authorities below are in accordance with law and do not call for any interference by this Court.

11. The Court has perused the record.

12. On the basis of the submissions made by the learned counsel for the parties, the issue, which arises for consideration by this Court, is as to whether on the basis of photocopy of the instruction, i.e., the agreement dated 19.01.2006, can the deficiency of stamp duty be imposed upon the petitioner without calling for the original instrument for the purpose of satisfying with regard to adequacy of the stamp duty paid thereon.

13. For appreciation of the controversy involved in this case, sections 2(12), 2(14), 17, 33(1), (4) & (5) of the Indian Stamp Act are relevant, which are quoted below:-

Section 2(12): "Executed" and "Execution". *"Executed" and "Execution" used with reference to instruments, mean signed and signature;*

Section 2(14): *Instrument. "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;*

Section 17: *All instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution.*

Section 33 (1): *Every person having by law or consent of parties authority to receive evidence, and every*

person in charge of a pubic office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

Section 33 (4): *In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under section 10 on the copy of the instrument:*

Provided *that no action under sub-section (3) or sub-section (4) shall be taken after a period of four years from the date of execution of the instrument.*

Section 33 (5): *In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under section 40 on the copy of the instrument:*

Provided *that no action under sub-section (4) or sub-section (5) shall be taken after a period of four years from the date of execution of the instrument:*

Provided further *that with the prior permission of the State Government an action under sub-section (4) or sub-section (5) may be taken after a period of four years but before a period of eight years from the date of execution of the instrument."*

14. From the perusal of the aforesaid provisions of the Indian Stamp Act, it is evident that section 2(12) provides that "Executed" and "Execution" is used with reference to instruments, mean signed and signature; section 2(4) provide that "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded; section 17 provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution.

15. Section 33 of the Indian Stamp Act empowers the authority to examine and impound the instruments before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions. Sub-section (4) thereof provides that in case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under section 10 on the copy of the instrument. Sub-section (5) empowers the authority that in case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under section 40 on the copy of the instrument.

16. Learned counsel for the petitioner has vehemently argued that the notice dated 17.06.2007 was issued without calling for the original agreement dated 19.01.2006, which has been rebutted by the learned standing counsel.

17. This Court has perused the notice dated 17.06.2007. The relevant part of the notice is quoted below:-

"आप कृपया दिनांक 30ध्6ध्2006 को प्रातः 10ण्30 बजे उपरोक्त सन्दर्भ में इस न्यायालय में विचाराधीन मूल अभिलेख सहित उपरोक्त पते पर ण्ण्ण् आना सुनिश्चित करेए मूल अभिलेख इस न्यायालय में दाखिल करे तथा पत्रावली के अध्ययन के उपरांत अपना पक्ष एवं उसके समर्थन में साक्ष्यः साक्षीः

अभिलेखए इस न्यायालय के आदेश के अनुसार निर्धारित तिथि में प्रस्तुत करना चाहें।"

18. The notice under section 33 of the Indian Stamp Act, as aforesaid, itself is very clear directing the petitioner to produce the original agreement on or before 30.06.2006, but in spite of service of notice, the original instrument was not produced by the petitioner.

19. It is not the case of the petitioner that he tried to submit the original instrument as per the notice dated 17.06.2007, the same was not accepted by the authorities below. Once, by notice dated 17.06.2007, when the original documents were sought to be produced and the petitioner failed to do so, the proceedings initiated under sub-sections (4) & (5) of section 33 of the Stamp Act are wholly justified. Further, the record shows that no where, either in the grounds of appeal or before this Court, the petitioner submitted that the agreement dated 19.01.2006 was not executed, but it has been only argued that after execution of the agreement dated 19.01.2006, it was never acted upon.

20. As soon as the petitioner accepted the execution of the agreement, section 17 of the Indian Stamp Act comes into picture and is pressed to service for getting the agreement duly stamped. It is immaterial as to whether, on the basis of the agreement dated 19.01.2006, the performance, as contemplated therein, was done or not done. Once, there is no denied of the execution of the agreement, at any stage, then the liability of stamp duty does arise.

21. The reliance placed by the petitioner upon the ***Hariom Agrawal*** *(supra)* and ***Som Dutt Builders Limited*** (supra) would be of no help to the petitioner, as in that case, the authorities never call upon for submission of original instrument. But in the present case, vide notice dated 17.06.2007, the petitioner was directed to produce the original agreement, but he failed to submit the same.

22. Another judgement in ***Som Dutt Builders Limited*** (supra) relied upon by the learned counsel for the petitioner is also of no help to the petitioner. Relevant paragraph nos. 8 & 9 of the aforesaid judgement is quoted below:-

*"**8.** As regards the first issue, although the agreement had been executed on 11.6.1987, action was first sought to be initiated only on 31.10.1994, which was after a lapse of more than 7 years. Admittedly the said action was initiated on the basis of a photo copy of the document dated 11.6.1987, by summoning the original document. The first proviso toSection 33of the Act makes it clear that no action can be taken underSection 33(4)of the Act (which deals with the cases where copy of the document is produced and the original instrument is called for) after a period of four years from the date of execution of the instrument. Since admittedly action was being taken on the basis of a document executed on 11.6.1987 and more than four years had elapsed, the provision ofSection 33(4)of the Act could not be attracted. The second proviso toSection 33of the Act having been inserted only w.e.f. 1.9.1998 would not be attracted in this case.*

***9.** As regards the second issue that the Additional District Magistrate had no jurisdiction to initiate proceedings on a photo copy of the document by summoning the original document for the purposes of*

ascertaining the liability of stamp duty under the Act, even if the notice dated 31.10.1994 and the action taken by the respondents in pursuance thereof could be said to be covered underSection 33(1)of the Act (although the petitioner disputes the same), still the said action would also be illegal and without jurisdiction. In response to the letter dated 31.10.1994 written by the Additional District Magistrate to the Kanpur Development Authority, the Kanpur Development Authority on 1.11.1994 is said to have sent the document in question to the Respondent No. 3. According to the petitioner the document so sent was only a copy of the original and not the original, which was and still remains in the possession of the petitioner. Specific assertion to that effect has been made in paragraph 31 of the writ petition that the original agreement is with the petitioner and the same has not been denied by Kanpur Development Authority or the State of U.P. in their counter affidavits. The learned Standing Counsel had also placed the original records of the case before me and the original agreement was not found there. The learned Standing Counsel could also not justify as to on what basis it has been claimed by him that the original document had been placed before the Additional District Magistrate on which action has been taken. At the time of hearing, the original document was actually placed before me by the learned counsel for the petitioner to show that the same was and still is in the possession of the petitioner. As perSection 33(1)of the Act, once the document or instrument appears to be under-stamped, the officer concerned shall impound the same, In the present case, the original document had never been impounded. The procedure for impounding a document has been laid down insection 40of the Act and it is no one's case that the same had been followed in the present case. Further, the said document was never produced nor came before the Additional District Magistrate in the performance of his official functions and hence the provisions ofSection 33(1)of the Act could not have been attracted. In the case of R.A. Remington v. Deputy Commissioner & Collector, Pithoragarh 1966 A.L.J. 514 the Apex Court has held that the authorities have no power underSection 33(1)of the Act to summon the document for the purposes of finding out whether it had been properly stamped or not. Thus the submission of the petitioner, that the case of the respondents for imposing penalty on the document would also not be covered under the provisions ofSection 33(1)of the Act, has force."

23. In the said case, the proceedings were initiated after a lapse of more than seven years; whereas, section 33 of the Act very clearly provides the limitation of four years. In the case in hand, the proceedings have been initiated within a period of 13 months. Further, section 33 of the Act has been inserted with effect from 01.09.1998; whereas, in the aforesaid case, the agreement was executed on 11.06.1987 and for the first time, proceedings were initiated on 31.10.1994. Therefore, the Court was of the opinion that the initiation of proceedings was without jurisdiction. But, in the case in hand, the agreement has been executed on 30.06.2006 and the notice was issued on 17.06.2007, i.e., within a period of 13 months, which is well within the period of limitation as prescribed under the Act.

24. In the case in hand, the original agreement was directed to be produced by the petitioner vide notice dated 17.06.2007 and the petitioner failed to produce the

same. Therefore, the proceedings under section 33(4) & (5) were rightly initiated.

25. In view of the aforesaid facts and circumstances of the case, the impugned order does not call for any interference by this Court. The question, framed above, is answered, accordingly, in favour of the State and against the petitioner.

26. The writ petition fails and it is hereby dismissed.

27. No order as to costs.

(2020)1ILR 1975

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ-C No. 25389 of 2019

Sudhir Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Ravikant, Sri Imran Syed

Counsel for the Respondents:
C.S.C., Sri Rajendra Singh Chauhan, Sri Sushil Kumar Rao, Sri Kunal Shah

A. Administrative law - principles of natural justice - administrative exercise of power - the authority exercising power has to not only render due application of mind but also to follow the procedure which would not render the entire action arbitrary - whatever is arbitrary, is hit by Article 14 of the Constitution of India – held - In the present case only the procedure that was followed by the respondents in taking impugned action was not only quite *ex parte* but also under the executive fiats of the Special Secretary of the Government which was quite uncalled for - Merely because the orders have come from the higher echelons of the Government functionaries, a Corporation which is an autonomous body would not mechanically act in compliance thereof and then administrative authority, therefore, is required to render due application of mind. (Para 21)

Order impugned is basically based on the enquiry report prepared by the Managing Director himself and that the enquiry was conducted in the *ex parte* manner and the Managing Director failed to offer any opportunity of hearing to the petitioner before passing the order impugned which has the effect of terminating the agreement for no justifiable reason to hold that the petitioner was at fault at any point of time - Element of *bias* therefore, under the circumstances at the end of Managing Director, cannot be ruled out - The order impugned, therefore, terminating the agreement dated 26.7.2019 cannot be sustained in law. (Para 35)

Held: - The petitioner was entitled to an opportunity of hearing before the order was passed and since the petitioner has not been issued any show cause notice, order cannot sustain in law. The enquiry report submitted by the Managing Director as well as the order passed by the Special Secretary quashed. (Para 27 & 36)

Writ Petition allowed. (E-7)

List of cases cited: -

1. JV v. Central Organization, 2018 (5) AWC 4772

2. Employees State Insurance Corporation and Anr v. Jadain, (2006) 6 SCC 581

3. M/s. Ambe Couriers v. State of U.P. & 3 Ors., (Writ-C No. 45762 of 2014

4. U.P. State Warehousing Corporation vs. Sunil ,2013 (3) ADJ 745

5. Sahara India (F) Lko v. Commissioner of Income Tax & another, (2008) 14 SCC 151

6. Securities and Exchange Board of India v. Akshay Infrastructure Pvt. Ltd., (2014) 11 SCC 112

7. Dharampal Satyapal Ltd. v. Deputy Commissioner, Central Excise, (2015) 8 SCC 519

8. United India Assurance Co. Ltd. v. Manubhai Dharmshree Bhai and others, (2008) 10 SCC 404

9. Bharti Airtel v. Union of India, (2015) 12 SCC 1

10. ECI-SPIC-SMO-MCML(JV) vs Central Organisation

11. State of Punjab & Ors v. Raja Ram & Ors, AIR 1981 SC 1694

12. Ramana Dayaram Shetty v. The International Authority of India,1979 (3) SCR 1014: (AIR 1979 SC 1628

13. U.P. State Warehousing v. Sunil Kumar Srivastava and another, 2013(3) ADJ 745

14. Manohar Lal Sharma v. Narendra Damodar Das Modi, (2019) 3 SCC 25

(Delivered by Hon'ble Ramesh Sinha, J.)

1. Heard Sri Imran Syed, learned counsel for the petitioner and Sri Kunal Shah, learned counsel for the respondents. Perused the record.

2. In this petition invoking our extra-ordinary jurisdiction under Article 226 of the Constitution of India the petitioners have sought relief in the nature of a writ of *certiorari* for quashing the order dated 26.07.2019 whereby the petitioner's agreement pursuant to a notice invoking tender dated 26.5.2018 has come to be canceled.

3. Briefly stated facts of the case are that petitioner who is a registered contractor with the respondents-Ware Housing Corporation applied against a notice invoking tender dated 1.6.2018 for the work to be carried out for Mirzapur, Bhawanipur-1, Bhawanipur-2 and tendu centres with respect to food grains of Food Corporation of India. The petitioner having offered the lowest rate to undertake the work to be assigned pursuant to the tender notice was selected in the L-1 category and after approval of the higher authorities the agreement came to be executed between the Corporation and the petitioner on 13.7.2018 for work at Bhawanipur-1, Mirzapur region. No sooner did the parties sign the agreement the petitioner started working as per the terms of the agreement. It appears that while others were also selected for different region for different work some complaint got lodged by one Pramod Kumar Singh with the Special Secretary, Department of Co-operatives, Government of U.P., Lucknow, Uttar Pradesh. The Special Secretary wrote a letter to the Managing Director of the Ware Housing Corporation on 30.5.2019 to hold an enquiry on two points: one related to a firm namely, Iqbal Ahmad Ansari *qua* its registration and renewal and it being black-listed already; the other point was with regard to the cancellation of tender notice dated 16.4.2018 and 5.5.2018 without assigning any reason and then floating a new tender notice dated 16.6.2018 and accepting higher prices for the distribution of work. While this letter was written by the Special Secretary to the Managing Director, it appears that the Special Secretary also wrote a letter directly to the Commissioner of the division to hold administrative enquiry of the complaint made in the matter. The

Commissioner of the Vindhyachal division obtained some report from the Ware Housing Corporation, Lucknow dated 13.7.2018 and proceeded to record a finding to the effect that the notice inviting tender was a sheer formality with some ulterior motive and the officers of the Ware Housing Corporation in a very hurried manner approved the tender application, inviting application only from the contractor registered with U.P. State Ware Housing Corporation, Vindhyachal; and the officers who were involved in the tender process forming a Committee were wrongly appointed in the sense that a contract employee was part of the tender committee. So basically complaint was that in the e-tender process only registered contractors were invited which was objectionable because had there been invitation from the open market there would have been more competition and the tender applicants would have offered an accurate price and that the work has been allotted in the contract at a very higher cost to say to much more that 100 % of the earlier one. In its concluding part the report contained a finding to the effect that no survey was conducted for the assessment of the cost and that the recommendation was made by the officers concerned in a very hasty manner and that the Chief Regional Manager did not act very fairly in the matter. After the said report was submitted it appears that the Managing Director of the State Ware Housing Corporation himself conducted an enquiry in compliance of the order of the Special Secretary dated 30.5.2019 and submitted a report to the Chief Secretary on 14.6.2019. The report has been placed before this Court by learned counsel for the petitioner which is taken on record and the learned counsel appearing for the respondent-Corporation does not dispute the same. In the report in the ultimate conclusion the Managing Director has led a finding to the effect that the earlier notice inviting tender dated 1.4.2018 was canceled on the ground that the lowest cost was not feasible and accordingly was not accepted and thereafter a Committee was constituted and that because of some incorrect application moved by one Uday Construction pursuant to the notice inviting tender dated 1.4.2018 and for that reason it was canceled being a result of concealment of forfeiture of the security amount and that was not proper to cancel the notice inviting tender for the other region on same ground. It is on the basis of this enquiry report which the Managing Director himself got prepared and is addressed to the Chief Secretary, Government of U.P., Lucknow that the impugned order has come to be passed on 26.7.2019 canceling the entire tender process which had already been undertaken and also the consequential contract entered between the petitioner and the respondent-corporation. With the cancellation of the agreement under the order impugned dated 26.7.2019 the respondents have proceeded to float new tender notice for the same work which the petitioner was carrying out at the time of passing of the impugned order.

4. Assailing the order impugned, learned counsel for the petitioner has argued following points:

a) The respondents were not justified in unilaterally canceling the written agreement with the petitioner after it had been executed duly with the approval of the higher authorities on 13.7.2019 and the stakes of the petitioner were involved it having invested huge money and incurred cost for carrying out the work under the contract;

b) Neither the enquiry report submitted by the Divisional Commissioner

dated 29.6.2019 nor, that of the Managing Director dated 14.6.2019 was ever supplied to the petitioner at any point of time asking for his explanation in respect of the proposed action;

c) None of the enquiry reports indict the petitioner in any manner for any foul play in getting its tender application accepted and approved by the officers of the Ware House Corporation and ultimately the agreement with the petitioner. The petitioner being not guilty of any charge of malafides, conspiracy or otherwise also not guilty of violation of any terms and conditions of the agreement, whether the respondents were justified in canceling the agreement.

d) The respondent-Authority did not apply its independent mind to the enquiry report and moreover, the Managing Director having himself submitted the report of enquiry was not justified in taking the decision as an element of bias would vitiate the entire action. The Authority has to apply its independent mind and on the plea that no one can be judge in his own case, the respondent-Managing Director being himself the Inquiry Authority, was not justified in taking action on the basis of the report submitted by him, and

e) The Ware Housing Corporation being an autonomous body, it is none of the business of the Secretaries of the Government to dictate terms for the working of the Corporation and its officials nor the respondent-Managing Director is justified in taking action on the dictates of the Special Secretary and hence, he submits that the order is vitiated in law and is liable to be quashed.

5. *Per contra*, the argument of learned counsel for the respondent Corporation is that the decision taken by the Managing Director in rescinding the contract, cannot be faulted with as it is based on a clear finding of facts with regard to the wrongful action in canceling the earlier notice inviting tender on the ground that the prices offered were not justified and yet all of a sudden tenders were accepted at a very exorbitant prices, inasmuch as, no survey having been conducted, the fixation of cost/price of the work was not proper. It is argued that Regional Manager of the Warehousing Corporation was found *prima facie* guilty of entire affair and the departmental inquiry has been initiated against him to fix the liability. It is argued that it is a case where huge public money is at stake and the error has got arrested, may be, after the execution of the agreement in the public interest, it should be taken to be a solemn act of the State owned Corporation and for technical reasons like non issuance of notice, show cause or for non compliance of principles of natural justice the order should not be set aside. He submits that whenever public money is involved and it is a matter of inviting applications for work from the open market through E-tendering process, transparency and fairness are the most important factors that are to be taken care of and if anything found to be vitiated for malafides on the part of those who are in helm of affairs, such action as has been taken in the present case is quite imperative. He has argued that the principles of natural justice could not be put in a straight jacket formula to apply in every case automatically. It is submitted that in matters of contract, the principles that are attracted in testing the administrative decision making, will not be applicable. He argues that the authority has neither exercised any quasi judicial function in passing the order nor, can be said to have

acted in a malafide manner. He submits that the findings have come to be recorded in both the inquiry reports and the Managing Director having rendered his due application of mind in the matter, the order cannot be said to be vitiated in law. He has relied upon several judgments of Apex Court like in Rajasthan Housing Board (2007) 1 SCC 477; ECISPIC MCM (JV v. Central Organization 2018 (5) AWC 4772; Employees State Insurance Corporation and Anr v. Jadain (2006) 6 SCC 581, M/s. Ambe Couriers v. State of U.P. & 3 Ors (Writ-C No. 45762 of 2014, decided on 09.09.2014);,

6. Whereas, learned counsel for the petitioner has relied upon various authorities in support of the arguments advanced and to quote: U.P. State Warehousing Corporation vs. Sunil 2013 (3) ADJ 745; Sahara India (F) Lko v. Commissioner of Income Tax & another (2008) 14 SCC 151; Securities and Exchange Board of India v. Akshay Infrastructure Pvt. Ltd. (2014) 11 SCC 112; Dharampal Satyapal Ltd. v. Deputy Commissioner, Central Excise (2015) 8 SCC 519; United India Assurance Co. Ltd. v. Manubhai Dharmshree Bhai and others (2008) 10 SCC 404; Bharti Airtel v. Union of India (2015) 12 SCC 1.

7. Having heard learned counsels for the parties and their arguments advanced across the bar and having perused the records, we find that following basic questions arise for consideration by us:

(a) Whether the two enquiry reports are procedurally defective inasmuch as the findings returned thereunder based upon no material and hence perverse;

(b) Whether the respondent Managing Director was justified in canceling the written agreement with the petitioner after a lapse of a year, without putting him to notice;

(c) Whether being an autonomous body, Corporation could not have been directed to take action in particular manner and Managing Director was not justified in cancelling the agreement under an executive fiat of Special Secretary; and

(d) Whether the order passed by Managing Director is vitiated for bias as he himself had been Inquiry Officer and without inviting the petitioner to explain in his defense he himself conducted the inquiry and then on the basis of report prepared by him, he proceeded to cancel the agreement.

8. In so far as the first question is concerned, Mr. Kunal Shah, learned counsel for the respondent Corporation has very fairly admitted that there was no notice ever issued to the petitioner prior to passing of the impugned order dated 26.07.2019. It is admitted to the Corporation that the agreement was duly entered by the Corporation with approval of the competent authority. The records relating to the earlier notices inviting tender dated 06.01.2018 and 31.03.2018 were well within the knowledge of the respondents. The reasons assigned for the cancellation of the same, if at all any, were well within the knowledge of the Corporation. Floating of a new tender notice dated 01.06.2018 was never put to challenge by any person at any point of time and those who had applied for the tender had duly participated and it is the petitioner who was selected for the Region Bhawanipur-I. Lowest price bid offered by the petitioner came to be considered by the higher officials and those who had been entrusted with the task to verify the

records, approved the same. There is a survey report also available on record dated 19.04.2018 in respect of various centres to have necessary *prima facie* opinion of the possible rates so that the rates could be fixed after appropriate assessment while evaluating the tender bid application insofar as the present notice inviting tender is concerned.

9. We have noticed that a private complaint was lodged by one Pramod Kumar Singh who was not the applicant against the notice inviting tender but the same seemed to have been entertained by the Special Secretary and instead of simply forwarding the complaint to the Managing Director, he not only directed the Managing Director under his letter dated 30.05.2019 to hold inquiry on two points but at the same time by way of abundant precaution, for the reasons best known to him, he also ordered the Divisional Commissioner of Mirzapur Division to hold an administrative inquiry. The Managing Director instead of applying his mind independently, seems to have mechanically acted on the order of Special Secretary and proceeded to hold inquiry himself instead of appointing any inquiry officer, while on the other hand the Divisional Commissioner also conducted an inquiry and and submitted a separate report dated 29.06.2019. It is after the report dated 14.6.2019 was submitted by the Managing Director to the Special Secretary, the Special Secretary issued an executive fiat vide letter dated 16.07.2018 directing for cancellation of the tenders already floated and also to initiate disciplinary proceedings against the erring officials and also called for a compliance report.

10. Perusal of two reports and the ultimate findings returned by the two officers namely the Divisional Commissioner, the following conclusion has been drawn:

''उपरोक्त से स्पष्ट है कि पूर्व में करायी ई–टेण्डरिंग से प्राप्त रेट्स काफी कम थे इसलिए इस सन्दर्भ में शिकायतकर्ता की शिकायत प्रथम दृष्टया सही है।

उल्लेखनीय है कि पूर्व में करायी गयी विज्ञापन सं0– 1.1001.23318 दिनांक 01.04.18 द्वारा करायी गयी ई–टैण्डरिंग प्रक्रिया को निरस्त इस आधार पर किया जाना कि प्राप्त न्यूनतम दर अव्यवहारिक है किसी भी दशा में स्वीकार्य योग्य नहीं है। इस सन्दर्भ मे ई–टेण्डरिंग की प्रक्रिया कराये जाने हेतु मण्डल स्तर पर गठित की गयी कमेटी द्वारा पी0ई0जी0 तेन्दू (सोनभद्र) को ही अव्यवहारिक माना था जबकि प्रधान कार्यालय द्वारा इसे समस्त केन्दों के सम्बन्ध में यथावत् स्वीकार किया। जहॉ तक उदय कन्सट्रक्शन द्वारा धरोहर राशि जब्त किये जाने सम्बन्धी तथ्यों को छुपाने अथवा प्रस्तुत किये जाने के सन्दर्भ में प्रस्तुत प्रत्यावेदन का प्रश्न है, तो इस सन्दर्भ में विदित हो कि उदय कन्सट्रक्शन द्वारा विज्ञापन सं0–1.1001. 23318 दिनांक 01.04.18 के द्वारा मात्र पी0ई0जी0 तेन्दू के लिए आवेदन किया गया था। इसलिए इस आधार पर अन्य केन्दों हेतु प्राप्त निविदाओं को निरस्त किया जाना प्रथम दृष्टया औचित्यपरक नहीं था।

आख्या आपकी सेवा मे सादर प्रेषित।''

11. If one goes through the conclusive findings returned by the two inquiry officers, one inquiry officer namely Managing Director records that since relating to the rates the controversy had arisen earlier and the notice inviting tender was canceled on 01.04.2018, the notice inviting tenders in respect of other centers should not have been canceled. So the conclusion drawn is that the earlier notice inviting tender dated 01.04.2018 was wrongly canceled. The finding returned therefore, is that earlier notice inviting tender dated 01.04.2018 was wrongly canceled. The natural corollary therefore, drawn is, as it appears, that the subsequent notice inviting tender was liable to go but no where there is any finding that there was any error with the floating of new notice inviting tender nor, any error in the new tender process

pursuant to NIT dated 01.06.2019, undertaken by the respondent Corporation. It is worth noticing that there is no complaint regarding the cancellation of earlier notice inviting tender. The complaint was in respect of tender in question only.

12. In so far as the other inquiry report is concerned, the conclusion drawn is to the effect only that no market survey was carried out and therefore, the price fixation was wrong and the concerned official of the Warehousing Corporation was therefore, guilty of the entire exercise of tender undertaken and acceptance thereof. It is also to be noticed at this stage that in the inquiry report dated 29.06.2019 the Commissioner has proceeded to consider the report of the Managing Director dated 13.07.2018 which does not discuss anything wrong with the new tender process. There is no discussion in the entire inquiry report as to how and under what circumstances such a finding has come to be returned, more so, the survey report which was prepared by the official of the Corporation dated 19.04.2018 had not been taken into account.

13. Insofar as the second inquiry report is concerned, it also does not reflect as to what were the materials before the Managing Director, to record a finding in respect of the earlier tender except the complaint. No independent inquiry has been conducted by the Managing Director except the fact that he has taken into account certain data which he claims to be the foundation to hold that earlier notice inviting tender was wrongly cancelled. The question is therefore, when the notice inviting tender dated 01.06.2019 was in issue, a finding ought to have been returned that the process undertaken pursuant to the notice inviting tender dated 01.06.2019 was vitiated for *malafides*, but no such finding has come to be returned.

14. Now in the face of above factual background and the findings returned by the two Inquiry Officers, if we look to the letter written by the Special Secretary to the Managing Director, Warehousing Corporation it reflects how executive has dominated over the freedom of an autonomous corporation commanding the Corporation to act in such a manner as official wants. He issues not only direction to take an action but also to report back to him. The letter dated 16.07.2018 of the Special Secretary is reproduced hereunder:

'' प्रेषक,
मो0 जुनीद,
विशेष सचिव,
उ0प्र0 शासन।

सेवा में,
प्रबन्ध निदेशक,
उ0प्र0राज्य भण्डारण निगम,
लखनऊ।

सहकारिता अनुभाग–1 लखनऊः
दिनांकः 16 जुलाई, 2018

विषयः– उ0प्र0 राज्य भण्डारण निगम में हैण्डलिंग एवं ट्रांसपोर्ट ठेको मे हुई अनियमितता के दृष्टिगत निगम को हुई करोड़ो की क्षति के संबंध में।

महोदय,

उपर्युक्त विषयक कृपया अपने कार्यालय पत्रांक–2043/वाणिज्य /है0ट्रा0/निविदा/2019–20 दिनांक 14.06.2019 का संदर्भ ग्रहण करने का कष्ट करे।

2– इस संबंध में अवगत कराना है कि आपके उक्त पत्र दिनांक 14.06.2019 एवं कार्यालय आदेश सं0–4108/वाणिज्य/है0ट्रा0/सामान्य /2019–20 दिनांक 15.06.2019 से स्पष्ट है कि मै0 इकबाल अहमद अंसारी प्रापराइटर शिप फर्म के

रूप में निगम में पंजीकृत थी, श्री इकबाल अहमद अंसारी की दिनांक 03.12.2014 को मृत्यु के उपरान्त–पार्टनरशिप एक्ट 1932 के सेक्शन 42 में उल्लिखित प्राविधान के अनुरूप स्वतः समाप्त मानी जायेगी। इसके उपरान्त भी उल्लिखित फर्म को टेण्डर दिया जाना मूल रूप मे नियम विरूद्ध है। अतः उल्लिखित फर्म के जो टेण्डर नियम विरूद्ध किये गये है उन्हें निरस्त करते हुये संबंधित भण्डारगृहों के एच0 एण्ड0 टी0 कार्य हेतु पुनः ई–टेण्डरिंग के माध्यम से ठेकेदारों की नियुक्ति किया जाना जनहित में होगा।

आपके उक्त पत्र दिनॉक 14.06.2019 द्वारा प्रेषित जॉच आख्या में विन्ध्यांचल मण्डल में दिनॉक 16.04.2018 को टेण्डर होने के फलस्वरूप प्राप्त टेण्डर (निम्न दरे) बिना कारण बताते हुये निरस्त किये जाने तथा पुनः दो माह के अन्तराल में टेण्डर कराते हुये बहुत अधिक दरों पर टेण्डर स्वीकृत करने की शिकायत की पुष्टि हुई है। इसमें क्षेत्रीय स्तर के अधिकारी (विन्ध्यांचल मण्डल) एवं स्वीकृतकर्ता अधिकारी तथा तत्कालीन प्रबन्ध निदेशक और मुख्यालय के संबंधित अधिकारियो की भूमिका भी संदिग्ध प्रतीत होती है।

3– अतः मुझे यह कहने का निदेश हुआ है कि आप अपने स्तर से प्रकरण छानबीन करके जो शासकीय धन की वित्तीय क्षति हुई है, उसका आंकलन करते संलिप्त धनराशि संबंधित ठेकेदार तथा संबंधित अधिकारीगण से वसूल करने कार्यवाही की जाये। जिस अधिकारियों/ कर्मचारियों के विरूद्ध विभागीय कार्यवाही पहले से ही प्रचलित है, उनके संबंध मे इन आरोपो को अतिरिक्त आरोप पत्र के रूप में सम्मिलित करते हुये निर्गत करने की कार्यवाही की जाये तथा प्रकरण में दोषी पाये गये जिन अधिकारियों/ कर्मचारियों के विरूद्ध कार्यवाही प्रचलित नहीं है, उनको चिन्हित करते हुये विभागीय कार्यवाही की जाये।

उल्लिखित फर्मो के जो टेण्डर नियम विरूद्ध किये गये है उन्हें निरस्त करते हुये संबंधित भण्डार गृहों के हैण्डलिंग एण्ड ट्रान्सपोर्ट कार्य हेतु पुनः ई–टेण्डरिंग माध्यम से ठेकेदारों की नियुक्ति की जाये।

उक्त कार्यवाही शीघ्रतिशीघ्र पूर्ण कराते हुये कृत कार्यवाही से शासन को अवगत भी कराने का कष्ट करें।

भवदीय

ह0 अपठनीय
(मो0 जुनीद)
विशेष सचिव''

15. Now, looking to the contents and language of this letter, we need to examine the import of the letter written by the Special Secretary to the Managing Director in connection with the controversy in hand, dated 16.7.2018. The language in which the concluding paragraph of the letter has been framed is quite indicative of a Government order. Paragraph 3 and the ultimate directions as contained in the letter have been highlighted in the bold letters and following is the english translation:

"Accordingly, I have been directed to ask you to calculate the loss of public money and to undertake accordingly the proceedings for recovery from the concerned contractor. The departmental enquiry that is pending against the officials and employees of the Corporation in this connection, the charges that have been found to be proved in your letter dated 14.6.2019 should be added as an additional charge and against those employees who have been found *prima facie* guilty of the charges they should also be proceeded with after they are identified.

The tender that have been accepted of the aforesaid firm should be canceled and for the purpose of carrying out the work under the contract, fresh notices inviting tender be issued.

The undersigned be informed about the actions to be taken by you promptly, as directed here-in-above."

16. We find from the perusal of the letter of the Managing Director dated 14.6.2019 addressed to the Chief Secretary that it is in the form of an enquiry, admittedly *ex parte* one, as far as petitioner is concerned and it is on the basis of the findings returned in the aforesaid administrative enquiry, that the Special Secretary has proceeded to pass the order on 16.7.2018, holding the tender

process pursuant to the notice inviting tender dated 1.6.2018, to be bad and unsustainable and so also the consequential agreements reached between the Corporation and the private contractor. As we have already discussed in the earlier part of our order that even from the closest scrutiny of the letter dated 14.6.2019 of the Managing Director we have not been able to trace out any finding to the effect that there was any error in the tender process undertaken pursuant to the notice inviting tender dated 1.6.2018, we fail to understand as to how the Special Secretary has come to record the finding to the effect that the tender procedure followed was proved to be bad and so also the consequential agreement. All that we notice in the letter dated 16.7.2018 is that the Special Secretary has expressed that the conduct of the officials of the Corporation in the totality was doubtful. One must not forget that a doubt remains a doubt unless it becomes a fact on the basis of proof thereof through intrinsic evidence and cogent and convincing finding to that effect based on such intrinsic material. This aspect of the matter is quite lacking both in the enquiry of the Managing Director dated 14.6.2019 and the letter dated 16.7.2018 issued by the Special Secretary. Since these two documents are admitted to the parties and they have been placed before the Court, we have taken judicial notice of these two documents and in our considered opinion these documents are unsustainable and so also we find that the finding returned in the order impugned being based on the report of the Managing Director dated 14.6.2019, the first issue is answered in affirmative in favour of the petitioner. One legal question we need to answer at this stage also is, as to whether the Managing Director was justified in taking an action on the basis of his own administrative enquiry and to pass order on the findings returned by him in his enquiry report can the order be turned as vitiated for bias.

17. Doctrine of fair play and fairness in action connote one thing and that is an administrative authority has to demonstrate that the procedure that it has followed is unquestionable if tested on the rule of natural justice and then the ultimate action is in accord with the principles as enshrined under Article 14 of the Constitution of India. Had the Managing Director while holding an enquiry heard the petitioner also who was working already under the agreement and then had recorded a finding that the procedure followed in the finalization of tender was bad for arbitrariness or malafides on the part of the officials of the respondent Corporation, it could have been said that the findings are not *ex parte* and, therefore, if action has been taken in pursuance thereof, this Court may not interfere and the charge of bias may not be sustainable. However in the present case the Managing Director not only held an enquiry himself without any participation of a third party and then did not hold exactly the petitioner guilty of any charge of undue influence and no finding has come to be returned that the procedure followed in the finalization of tender in question was bad for certain reasons, the Managing Director virtually acted in an arbitrary manner in accepting his own report. The letter of the Special Secretary is absolutely silent about any independent finding of fact on the basis of the material, if any, produced before him. He only issued a direction to the Managing Director to act upon his own enquiry report. In such circumstances, therefore, issuance of a show cause notice to the

petitioner of the proposed action was quite imperative as any opportunity of that kind and inviting explanation from the petitioner and consideration thereof, would have definitely removed the element of bias in the decision making process at the end of the respondent- Managing Director but since no such procedure was followed and the manner in which the Managing Director has conducted *ex parte* enquiry and then proceeded to take action on the basis of the report in which no definite finding has come to be recorded regarding undue advantage taken by the petitioner in getting his tender accepted by the authority, the impugned action is certainly vitiated for bias.

18. Coming to the second question as to whether the petitioner was entitled to any opportunity of hearing or not, or as to whether principles of natural justice would be attracted in the present case or not, it is required to be examined as to what kind of action has been taken and what were the considerations thereof. As we have already discussed in earlier part of this order that it was a simple complaint of a third party that the entire proceedings had been initiated and the complainant being not one of the tender applicants and so no stakes of the complainant was involved, he seems to have been taken as a whistle blower in the matter and it is on that basis that taking the issue opposed to public policy involving huge public money that the respondents have proceeded to pass an order. In this case it was not a case of a kind where a tender application is said to have been accepted for any action of *mala fides*, and a result of some conspiracy at the end of the petitioner and the officials of the Corporation. If the officials had canceled the earlier tender notice in their wisdom and those tender notices and the cancellation of those tender notice was never questioned, merely because those earlier tender notices were cancelled/ withdrawn, a necessary presumption cannot be raised that the third notice inviting tender was for some extraneous considerations. It is true that the prices this time were taken to be very high as against the earlier ones in the process of tender in which the prices were quoted very low but that does not itself become the ground to cancel the entire tender process which had not only been finalized but even the agreement had been entered into and the party under the contract was carrying out the work making huge investment of money. Had it been a case also of the kind where the party to the contract had violated the terms and conditions of the contract, it could have been said that the tender was liable to be canceled for violation of terms and conditions of the tender agreement. But in the instant case no such finding has come to be returned. The reasons for which the tender proceedings that had already been concluded with the execution of the agreement, has been canceled without assigning any reason of wrong practice adopted by the petitioner in obtaining the agreement. Thus the petitioner cannot be said to be at fault in the matter and, therefore, in our considered opinion if the petitioner was already working under the agreement and no charge was there that he violated the terms and conditions of the agreement, the respondents were not justified in canceling the agreement *ex parte.*

19. There are three stages in which the entire tender proceeding is undertaken:

1. The issuance of notice inviting tender;

2. Opening Technical and financial bid; and

3. Approval of the financial bid and agreement pursuant thereto.

20. There is no finding returned that at the stage of submission of the application against the notice inviting tender, the petitioner was not eligible or that at the time of the opening of the technical bid and financial bid the petitioner got wrongfully qualified and that the financial bid of the petitioner was wrongly approved and that the agreement entered between the petitioner and the Corporation was *void* being against the law.

21. If in all the above three stages the petitioner cannot be held to be guilty in any manner for manipulating the things and obtaining the tender by hatching any conspiracy in connivance with the officials of the Corporation, cancellation of the agreement suddenly by the Managing Director holding that the entire Notice Inviting Tender was bad, certainly required a notice and opportunity of hearing to be afforded to the petitioner prior to passing of such an order. It is a settled principle of law that in administrative exercise of power, the authority exercising power has to not only render due application of mind but also to follow the procedure which would not render the entire action arbitrary. It is settled legal principle that whatever is arbitrary, is hit by Article 14 of the Constitution of India and in the present case we find that only the procedure that was followed by the respondents in taking impugned action was not only quite *ex parte* but also under the executive fiats of the Special Secretary of the Government which was quite uncalled for. Merely because the orders have come from the higher echelons of the Government functionaries, a Corporation which is an autonomous body would not mechanically act in compliance thereof and then administrative authority, therefore, is required to render due application of mind. The words and expression due application of mind means what a reasonable person holding a responsible position would consider an appropriate step to be taken in a situation where a process has already undergone and a consequential actions have been taken, to question the process already undergone and to annul the action already undertaken as a consequence thereof. Thus any action by a responsible administrative officer calls for not only reasonable approach in conducting a proceeding but also giving opportunity to the person whose interest and rights are going to be prejudiced by the proposed action. The rights and obligations that flow from a contract pure and simple, no doubt calls for an action in common law and no writ will ordinarily be issued to protect the interest of either of the parties but where a party has been put to prejudice not for any obligations not being discharged under the agreement at his end but for certain administrative reasons, then it cannot be said to be an action flowing from a contract pure and simple and, therefore, even in such matters the rule of principles of natural justice will be attracted. The cases cited by the learned counsel for the contesting respondents are distinguishable on facts.

22. In the case of Rajasthan Housing Board vs. G.S. Investments and another *(Supra)* the auction notice had been published on 19.2.2002, the auction was conducted on 20.2.2002 and the bid offered was much below the market rate.

On 22.2.2002, the records were summoned by the State Government and on 20.3.2002 the action was taken against the erring officials of the Rajasthan Housing Board by the Government. So factually in that case situation was different because the auction proceedings held never came to be finalized and no auction bid was finally approved by the authority, under such circumstances no right as such had accrued in favor of the auction bidder and under the circumstances the Court was justified while refusing to interfere in the matter.

23. In the Case of ECI-SPIC-SMO-MCML(JV) vs Central Organisation for Railway Electrification and another, the Court refused to interfere with the order of the competent authority in the matter because there was a breach of the terms and conditions of the agreement on the part of the petitioner and resultantly the Chief Project Director issued the order of termination with the approval of the General Manager. That was a case indeed where the violation of terms of agreement had taken place and the authorities were well within their rights to rescind the contract. So factually this case was also distinguishable and Court rightly refused to interfere with the order terminating the contract. Insofar as the case of Employees State Insurance Corporation and others vs. Jardine Henderson Staff Association *(Supra)* is concerned, in the said case, the Court had observed vide paragraph-61 that both law as well as the facts in the said case were in favor of the respondents and the High Court had correctly appreciated the tremendous hardship that would be caused by the respondents staff association in case if the arrears were sought to be paid and no body stood to gain either the employer or the employee. The Court had declined to interfere in the matter by observing that *"Even assuming that the law is in the favour of the ESI, keeping in view the special facts and circumstances of the case, relief cannot be denied under Article 226 of the Constitution of India"* Thus it is in that background of facts of that case that the Court refused to interfere with the impugned judgment even if it was found to be erroneous, in order to do substantial justice in the matter.

24. The Court observed that a relief can be denied *inter alia*, when it would be opposed to public policy or where quashing of an illegal order may revive another illegal one. This above principle of law is not attracted in the setting of facts of the present case because here nothing was found illegal with the tender proceedings that ultimately resulted in the agreement with the petitioner by the Corporation. Fixation of price as a cost to carry out the work, has been after the market survey was carried out by the official of the Corporation itself on 19.4.2018 and merely because the Corporation in its wisdom decided to accept the bid with its approval by the higher authority, it cannot be said that the entire tender proceeding stood vitiated in law as being result of some extraneous consideration. Moreover, in this case, the petitioner has not been found guilty of any charge of undue influence or conspiracy. The petitioner has worked for over a year under the agreement and any annulment whereof mid-term at this stage and floating of a tender afresh for the same work will again entail a detailed lengthy exercise involving public money and on the mathematical principle of average such a stand would be opposed to public policy.

25. Yet another judgment relied upon by learned counsel for the petitioner is

M/s. Ambe Carrier v. State of U.P. & 3 Ors *(Supra)*. This case is also distinguishable on facts because in the said case the agreement had already come to an end in the financial year 2013-14 and the period of the contract was extended by administrative order until 31.3.2014 and there were certain breaches committed by the Contractor that had resulted into serious irregularities leading the authority to terminate the agreement. It is in the above background that the Court rejected the argument raised in that case that the order terminating the contract must be held to be invalid, as no opportunity of hearing was provided. The Court had rightly observed that in matters arising out of contractual obligations did not involve the strict compliance of the rule of natural justice. The remedy for such termination of contract on breaches of the conditions and failure to carry out the obligation under the agreement are subject matter of either arbitration or the common law remedy. In the present case there is no such complaint against the petitioner nor, the petitioner is guilty of any fault at his end in carrying out the agreement.

26. In the case of Ramana Dayaram Shetty (Supra), the Court vide Paragraph-10 has held thus:

".... It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in ***Viteralli v. Saton*** *where the learned Judge said:*

"An executive agency must be rigorously held to the standards by which it professes its action to be judged . . . . Accordingly, if dismissal from employment is based on a define(l procedure, even though generous beyond the requirement that bind such agency, that procedure must be scrupulously observed . . . . This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

This Court accepted the rule as valid and applicable in India in ***A. S. Ahuwalia v. Punjab*** *and in subsequent decision given in* ***Sukhdev v. Bhagatram****, Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation fromArticle 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's "Administrative Law", 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law.….*

27. In view of the above, therefore, we are of the considered opinion that in the facts and circumstances of the present case, the petitioner was certainly entitled

to an opportunity of hearing before the order impugned was passed and so on that count also since the petitioner has not been issued any show cause notice, order impugned cannot sustained in law and is liable to be quashed.

28. Coming to the third point as to when the respondents- Warehousing Corporation is an autonomous body, could it be administratively directed by the authorities to conduct the affairs in a particular manner and can it be further directed by Administrative Authorities through executive fiats to cancel an agreement holding that the tender proceedings conducted were bad in law. In other words, the argument is that whether an autonomous body is bound to follow the dictates of the Secretaries of the Government.

29. In the case of **State of Punjab & Ors v. Raja Ram & Ors in AIR 1981 SC 1694** Apex Court vide paragraph no.5 has held thus:

"Learned counsel for the appellant then urged that the Corporation is a Government department. We are unable to accept this submission also. A Government department has to be an organization which is not only completely controlled and financed by the Government but has also no identity of its own. The money earned by such a department goes to the exchequer of the government and losses incurred by the department are losses of the government. The Corporation, on the other hand, is an autonomous body capable of acquiring, holding and disposing of property and having the power to contract. It may also sue or besued by its own name and the government does not figure in any litigation to which it is a party. It is true that its original share capital is provided by the Central Government (S. 5 of the F.C. Act) and that 11 out of 12 members of its Board of Directors are appointed by that Government (S. 7 of the F.C. Act) but then these factors may at the most lead to the conclusion (about which we express no final opinion) that the Corporation is an agency or instrumentality of the Central Government. In this connection we may cite with advantage the following observations of this Court in Ramana Dayaram Shetty v. The International Authority of India, 1979 (3) SCR 1014: (AIR 1979 SC 1628 at p.1639):

"A Corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a Corporation incorporated under law is managed by a Board of Directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition, there should be a certain

amount of direct control exercised by Government and, if so what should be the nature of such control? Should the functions which the Corporation is charged to carry out possess any particular characteristics or feature or is the nature of the functions immaterial? Now, one thing is clear that if the entire share capital of the Corporation is held by Government it would be a long way towards indicating that the Corporation is an instrumentality or agency of Government. But, as is quite often the case the Corporation established by statute may have no share or shareholders in which case it would be a relevant factor to consider whether the administration is in the hands of a Board of Directors appointed by Government though this consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions."

Even the conclusion, however, that the Corporation is an agency or instrumentality of the Central Government does not lead to the further inference that the Corporation is a Government department. The reason is that the F.C. Act has given the Corporation an individuality apartfrom that of the Government. In any case the Corporation cannot be divested of its character as a 'Company' within the meaning of the definition in clause (e) of section 3 of the L.A. Act, for it completely fulfils the requirements of that clause, as held by us above."

30. In the case of **U.P. State Warehousing v. Sunil Kumar Srivastava and another 2013(3) ADJ 745** a Division Bench of this Court vide paragraph no.28 and 43 has observed thus:

"28. Keeping in view the definition of corporation and statutory provisions(supra), there appears to be no room of doubt that the appellant corporation possess autonomy and its business is regulated in pursuance to statutory power conferred by the Act and Regulations framed thereunder. It also possess autonomy to make appointment and deal with the service conditions of its employees (Section 23). The decision with regard to commercial mattes or with regard to services of employees may not be subject-matter for approval or disapproval for the State Government. Of course, in case the Government takes a policy decision and circulate the same subject to rider contained in sub-section (5) of Section 20, the corporation shall be abide by such policy decision. The corporation owes its origin and birth to the Act and not established in compliance of certain orders or decision taken by the State Government through its Cabinet. The corporation has right to discharge its statutory obligations through its authorities created under the Act. The State Government lacks jurisdiction to interfere with the individual decision taken by the corporation through its Board of Directors to manage its affairs or its day to day working in business interest.

.....

43. Keeping in view the aforesaid judgments right from Rajasthan Electricity Board, Jaipur v. Mohan Lal and Others (Supra) including the case of Neeraj Awasthi (Supra), it has been consistent view of Hon'ble Supreme Court that while establishing corporation under the statutory provisions the sovereign power of the State is delegated to respective Boards and the Board has been conferred power to discharge its statutory obligations to run its business. The government has been conferred power to play down policy decisions which means the decision, order or circular in Rem and

not in personem. Any other interpretation shall be subversive to autonomy and statutory function of the Board / Corporation and shall create mal-administration and corrupt the system because of day to day interference by the Government on one or other grounds. "

31. In view of the above, therefore in ordinary circumstances, we are of the opinion that the State Government cannot interfere through its administrative officers in day to day affairs and functioning of the Corporation which is an autonomous body.

32. However, since the Corporation is a public sector corporation, it is an instrumentality within the meaning of Article 12 of the Constitution of India. The Government has framed rules and regulations governing contractual matters and, therefore, in principle it cannot be ruled out that Corporation while dealing with such matter has to follow those rules and regulations and, therefore, if any flaw is detected by the State Government because of some wrongful action at the end of the officials of the Corporation, we do not find anything wrong if the State Government wants to set right the things but in every State action it has to be seen as to whether the rule of law has been followed or not. The State Government may have a deep pervasive control in the affairs of a Corporation but the very purpose of making a Corporation an autonomous body would fail if it is not given freedom in the affairs of its working. The overall general control in the day to day affairs of the Corporation cannot be appreciated, however, where the Government finds that the officials of the Corporation have acted against the public policy and the State's interest is geopardised on one hand and the public interest is put on stake on the other hand, it can always interfere but for such interference the Government has to follow the procedure, either it may lay down the guidelines for the said purpose or it shall follow the common rule of law but by no executive fiats or orders it can dictate the officials of the Corporation to act in a particular manner. The legal principle as has come to be enunciated in catena of decisions by the Apex Court and this Court do not warrant such action at the end of the Government official/authorities.

33. In so far as 4th issue is concerned, in this matter we have found that the Special Secretary had virtually got swayed away by the complaint and taking the complaint to be a genuine one *prima facie* he directed in a very hurried manner to the Divisional Commissioner to hold an enquiry and also to the Managing Director to conduct an enquiry. He did not appreciate the enquiry reports and proceeded thereafter to hold that the respondent- Corporation was at fault in issuing the tender dated 1.6.2018. He also failed to appreciate that the stage of acceptance of tender application of the petitioner and approval thereof as a lowest bidder and then entering into the agreement where all the stages that had already been undertaken and there is no finding of arbitrariness. The manner in which the order-cum-letter dated 16.7.2018 has been issued, it does not indicate due application of mind and therefore the letter cum order dated 16.7.2018 deserves to be quashed. The Managing Director's report is also not very happily drawn. Moreso, no conclusion has been drawn regarding involvement of the petitioner by way of manipulation or conspiracy in getting his tender accepted and then approval thereof and the

consequential agreement, so this enquiry report also is not sustainable on that count. The findings are not cogent and convincing to hold that the notice inviting tender dated 1.6.2018 was bad in any manner and, therefore, the enquiry report to that extent also cannot be sustained in law.

34. Besides manafides and favouritism, illegality, irrationality and procedural impropriety in State action also are the reasons for judicial review thereof. In the case of **Manohar Lal Sharma v. Narendra Damodar Das Modi (2019) 3 SCC 25**, speaking for the Bench the Chief Justice in paragraph 7 to 11 has observed thus:

"7. Parameters of judicial review of administrative decisions with regard to award of tenders and contracts has really developed from the increased participation of the State in commercial and economic activity. In Jagdish Mandal vs. State of Orissa, this Court, conscious of the limitations in commercial transactions, confined its scrutiny to the decision making process and on the parameters of unreasonableness and mala fides. In fact, the Court held that it was not to exercise the power of judicial review even if a procedural error is committed to the prejudice of the tenderer since private interests cannot be protected while exercising such judicial review. The award of contract, being essentially a commercial transaction, has to be determined on the basis of considerations that are relevant to such commercial decisions, and this implies that terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailormade to benefit any particular tenderer or a class of tenderers. (See Maa Binda Express Carrier & Anr. Vs. NorthEast Frontier Railway)

8. Various Judicial pronouncements commencing from Tata Cellular vs. Union of India, all emphasise the aspect that scrutiny should be limited to the Wednesbury Principle of Reasonableness and absence of mala fides or favouritism.

9. We also cannot lose sight of the tender in issue. The tender is not for construction of roads, bridges, etc. It is a defence tender for procurement of aircrafts. The parameter of scrutiny would give far more leeway to the Government, keeping in mind the nature of the procurement itself. This aspect was even emphasized in Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India. The triple ground on which such judicial scrutiny is permissible has been consistently held to be "illegality", "irrationality" and "procedural impropriety".

10. In Reliance Airport Developers (P) Ltd. vs. Airports Authority of India the policy of privatization of strategic national assets qua two airports came under scrutiny. A reference was made in the said case (at SCC p.49, para 57) to the commentary by Grahame Aldous and John Alder in their book 'Applications for Judicial Review, Law and Practice':

"57. ... There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of nonjusticiable area

judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the royal prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions Vs. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili (sic.) appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, nonjusticiable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another nonjusticiable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest." [emphasis supplied]

35. Order impugned is basically based on the enquiry report prepared by the Managing Director himself and that the enquiry was conducted in the *ex parte* manner and the Managing Director failed to offer any opportunity of hearing to the petitioner before passing the order impugned which has the effect of terminating the agreement for no justifiable reason to hold that the petitioner was at fault at any point of time. Element of *bias* therefore, under the circumstances at the end of Managing Director, cannot be ruled out. The order impugned, therefore, terminating the agreement dated 26.7.2019 cannot be sustained in law.

36. Thus, for the forgoing discussions writ petition succeeds and is allowed. The order dated 26.7.2019 (Annexure-13) to the writ petition and the enquiry report dated 14.6.2019 submitted by the Managing Director as well as the order passed by the Special Secretary dated 16.7.2019 are also hereby quashed.

37. The consequential action if taken pursuant to the impugned order is also quashed. The consequences to follow, however, there will be no order as to costs.

(2020)1ILR 1992

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ-C No. 30353 of 2014

Mata Deen Bhagwan Das & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Swapnil Kumar

Counsel for the Respondents:
C.S.C.

A. Application for grant of freehold rights - pending since 11 years-such right granted on the same plot to one charitable trust which right arose out of the Petitioner-Petitioner's case was lingered without sufficient cause-directed to apply same rate that applied to the Trust.

Writ Petition allowed. (E-9)

List of cases cited: -

1. Anand Kumar Sharma Vs. State of U.P. and others, 2014(2) ADJ 742

2.Amar Nath Bhargava Vs. State of U.P. and others ,2019 (8) ADJ 442(DB)

3.Dr. Ashok Tahiliani Vs. State of U.P. and others 2019 (9) ADJ 176

(Delivered by Hon'ble Pankaj Mithal,J.
& Hon'ble Vipin Chandra Dixit,J.)

1. Heard Sri Swapnil Kumar, learned counsel for the petitioners and Sri Mata Prasad, learned Standing Counsel.

2. The petitioners have invoked the writ jurisdiction of the court for issuance of a writ in the nature of mandamus commanding the respondents to execute a freehold deed in their favour in respect of the land plot No.71, Block No.79 (House No.79/75), Area 3213.76 Sq. Mtrs. situate in Bansmandi Kanpur, pursuant to their application dated 29.01.1999 for grant of freehold rights in the said land.

3. The petitioners at the same time have also prayed for the quashing of the Government Orders dated 04.03.2014 and 28.09.2011 and Clause 2(i) of the Government Order dated 15.01.2015 which provides for applying the circle rate prevailing on the date of disposal of the freehold application instead of the date of submitting the application.

4. The petitioners allege that in respect of Nazul land of plot No.71 aforesaid having an area of 3351.31 Sq. Mtrs. a lease deed was executed on 01.03.1897 for a period of 99 years in favour of Babu Murlidhar and two others. The said lease rights were inherited by Smt. Pranpati @ Kishan Rani, who transferred the said rights vide sale deed dated 03.02.2016 in favour of Lala Rang Lal and Ram Gopal. Later Ram Goptal vide sale deed dated 10.10.2017 purchased the entire rights in the said property and became the exclusive lessee of it.

5. The petitioners purchased the leasehold rights in the said property on 01.07.1921 from Ram Gopal. Ever-since then they are in actual physical possession of the aforesaid plot. However, the petitioners vide registered sale deed dated 29.01.1972 transferred their rights in a small portion of the said property to the extent of 137.55 Sq. Mtrs. in favour of Ganpat Rai Moti Ram Charitable Trust.

6. In view of the above, the petitioners remain to be the lease of 3213.76 Sq. Mtrs. of the said plot of land whereas the above Charitable Trust became the lessee of an area of 137.55 Sq. Mtrs. of it.

7. The State Government came out with a policy for converting Nazul land into freehold by issuing Government Orders from time to time and finally a Government Order dated 01.12.1998 was issued in this regard.

8. The petitioners in accordance with the terms and conditions of the aforesaid Government Order deposited 25% of the self-assessed market value of the said land amounting to Rs.7,35,182/- and submitted application dated 29.01.1999 for the grant of freehold rights in the aforesaid land of plot No.71 having an area 3213.76 Sq. Mtrs.

9. Simultaneously, vide application dated 30.01.1999 Ganpat Rai Moti Ram Charitable Trust also applied for grant of freehold rights in respect of 137.55 Sq. Mtrs. of the land of the aforesaid plot No.71 which it had purchased from the petitioners.

10. The Charitable Trust has been granted freehold rights in the said portion

of land and a freehold deed in its favour has been executed on 29.03.2012 on being satisfied that its rights over it as claimed by it are not in doubt.

11. In regard to the application of the petitioners for grant of freehold rights, Additional District Magistrate (F & R) vide letter dated 20.01.2003 made certain inquiries with regard to the manner in which the petitioners have acquired rights in the above property. The petitioners in response to the said query supplied all documents pertaining to their title/leasehold rights over the said land.

12. Despite the above, the District Magistrate vide letter dated 05.12.2007 required the petitioners to produce all documents of their rights which were again produced before him on 02.01.2018 by the petitioners. Then certain clarifications were sought which were duly clarified by means of an affidavit submitted on 03.08.2010. Thereafter the petitioners were given personal hearing and they appeared on 26.10.2010 but the respondents failed to issue the demand letter for the balance amount so as to convert the land into freehold.

13. In the meantime pending the above proceedings a Government Order was issued on 28.09.2011 directing the authorities to decide all pending applications for freehold within six months and if they remain undecided they shall stand rejected. Another Government Order dated 04.03.2014 provided that for the purposes of disposal of all such applications circle rate on the date of submission of applications as per the land use according to the master plan shall apply subject to the area of the plot. The rejection clause was withdrawn by the Government vide another Government Order dated 15.01.2015 and it was provided that for the purpose of grant of freehold rights the circle rate of the land as per the Government Orders dated 28.09.2011 and 04.03.2014 shall be applicable.

14. One Sanjiv Kumar Shakya, the then Tehsildar Ghatampur, District Kanpur Nagar has filed a counter affidavit on behalf of the respondents. In addition to it a separate counter affidavit has been filed by one Virag Karvariya, Naib Tehsildar, Tehsil Sadar, District Kanpur in response to the amended paragraphs of the above writ petition.

15. In the counter affidavit it has not been disputed that the petitioners have applied for grant of freehold rights in the Nazul land as stated by them. In paragraphs 10 and 16 of the first counter affidavit it has been admitted that the application of the petitioners was complete and a proposal was got prepared for getting the land converted into freehold but the freehold rights could not be granted as in the meantime a notification was issued declaring elections of the U.P. Vidhan Sabha. It further states that the application of the petitioners stood rejected in view of the Government Order dated 28.09.2011.

16. It has also been averred that as the application of Ganpat Rai Moti Ram Charitable Trust was complete the Distrcit Magistrate in April, 2007 accorded approval for conversion of its Nazul land into freehold. Consequently, a freehold deed dated 19.03.2012 was executed in its favour.

17. In the counter affidavit filed in reply to the amended paragraphs of the

writ petition it has been stated that in accordance with the Government Order dated 15.01.2015 which provides that all pending applications for freehold shall be treated as valid and therefore, shall be decided in accordance with the circle rate prevailing at the time of the disposal.

18. Despite complete pleadings on record vide order dated 21.08.2019, learned Standing Counsel was granted indulgence to seek instructions as to whether actually the application of the petitioners was complete in all respect before the declaration of the general elections of Vidhan Sabha of the State of U.P. and as to why the immediate action was not taken on it.

19. Learned Standing Counsel, thus obtained instructions and accepted it that the application was complete as mentioned in paragraphs 10 and 16 of the counter affidavit but action could not be taken as it was treated to have been rejected.

20. On the basis of the above instructions he proposed to file an additional counter affidavit which we refused to accept at this stage of final hearing as the court had not required filing of any further or additional counter affidavit. It is well settled that a party is entitle to file reply in response to the petition only once and that successive counter affidavits are not to be permitted as a matter of course.

21. In view of the stand taken by the respondents in the above counter affidavits, it is clear that the respondents have initially treated the application of the petitioners to have been rejected and that presently the application is said to be pending but no final decision thereof could be taken for the reason that now the demand note has to be issued as per the prevailing circle rate.

22. The bone of contention is as to why the application of the petitioners for grant of freehold rights could not be finalised earlier when the subsequent application of another party in respect of a small portion of the same very plot of land has been considered and the freehold deed dated 19.03.2012 was executed in respect to said portion of the land and as to the rate on which the petitioners are entitled to get the freehold rights.

23. There is not dispute to the fact that the petitioners have applied for grant of freehold rights in accordance with the terms and conditions of the Government Order dated 12.01.1998 and accordingly, they are entitle to freehold rights on fulfillment of the conditions laid down therein and as modified by the subsequent government orders.

24. The counter affidavit makes it abundantly clear that the application of the petitioners for grant of freehold rights was complete but it could not be finalised due to implementation of the Model Code of Conduct. The Model Code of Conduct had not remained in operation for long and despite its lifting the application of the petitioners was not processed and finalised.

25. There is nothing on record to show inability on part on part of the respondents in not granting the freehold rights to the petitioners on or before 28.09.2011 except for the implementation of the Model Code of Conduct for which purpose no relevant dates as to when it was enforced and lifted has been mentioned.

26. The above excuse is apparently an eyewash. We do not find any valid or logical reason on part of the respondents in keeping the application of the petitioners for grant of freehold rights pending since January, 1999 till September, 2011 i.e. for a period of 11 years except for making inquiries regarding the rights of the petitioners on the said land when in respect of the application of one another person, who claims rights from the petitioners no such query or inquiry was made and freehold rights were granted.

27. In the event the holder of a small portion of the land of the same plot in respect of which the petitioners are claiming freehold rights has been granted freehold rights there appears to be no justification on part of the respondents in not considering the application of the petitioners. It is not the case of the respondents that the petitioners do not fulfill or satisfy the conditions set out in the Government Order dated 12.01.1998 or their title/rights are in doubt. In fact, the title or rights of the petitioners in the said land can not be doubted when the person deriving rights from them has already been recognised for grant of freehold rights.

28. The contention that the petitioners never accepted for grant of freehold rights on the prevailing circle rate or on the higher rate is neither here nor there as the respondents never issued any demand notice to the petitioners demanding any amount at any rate much less the prevailing circle rate.

29. Thus, on the ground of parity alone the petitioners are also entitle for freehold rights in the land in question from the date i.e. 19.03.2012 on which Ganpat Rai Moti Ram Charitable Trust has been granted freehold rights.

30. The condition that all applications which have remained pending for over six months from the issuance of Government Order dated 28.09.2011 stand automatically rejected has lost all its efficacy and is meaningless as the said condition of the Government Order dated 28.09.2011 was subsequently recalled vide Government Order dated 15.01.2015 and the applications were restored.

31. The issue as to the validity of Clause 2(i) of the Government Order dated 15.01.2015 which provides for applying the circle rate as provided in Government Orders dated 28.09.2011 & 04.03.2014 i.e. the rate prevailing on the date of the disposal of the application of freehold rights, it is pertinent to mention that the issuance is res integra as it is squarely covered by the Full Bench decision in the case of **Anand Kumar Sharma Vs. State of U.P. and others, 2014(2) ADJ 742** wherein it has been categorically held that mere making of an application for freehold rights does not give rise to any vested right and if in the meantime there is a change in policy, the application has to be decided as per the policy in existence at the time of passing of the order and consequently for the purpose of freehold rights, the applicant has to deposit the amount as per the circle rate prevailing on the date of the application.

32. In view of above, we have no hesitation to say that the petitioners are also liable for the payment of the amount at the circle rate prevailing on the date of disposal of the application.

33. The challenge to the Government Orders dated 04.03.2014 and 28.09.2011 is only to a limited extent in so far as they directed for the disposal of the freehold applications within six month failing which they would stand automatically

rejected. Since the said condition of rejection has been withdrawn the challenge to the said orders to the above extent is of no avail.

34. It may not be out of context to mention that a Division Bench of this court in which of us (P. Mithal, J.) was a member of in the case reported in **2019 (8) ADJ 442(DB) Amar Nath Bhargava Vs. State of U.P. and others** has issued general directions to the District Authorities of Allahabad to finalise all pending applications for grant of freehold rights filed in pursuance to the Government Order dated 01.12.1998 most expeditiously latest by 31 December, 2019.

35. In **Dr. Ashok Tahiliani Vs. State of U.P. and others 2019 (9) ADJ 176** another Division Bench of this court in the matter concerning grant of freehold rights in Nazul land on an application submitted in accordance with Government Order dated 01.12.1998 issued a general mandamus commanding all District Magistrates throughout the State of U.P. to take a decision on all pending applications within a time bound period not exceeding six months.

36. In the case at hand, we do not find that the petitioners were in any way responsible for the delay in consideration of their application for freehold rights. There application was complete in all respect. It was not rejected or even treated to be rejected as the 25% amount deposited by the petitioners were never offered to be returned. There is no allegation anywhere that the petitioners were not taking interest and have delayed the proceedings.

37. In view of the aforesaid facts and circumstances, we are of the opinion that there is an inordinate and unexplained delay on part of the respondents in dealing with the application of the petitioners for grant of freehold rights. Since the respondents have executed freehold deed in favour of Ganpat Rai Moti Ram Charitable Trust that has purchased a small portion of the aforesaid plot from the petitioners on 19.03.2012, the petitioners are also entitled for freehold rights as on the aforesaid date and at the rate on which the rights were so conferred upon the said trust or in the alternatively to pay damages to the petitioners at the rate of difference between the circle rate prevailing as on date and that which has been applied for grant of freehold rights to the aforesaid trust.

38. Accordingly, we issue a writ in the nature of mandamus commanding the respondents to issue a demand note to the petitioners by applying the same rate that had been applied for grant of freehold rights to the aforesaid Trust or the rate prevailing as on date within a period of one month from today and on the petitioners depositing the said amount to execute the sale deed within a further period of one month from the date of deposit of the amount by the petitioners. In the event, the circle rate prevailing today is applied the respondents shall compensate the loss to the petitioners by paying damages as observed above.

39. The Writ Petition is **allowed** with no order as to costs.

(2020)1ILR 1997

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2019

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ-C No. 35999 of 2019

Mohammad Ahmad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Om Narayan Dwivedi, Sri Devendra Singh

Counsel for the Respondents:
C.S.C.

A. Cancellation or suspension of fair price shop - Allotment of the fair price shop during pendency of appeal - State Government has no restriction - A subsequent allottee has no right to challenge the restoration of license - U.P. Essential Commodities Distribution Control Order 2016, - paragraph-9 - Suspension or cancellation of the agreement - the Competent Authority shall make alternative arrangement for ensuring uninterrupted supply of food grains to the eligible households - Proviso to paragraph-9 - cancellation of the fair price shop - new arrangement shall be issued within a month of cancellation - no locus on the subsequent allottee to challenge the order passed in favour of the former allottee. (Para 12, 13 & 14)

State Government is empowered to make alternative arrangement either by way of attaching the card holders of another shop or by way of making fresh allotment - if it is by fresh allotment, in case the appeal filed by original allottee is allowed, subsequent allottee shall have no right whatsoever to challenge the same, i.e., it shall not be open to him to challenge the restoration of license in favour of the original license holder. (Para 15)

Held: - The State authorities have a right to make alternative arrangements and that the new allotment is always subject to the decision of the appeal of the existing dealer whose license was cancelled. In case the appeal is allowed, the subsequent allottee has no right to challenge the same. Therefore, there can be no restriction on the State Government to allot the fair price shop during pendency of the appeal. (Para 13)

Writ Petition dismissed. (E-7)

List of cases cited: -

1.The Sahkari Sasta Galla Vikreta Union, Tehsil Sardhana, Meerut Vs. State of U.P. & 4 Others

2. Vinod Kumar Vs. State of U.P. and Others, 2014(8) ADJ (DB)(LB)

3. Nasir Ali Vs. State of U.P. and Others, 2015(4) ADJ 214 (DB)

4. Vinod Kumar Gupta Vs. State of U.P. and Others, 2014(9) ADJ 761

5. Poonam Vs. State of U.P. & Others, 2016(2) SCC 779

6. Smt. Kalawati Vs. State of U.P. and Others, 2011(10) ADJ 829

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. Pursuant to the order dated 07.11.2019, learned Standing Counsel has produced a copy of the instructions dated 16.11.2019 sent by the District Supply Officer, Meerut. Copy of the instruction has also been supplied to the learned counsel for the petitioner.

3. The present petition has been filed with following relief:-

(I) Issue a writ, order or direction in the nature of mandamus directing the respondent nos.2 and 3 not to allot the fair price shop in pursuance of notification which was published in daily news paper dated 16.10.2019 till submission of final report of S.T.F.,

Lucknow where enquiry/investigation is pending.

4. Submission of the learned counsel for the petitioner is that admittedly, pursuant to the direction of the Hon'ble Division Bench of this Court issued vide judgment and order dated 05.12.2018 passed in Public Interest Litigation (PIL) No.4839 of 2018, ***The Sahkari Sasta Galla Vikreta Union, Tehsil Sardhana, Meerut Vs. State of U.P. & 4 Others*** Senior Superintendent of Police (STF), Lucknow has been directed to complete the enquiry as far as possible within a period of six months in regard to misuse of Aadhaar authentication of E-POS. Submission is that till date the enquiry has not been completed, but the advertisement has been issued for allotment of shops involved in the enquiry. Submission is that unless the enquiry is concluded, there is no justification in making a fresh allotment and the petitioner is entitled for continuation for his shop.

5. Per contra, learned Standing Counsel submits that the enquiry is pending and longer time is being taken because the Aadhaar Card data is required for examination of the allegations. He further pointed out that it had been a large scale scam wide spread throughout the State and as many as 44 districts are involved in the same. Learned Standing Counsel further stated at the bar that in some of the districts the dealers have also deposited the amount. He further pointed out that as per information supplied dealers named in the scam in the district of Prayagraj, have already deposited amount that was being sought to be recovered from them.

6. I have considered the submission and perused the record. In so far as the present petition is concerned, the only prayer is that no fresh notification be made in regard to the shop of the petitioner, pursuant to the notification published in daily newspaper dated 16.10.2019 till submission of final report of Senior Superintendent of Police (STF), Lucknow, wherein enquiry/investigation is pending. Along with the supplementary affidavit, a copy of the cancellation order dated 05.01.2019 passed by the District Supply Officer, Meerut has been filed.

7. During the course of arguments learned counsel for the petitioner further stated that an appeal before the Commissioner being Appeal No.694 of 2019 is pending against the aforesaid cancellation order. The cancellation order is admittedly, not under challenge before this Court.

8. Confining to the relief claimed in the present petition, a reference may be made to the judgment of Hon'ble Division Bench of this Court in the case of **Vinod Kumar Vs. State of U.P. and Others, 2014(8) ADJ (DB)(LB),** para-12 whereof is quoted as under:-

"Hence, on considering the diverse orders which have been passed by the Division Benches of this Court, it is clear that this Court has not held, as a principle of law, that pending the disposal of an appeal before the Appellate Authority under Clause 28(3) of the Control Order, no arrangements can be made by the State for securing the interest of the card holders. On the contrary, in our view, it is open to the State, pending disposal of an appeal, to make suitable alternate arrangements either by attaching the card holders to an existing fair price shop or by allotting the fair price shop to a new licensee subject to the result of the

appeal. The reasons which were adduced in the interim order of the Division Bench in *Vinod Kumar Mishra*, with respect, over-looked the clear mandate of Clause 28(5) of the Control Order which were not pointed out to the Court. Be that as it may, we may let the matter rest there since it is a well-settled principle in law that any interim order of the Court will ultimately give way to the final decision in the proceedings. Writ Petition No. 11977 (M/B) of 2010 was finally disposed of on 12 December 2011. The interim order came to an end with the final disposal of the petition."

(Emphasis Supplied)

9. A reference may be made to the judgment of the Hon'ble Division Bench in the case of **Nasir Ali Vs. State of U.P. and Others, 2015(4) ADJ 214 (DB)**, para 4 whereof is quoted as under:-

"A Division Bench of the Lucknow Bench of this Court in Writ Petition No. 7649 of 2014 (Vinod Kumar Vs. State of U.P. through Principal Secretary Food and others) decided on 19.8.2014 after considering the interim orders passed by the Division Bench of the Lucknow Bench clarified that as a principle of law the Court had not held that pending disposal of an appeal before the Appellate Authority under Clause 28(3) of the control order, no arrangements could be made by the State for securing the interest of the card holders. The Division Bench took the view that it was open to the State Government that pending disposal of an appeal to make suitable alternate arrangements either by attaching the card holders to an existing fair price shop or by allotting the fair price shop to a new license subject to the result of the appeal." (Emphasis Supplied)

10. A reference may be made to the judgment in the case of **Vinod Kumar Gupta Vs. State of U.P. and Others, 2014(9) ADJ 761**, para 7 whereof is quoted as under:-

"It appears that the Hon'ble Court was not apprised of earlier Division Bench judgment on the subject wherein this issue has been considered and decided long back. I may refer hereat the Division Bench judgment in Writ Petition No. 19080 of 2008, *Naubat Singh Vs. State of U.P. and others*, decided on 11.04.2008, wherein this very issue was raised but was negatived by giving reasons. The Court said:

"Learned counsel for the petitioner contended that since the appeal is already pending it is not open to respondents to appoint another person as fair price shop dealer in respect to the area where the petitioner was working as fair price shop dealer.

However, we do not find any force in the submission. *The petitioner's agreement for distribution of essential commodities having been cancelled admittedly, presently he has no right in the matter of distribution of essential commodities of fair price to the public at large.* Since there appears to be no person available for distribution of essential commodities of fair price, the public at large cannot be made to suffer and, therefore, the respondents decided to appoint another person as a fair price shop dealer pursuant whereto the impugned order dated 2.4.2008 has been passed. The aforesaid order obviously is for appointing an intermittent dealer and subject to the result of the petitioner's appeal, inasmuch as, in case the said appeal is allowed and the petitioner's agreement is restored, any person who has been appointed in place of

petitioner would have no right to continue thereafter, but till the time, appeal of petitioner is decided, in our view, the petitioner has no right, legal or otherwise, to restrain the respondents from making arrangement of distribution of essential commodities appointing another person as dealer in the area where the petitioner was operating as fair price shop dealer.

Learned counsel for the petitioner seeks to place reliance on order dated 23.11.2007 passed by Hon'ble Single Judge of this Court in Writ Petition No. 57682 of 2007 wherein an order was passed restraining the authorities from doing any fresh allotment of the fair price shop till the appeal is decided.

In our view, the aforesaid order would have no application in the present case. Firstly, in the earlier writ petition filed by the petitioner which has been disposed of this Court on 07.03.2008 directing the appellate authority to decide his appeal within three months, no such order has been passed restraining the respondents from allotting shop in question to any one and for the said purpose only no fresh petition would lie. Secondly, *we are of the view that so long as the licence of a person continued to be cancelled he has no right either in law or otherwise to create any obstruction in the way of respondent-authorities in making arrangement for distribution of essential commodities to the public at large in such manner as they found expedient and in the interest of public at large.* If the authorities found it appropriate that the people would be better serve if the fair price shop is allotted to a third person, we do not find any illegality or irregularity in such exercise of power unless it can be shown that it is mala fide or without jurisdiction or is inconsistent to any provision or executive order having force of law. No such provision has been placed before us." (emphasis added)"

(Emphasis Supplied)

11. A reference may also be made to **Smt. Kalawati Vs. State of U.P. and Others, 2011(10) ADJ 829**, para-5 where of is quoted as under:-

"Thus the third party, who is allotted the distribution, do not have any individual right but its rights are subject to the decision in appeal and therefore a fair price dealer, whose matter is pending in appeal, does not suffer in any manner."

(Emphasis Supplied)

12. It is the settled law that a subsequent allottee has not right to challenge the restoration of license as held in **Poonam Vs. State of U.P. & Others, 2016(2) SCC 779,** para 49 whereof is quoted as under:-

"In the instant case, shop No. 2 had become vacant. The appellant was allotted the shop, may be in the handicapped quota but such allotment is the resultant factor of the said shop falling vacant. The original allottee, that is, the respondent, assailed his cancellation and ultimately succeeded in appeal. We are not concerned with the fact that the appellant herein was allowed to put her stand in the appeal. She was neither a necessary nor a proper party. The appellate authority permitted her to participate but that neither changes the situation nor does it confer any legal status on her. She would have continued to hold the shop had the original allottee lost the appeal. She cannot assail the said order in a writ petition because she is not a necessary party. It is the State

or its functionaries who could have challenged the same in appeal. They have maintained sphinx like silence in that regard. Be that as it may, that would not confer any locus on the subsequent allottee to challenge the order passed in favour of the former allottee, She is a third party to the list in this context" (Emphasis Supplied)

13. The above quoted judgments of this Court clearly holds that the State authorities have a right to make alternative arrangements and that the new allotment is always subject to the decision of the appeal of the existing dealer whose license was cancelled. It is a settled law that in case the appeal is allowed, the subsequent allottee has no right to challenge the same. Therefore, there can be no restriction on the State Government to allot the fair price shop during pendency of the appeal. A reference may also be made to the paragraph-9 of the U.P. Essential Commodities Distribution Control Order 2016, which is quoted as under:-

"(9) In case of suspension or cancellation of the agreement, the Competent Authority shall make alternative arrangement for ensuring uninterrupted supply of foodgrains to the eligible households :

Provided that in case of cancellation of the arrangement of the fair price shop owner, new arrangement shall be issued within a month of cancellation."

(Emphasis Supplied)

14. Thus, Proviso to paragraph-9 clearly provides that in case of cancellation of the fair price shop, new arrangement shall be issued within a month of cancellation.

15. It is needless to say that obviously the aforesaid provision has been made so that the ration card holders may not suffer on account of cancellation or suspension of fair price shop. The picture as emerges from the above noted discussion is that the State Government is empowered to make alternative arrangement either by way of attaching the card holders of another shop or by way of making fresh allotment. However, if it is by fresh allotment, in case the appeal filed by original allottee is allowed, subsequent allottee shall have no right whatsoever to challenge the same, i.e., it shall not be open to him to challenge the restoration of license in favour of the original license holder.

16. That apart, in this case in P.I.L. No. 4839 of 2018 vide order dated 05.12.2018, the Hon'ble Division Bench has directed for enquiry within a period of six months, which is being conducted by the Senior Superintendent of Police (STF), Lucknow. Aforesaid order dated 05.12.2018 is quoted as under:-

"The Public Interest Litigation has been filed for an appropriate writ, order or direction for the respondents to conduct enquiry in accordance with Government Order dated 27.8.2018 and complete the same within a definite time frame.

From perusal of the office order dated 29.8.2018 (Annexure-4) it reveals that the entire issue with regard to misuse of Aadhar authentication in distribution of E-POS has been handed over to Special Task Force, Uttar Pradesh.

It is submitted by the learned Standing Counsel that the Special Task Force is making necessary enquiry in the matter.

Having considered the statement made at Bar and having looked into the office order dated 29.8.2018, we leave it for appropriate disposal by directing the Senior Superintendent of Police (STF), Lucknow to ensure expeditious enquiry/investigation in the matter and to arrive at a logical consequence. The entire enquiry should be completed as far as possible within a period of six months from today.

The writ petition stands disposed of."

17. This Court was further informed that when the enquiry was not completed pursuant to the above quoted order, a P.I.L. No.1404 of 2019, *Naresh Kumar Agarwal Vs. State of U.P. & Others* was filed, wherein order dated 18.10.2019 was passed, which is quoted as under:-

"Pursuant to an order dated 5.12.2018 passed in Public Interest Litigation No. 4839 of 2018 (The Sahkari Sasta Galla Vikreta Union, Tehsil Sardhana, Meerut v. State of U.P. & others) an enquiry has been instituted but it has not been taken to its logical end. The present PIL has been filed with the grievance that in spite of the order of the Division Bench dated 5.12.2018 no further progress has been made in the said enquiry.

On 16.9.2019 learned counsel for the State was granted time to seek instructions regarding progress of the enquiry. Sri A.K. Goyal, learned Addl. Chief Standing Counsel has received the instructions from S.T.F. Headquarter, Lucknow. We have perused the same and it is taken on record.

In the aforementioned instructions it is recorded that in respect of the food scam 458 cases have been registered and the matter has been transferred from Inspector General, S.T.F., who was earlier appointed as Nodal Officer, to the Inspector General, Cyber Crime.

List this case after six months before the appropriate Bench. By the next date, learned Addl. Chief Standing Counsel shall file progress report of the next six months.

Sri P.K. Srivastava, learned Advocate has filed his memo of appearance on behalf of Union of India. It is also taken on record."

18. For the discussion made hereinabove, I do not find any merit in the claim of the petition. Moreover, in view of the facts as highlighted by learned Standing Counsel that the E-POS machine scam is State wide and is spread over in as many as 44 districts of the State and is being investigated by the I.G., Cyber Crime, I am not further inclined to exercise powers of this Court under Article 226 of the Constitution of India.

19. At this stage, learned counsel for the petitioner submitted that interim protection was granted to the petitioner in vide order dated 16.11.2019 passed in Writ C No.37214 of 2019, M/s Sarfaraj Vs. State of U.P. and 2 Others by pointing out that till next date of listing no further allotment shall be done by the competent authority.

20. In the facts and circumstances of the case as discussed above, I am not inclined to follow the aforesaid interim order particularly in view of the law settled by the Full Bench as well as Hon'ble Division Bench of this Court by which rights were finally decided. Moreover, this petition itself is being decided finally after full length hearing.

21. The petition is devoid of merit and is, accordingly, dismissed.

(2020)1ILR 2004

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ-C No. 38530 of 2019

M/s J.H.V. Sugar Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shakti Swarup Nigam, Sri Alok Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Ravindra Singh

A. Allotment of sugarcane area - U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 - Section 12 - Estimates of requirements - Sections 15 - Declaration of reserved area and assigned area - Section 15(4) - an appeal before the State Government against the order of the Cane Commissioner passed under Section 15(1) - petitioner failed to submit its estimate of requirement of the quantity of sugarcane to the cane commissioner needed for the crushing - Cane Commissioner committed no error or illegality in not reserving/assigning any area for the supply of sugarcane - petitioner has an alternative remedy of filing an appeal to the State Government against the order of the Cane Commissioner reserving/assigning any area for the purposes of supply of sugarcane to a sugar mills. (Para 10, 30 & 39)

Writ Petition dismissed. (E-7)

List of cases cited: -

1. Simbholi Sugars Ltd. Vs. State of U.P. and others 2010(3) ADJ 628 (LB)

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Vipin Chandra Dixit, J.)

1. The petitioner J.H.V. Sugar Ltd. is a company incorporated and registered under the Companies Act, 1956 and is running a sugar mill at Gadaura, Tehsil Nichlaul, District Maharajganj.

2. The aforesaid sugar mill since 1999 has been allotted sugarcane area for the supply of the sugarcane for each crushing season. It has a crushing capacity of 4500 TCD.

3. The aforesaid sugar mill has been allotted sugarcane area for each of the crushing season from 2000-01 till 2014-15. In 2015-16 no allotment was made in its favour due to labour problem. Thereafter, sugarcane area was again allotted to it in the year 2016-17 and 2017-18. In the crushing season 2018-19 again the said mill had not functioned and as such no allotment was made.

4. In the present writ petition the petitioner has raised dispute regarding allotment of sugarcane area for the crushing season 2019-20.

5. It has filed the writ petition seeking a direction upon the respondent No.2 i.e. the Cane Commissioner, U.P. Lucknow to allot sugarcane area to its aforesaid mill for the year 2019-20 as per its crushing capacity.

6. Sri Shakti Swarup Nigam, Senior Counsel assisted by Sri Alok Kumar Srivastava, who appears for the petitioner has raised two points in support of the relief claimed in the petition.

7. The first is that the aforesaid sugar mill had been allotted sugarcane area in all the previous years from 2000-01 but for exception of two years and that there is no justification on part of the respondent No.2 to omit it from the allotment for the crushing season 2019-20. The said sugar mill has been singled out inasmuch as all other sugar mills in the State of U.P. have been allotted suitable appropriate areas.

8. Secondly, he submits that the respondent No.2 has acted in an arbitrary manner rather in a discriminatory manner in the allotment of the sugarcane area to the sugar mills. The mills that have defaulted in the payment of cane dues, have been allotted sugarcane areas whereas the petitioner's sugar mill has been left out probably on account of default in the payment of the cane dues. The outstanding dues of the sugarcane can be paid by the defaulting sugar mills in the next area in accordance with the government order dated 02.11.2017.

9. The petition has been opposed by the State of U.P. by filing counter affidavit for two reasons that the petitioner is a defaulter and that it had also failed to submit the statement of the quantity of the sugarcane required by it to the Cane Commissioner for the crushing season 2019-20.

10. Sri Ravindra Singh, learned counsel appearing for the respondents No. 6 to 12 has also opposed the writ petition on similar grounds by filing a separate counter affidavit. He further contends that the petitioner has an alternative remedy of filing an appeal to the State Government against the order of the Cane Commissioner reserving/assigning any area for the purposes of supply of sugarcane to a sugar mills.

11. The petitioner has filed rejoinder affidavits to the above counter affidavits contending that the appeal does not lie in the present case as there is no order of reservation/assignment of any area for the supply of the cane to the aforesaid sugar mill. The provision of appeal would only apply when there is such an order and a person is aggrieved by it.

12. It is further submitted that there was no occasion for the petitioner sugar mill to submit any statement as no notice as contemplated by Section 12 of the Act was given and reserved upon the petitioner.

13. In order to consider the aforesaid rival claims of the parties it would be relevant to mention that the supply and purchase of sugarcane for the use in sugar factories/mills is controlled and governed by the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953.(hereinafter referred to as the Act). Under the scheme of the said Act the Cane Commissioner is required to reserve/assign area to every sugar mill for the purposes of supply of cane for the crushing seasons and that the cane growers of that area have to supply sugarcane to the sugar mills through the Cane Growers Cooperative Societies.

14. Chapter III of the aforesaid Act deals with the supply and purchase of the sugarcane. Sections 12 and 15 of the aforesaid Act are relevant for our purpose which are being reproduced herein-below:-

*"12. **Estimates of requirements**. - (1) The Cane Commissioner, may for purposes of Section 15, by order, require the occupier of any factory to furnish in the manner and by the date specified in the*

order to the Cane Commissioner an estimate of the quantity of cane which will be required by the factory during such crushing seasons or crushing seasons as may be specified in the order.

(2) The Cane Commissioner shall examine every such estimate and shall publish the same with such modifications, if, any, as he may make.

(3) An estimate under sub-section (2) may be revised by an authority to be prescribed.

15. ***Declaration of reserved area and assigned area.*** *- (1) Without prejudice to any order made under Clause (d) of sub-section (2) of Section 16 the Cane Commissioner may, after consulting the Factory and Cane-growers' Co-operative Society in the manner to be prescribed:*

(a) reserve any area (hereinafter called the reserved area); and

(b) assign any area (hereinafter called an assigned area),

for the purposes of the supply of cane to a factory in accordance with the provisions of Section 16 during one or more crushing seasons as may be specified and may likewise at any time cancel such order or alter the boundaries of an area so reserved or assigned.

(2) Where any area has been declared as reserved area for a factory, the occupier of such factory shall, if so directed by the Cane Commissioner, purchase all the cane grown in that area, which is offered for sale to the factory.

(3) Where any area has been declared as assigned area for a factory, the occupier of such factory shall purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner.

(4) An appeal shall lie to the State Government against the order of the Cane Commissioner passed under sub-section (1)."

15. Section 12 of the Act obliges every sugar mill to furnish by specified date the estimate of the quantity of the sugarcane required by it during the crushing seasons on the asking of the Cane Commissioner.

16. The Cane Commissioner after necessary examination of the estimates finalise it and publishes it whereupon the areas are assigned to the sugar mills under Section 15 of the Act.

17. According to the Section 15 of the Act where any area is reserved or assigned to any sugar mill the said mill is required to purchase all the sugarcane grown in that area and i.e. offered for sale to it.

18. There is no dispute to the fact that the Cane Commissioner for the crushing season 2019-20 after requiring all the sugar mills to submit their estimates of the quantity of the sugarcane required had passed an order of reservation/assignment of the sugarcane areas to each of the sugar mill except for the petitioner sugar mill. Accordingly, the petitioner sugar mill has been left out from the allotment of the sugarcane area for the crushing season 2019-20.

19. The petitioner submits that the Cane Commissioner had not required it to furnish any statement as no notice in this regard was served upon it.

20. The respondents have brought on record the copy of the office order dated 13.08.2019 issued by the Cane Commissioner U.P. under Section 12(1) of

the Act requiring all the sugar mills to supply their estimates of quantity for the crushing season 2019-20.

21. It is stated the aforesaid order was sent to each of the sugar mills through email and all of them submitted their estimates except the petitioner. The Cane Commissioner after examining the estimates of each one of them finalised the areas. No area could be reserved or assigned to the petitioner as it failed to submit any estimate.

22. Sri Nigam, has made an effort to submit that no such email was received by the petitioner sugar mill and that a notice for the supply of the estimates was issued to some of the sugar mills otherwise than by email but the petitioner was left out.

23. There is no specific mode provided under the Act or the Rules in which an order would be served upon the occupiers of the sugar mill to furnish their estimates of the quantity of sugarcane required for the crushing seasons.

24. In the absence of any specific mode of service of the order contemplated under Section 12 of the Act, the service of the same by email cannot be held to be illegal. It is one of the fastest mode of service in the present days which is acquiring all round acceptability.

25. The respondents in the counter affidavit have clearly stated that the aforesaid order requiring estimate from the sugar mills was sent through email to all the sugar mills requiring them to submit their estimates in the required form by 20th August, 2019.

26. All the sugar mills submitted their estimates except the petitioner.

27. The mere denial of the service of such an email by the petitioner does not inspire confidence when similar emails were duly served upon the other sugar mills.

28. The petitioner had not run the sugar mill in the last crushing season 2018-19.

29. It was therefore, but natural to presume that the petitioner was still not ready to run it until and unless there was any specific information that it contemplates to run the mill in the present crushing seasons.

30. In view of the aforesaid facts and circumstances, as the petitioner failed to submit its estimate of requirement of the quantity of sugarcane needed for the crushing season 2019-20, the Cane Commissioner committed no error or illegality in not reserving/assigning any area for the supply of sugarcane to it.

31. This apart the other reason which has come on record for not allotting any area to the petitioner sugar mill is non-clearance of the sugarcane dues of the past years.

32. In this regard Rule 22 of the Rules framed under the Act is relevant which provides that in reserving or assigning the area to any sugar mill or determining the quantity of cane to be purchased by any mill, the cane Commissioner shall take into consideration apart from the other things, the arrangements made by the factory in previous years for the payment of not only cess and commission but also the cane price.

33. The relevant part of the aforesaid Rule reads as under:-

"In reserving an area for or assigning an area to a factory or determining the quantity of cane to be purchased from an area by a factory, under Section 15, the Cane Commissioner may take into consideration-

(a) the distance of the area from the factory,

(b) facilities for transport of cane from the area,

(c) the quantity of cane supplied from the area to the factory in previous year,

(d) previous reservation and assignment orders,

(e) the quantity of cane to be crushed in facotry,

(f) the arrangements made by the factory in previous years for payment of cess, cane price and commission,

(g) the views of the Cane-growers' Co-operative Society of the area,

(h) efforts made by the factory in developing in reserved or assigned area."

34. In view of the aforesaid Rule the arrangement made by the petitioner for the payment of cane price in the past years is a material and relevant consideration for the allotment of sugarcane area to it.

35. Learned counsel for the petitioner does not dispute that the petitioner had not cleared the complete dues of the cane price of the last year or of some previous years.

36. In **Simbholi Sugars Ltd. Vs. State of U.P. and others 2010(3) ADJ 628 (LB)** it has been observed that it shall be obligatory on part of the Cane Commissioner and the government not to allot or reserve or assign any new purchase centre and also to continue with the old one of any sugar mills against the whom cane price are outstanding.

37. The argument that the petitioner has been discriminated as some of the defaulting sugar mills have been allotted sugar canes areas is of no substance. First, the petitioner cannot claim equality with any illegality. Secondly, petitioner is not aggrieved by the allotment of area to such other sugar mills and has not put any challenge to any such illegal allotment.

38. The petitioner is not entitle to any benefit of the government order dated 02.11.2017 inasmuch as it relates only to the clearance of the dues of the last crushing season.

39. In addition to the above, Section 15(4) of the Act clearly provides that an appeal shall lie to the State Government against the order of the Cane Commissioner passed under Sub-Section (1) of Section 15 of the Act.

40. Sub-Section (1) of Section 15 of the Act pertains to the order of the Cane Commissioner reserving any area/assigning any area for the purpose of supply of cane to a factory during a particular crushing season. Non-reservation of an area for any reason amounts to implied refusal of allotment to the sugar mill and as such the order of allotment of sugarcane area to other sugar mills leaving aside the petitioner sugar mill is an order which would fall in the same category and would be appealable under Section 15(4) of the Act but the petitioner chose not avail the said remedy.

41. In view of the totality of the facts and circumstances of the case, we do not feel incline or deem it necessary to exercise our discretionary jurisdiction in the matter.

42. The writ petition is accordingly **dismissed** with no order as to costs.

(2020)1ILR 2009

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 39799 of 2019

Ashutosh Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri H.R. Mishra, Sri Krishna Mohan Mishra

Counsel for the Respondents:
C.S.C.

A. U.P. Cooperative Societies Act, 1965- section 65- Reserve Bank of India- cancelled the license of bank-and directed the Registrar of Cooperative Societies to wind up the bank and appoint a liquidator-Registrar have power to suo moto initiate inquiry or upon the application of 1/3 of the total members of the society-Inquiry not bad.

Held, A careful reading of Section 65 of the Act provides that Registrar may, of his own accord, himself or by a person authorised by him by order in writing, hold an inquiry into the constitution, working and financial condition of a co-operative society. Thus, Sub-Section (1) of Section 65 is crystal clear as far as the powers of Registrar are concerned for suo moto initiating inquiry by himself or by a person authorised by him, as in the present case the Assistant Commissioner/Assistant Registrar, who has been delegated powers of the Registrar, proceeded to initiate inquiry under Section 65 of the Act. (Para 12)

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Hari Om Gupta Vs. State of U.P. and others- Writ Petition No. 37566 of 2019

2. Vishnu Kumar Jha Vs. Reserve Bank of India and others, Public Interest Litigation (PIL) No. 48181 of 2017

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri H.R. Misra, learned Senior Counsel assisted by Sri K.M. Misra, learned counsel for the petitioner and learned Standing Counsel for the respondent nos. 1 to 5.

2. This writ petition has been filed assailing the order dated 29.08.2018 passed by the respondent no. 5 directing inquiry under Section 65 of the U.P. Cooperative Societies Act, 1965 (hereinafter referred to as the "Act').

3. Facts, in brief, as narrated in the writ petition, are that there is one Brahmawarta Commercial Cooperative Bank Limited (hereinafter referred to as the "bank') having its Head Office at 90, M.I.G. Ratan Lal Nagar, Kanpur Nagar. The aforesaid bank has been registered under the provisions of the Act and was granted banking license by the Reserve Bank of India under the provisions of Banking Regulations Act, 1949. The bank in question is a Primary Urban Cooperative Bank having been insured under the provisions of the Deposit Insurance Corporation Act, 1961.

4. According to the petitioner there are forty thousand individuals as members of the bank. By order dated 26.06.2018, relying upon the inspection report dated 31.03.2014, the Reserve Bank of India cancelled the license of the bank in question. On 26.06.2018, the Executive Director of the Reserve Bank of India by exercising powers under Section 22 read with Section 56 of the Banking

Regulations Act, required the Registrar of Cooperative Societies U.P. to wind up the affairs of the bank in terms of Section 90-B (II) of the Act read with Section 13-D of the Deposit Insurance and Credit Guarantee Corporation Act, 1961 and further appoint a Liquidator.

5. Simultaneously, the General Manager of the Reserve Bank of India referring to the letter of the Executive Director on 28.06.2018 directed the respondent no. 2 to appoint Official Liquidator in the bank under Section 90-B (II) of the Act. Against the orders of the Executive Director of the Reserve Bank of India, the bank preferred statutory appeal before the Central Government under Section 22 (5) of the Banking Regulations Act. On 03.07.2018 the respondent no. 3 directed the respondent no. 4 to ensure immediate action in regard to appointment of Official Liquidator in the bank in question. Pursuant thereto one Rakesh Kumar, A.D.C.O. Kanpur Nagar, was appointed as the Official Liquidator of the bank. It appears that the Official Liquidator, so appointed, proceeded to issue an office memorandum dated 10.07.2018, which was challenged before this Court in Writ Petition No. 17873 of 2018. On 27.09.2018. A co-ordinate Bench of this Court quashed the order dated 10.07.2018 passed by the Official Liquidator and held that the employees would be deemed to be continuing in service without any break with all consequential benefits. Thereafter, the respondent no. 2 on 17.10.2018 appointed one Raj Kumar Mishra, Regional Assistant Commissioner/Assistant Registrar, Cooperative, U.P. Kanpur Region, Kanpur as Official Liquidator.

6. It was after the appointment of Sri Mishra that the respondent no. 5 by the order impugned dated 29.08.2018 had directed for inquiry under the provisions of Section 65 of the Act constituting a three member committee.

7. Sri H.R. Misra, learned Senior Counsel, appearing on behalf of the petitioner, submitted that the inquiry contemplated under Section 65 of the Act can be held only on application of a society or upon an application signed by not less than 1/3 of the total members of the society, or majority of the members of the Committee of Management of the society, as in the present case the bank is under liquidation and no application has been moved signed by1/3 of the total members of the society nor majority of members of the Committee of Management have come up for such inquiry, as such, the order passed by the respondent no. 5 initiating the inquiry is against the provisions of Sub-Section 2 of Section 65 of the Act.

8. He further contended that the Assistant Commissioner/Assistant Registrar, Cooperative Societies, Kanpur Region, Kanpur is admittedly the Official Liquidator, then in such a view of the matter the order dated 29.08.2018 is wholly illegal and without jurisdiction and no inquiry can be initiated under Section 65 of the Act. Apart from these two contentions no other point was pressed by learned counsel for the petitioner. He further placed reliance upon a decision of co-ordinate Bench of this Court passed in Writ Petition No. 37566 of 2019 (Hari Om Gupta Vs. State of U.P. and others) where a solitary member of the society had filed petition for direction for initiating inquiry and this Court declined to interfere in the said case.

9. *Per contra*, learned Standing Counsel submitted that there is no bar under the Act that the Registrar cannot *suo moto* himself initiate the inquiry under Section 65 of the Act and also in a case

where a society is under liquidation. He further placed before the Court a decision of a coordinate Bench of this Court passed in Public Interest Litigation (PIL) No. 48181 of 2017 (Vishnu Kumar Jha Vs. Reserve Bank of India and others) in which similar prayer was made for inquiry against the bank in question, and the Court declined to entertain the petition and directed that the petitioner may approach the Registrar, Cooperative Societies, for holding an inquiry in respect of the financial irregularities. The said order dated 13.10.2017 is extracted here as under;

"The only prayer made in the writ petition reads thus:

"I. Issue a writ, order or direction in the nature of Mandamus commanding the respondent no. 1 to set up an investigating sleuth and conduct through and proper enquiry of financial embezzlement and corruption, being done by the respondent no. 5, in the garb of alleged ban imposed by the respondent no. 1- Brahmwart Commercial Cooperative Bank Ltd. having its registered Office at Ratan Lal Nagar, Kanpur Nagar."

We are not inclined to entertain this writ petition for such a prayer since there are several remedies available under the provisions of the U.P. Cooperative Societies Act, 1965 for redressal of his grievance including under Section 65. Under this provision, it is always open to the petitioner to approach the Registrar, Cooperative Societies, for holding an inquiry in respect of financial irregularities. Keeping that remedy open, the petition is disposed of."

10. We have heard learned counsel for the parties and perused the material on record.

11. Before proceeding to appreciate the respective arguments it would be appropriate to have a glance of Section 65 of the Act, which is reproduced below;

"65. Inquiry by Registrar. *- (1) The Registrar may, of his own accord, himself or by a person authorised by him by order in writing, hold an inquiry into the constitution, working and financial condition of a co-operative society.*

(2) An inquiry of the nature referred to in sub-section (1) shall be held by the Registrar or by a person authorised by him in writing in this behalf on the application of-

(a) a co-operative society to which the society concerned is affiliated;

(b) not less than one-third of the total members of the society;

(c) a majority of the members of the committee of management of the society.

(3) The Registrar, or the person authorised by him under sub-section (1) shall for the purposes of any inquiry under this section, have the following powers, namely -

(a) he shall, at all times, have access to the books, accounts, documents, securities, cash and other properties belonging to or in the custody of the society and may summon any person in possession of, or responsible for the custody of any such books, accounts, documents, securities, cash or other properties, to produce the same at any place at the headquarters of the society or any branch thereof;

(b) he may summon any person who, he has reason to believe has knowledge of any affairs of the society to appear before him at any place at the headquarters of the society or any branch thereof and may examine such person on oath;

(c) he may, notwithstanding any rule or bye-law specifying the period of notice for a general meeting of the society required the officers of the society to call a general meeting at such time and place at the headquarters of the society or any branch thereof and to determine such matters as may be directed by him and where the officers of the society refuse or fail to call such a meeting he shall have power to call it himself; and

(d) he may in the manner and for the purpose mentioned in clause (c) requires to be called of himself call a meeting of the committee of management.

(4) Any meeting called under clause (c) or clause (d) of sub-section (3) shall have the powers of the general meeting or meeting of the committee of management, as the case may be, under the bye-laws of the society and its proceeding shall be regulated by such bye-laws.

(5) When an inquiry is made under this section, the Registrar shall communicate the result of the inquiry to the society and, in the case of inquiry on an application under clause (a) of sub-section (2), also to the applicant co-operative society."

12. A careful reading of Section 65 of the Act provides that Registrar may, of his own accord, himself or by a person authorised by him by order in writing, hold an inquiry into the constitution, working and financial condition of a co-operative society. Thus, Sub-Section (1) of Section 65 is crystal clear as far as the powers of Registrar are concerned for *suo moto* initiating inquiry by himself or by a person authorised by him, as in the present case the Assistant Commissioner/Assistant Registrar, who has been delegated powers of the Registrar, proceeded to initiate inquiry under Section 65 of the Act.

13. Sub-Section (2) of Section 65 of the Act deals with a situation where any society which is affiliated to the society in question approaches with an application to the Registrar or where 1/3 of the total members of the society or majority of the members of the Committee of Management approach the Registrar for initiating inquiry, then the Registrar may initiate inquiry as provided under Sub-Section (1) of Section 65 of the Act. Thus, from the conjoint reading of the Sub-Sections 1 and 2 of Section 65, it is clear that both sub-sections operate independently and Registrar under Sub-Section 1 has ample power to either himself order for an inquiry or by any person authorised by him order holding an inquiry into the constitution, working and financial condition of cooperative society. Thus, there is no bar that only on application by a society or 1/3 of the total members of the society or majority of members of Committee of Management inquiry can be initiated into the constitution, working or financial condition of a society.

14. Rather, Sub-Section 2 has been provided under Section 65 of the Act so as to safeguard in those cases where Registrar or his subordinate failed to exercise the powers, so conferred on them, then on an application by the society or 1/3 members of the society or majority of members of the Committee of Management an inquiry can be held under Section 65.

15. The argument raised by Sri Misra, learned Senior Counsel, cannot be accepted to the extent that only on an application of 1/3 members of the society or majority of the members of the Committee of Management, Registrar can exercise power of inquiry under Section 65

of the Act. The Act in noway bridles the powers of Registrar *suo moto* exercising power of inquiry into the constitution, working and financial condition of a cooperative society.

16. The second argument of the learned Senior Counsel in regard to the bank in liquidation and the Assistant Commissioner/Assistant Registrar holding the charge of Official Liquidator, hence, Registrar cannot order for inquiry is also not founded on any cogent reasons, as the respondent no. 5, in the present case, had constituted a three member committee for holding inquiry under Section 65 of the Act. Further, Section 72 of the Act contemplates winding up of a cooperative society if the Registrar after an inquiry as has been held under Section 65 or upon inspection made under Section 66, or on receipt of an application made by not less than 3/4 members of the cooperative society is of the opinion that the society ought to be wind up may pass an order for winding up, meaning thereby that the conditions precedent to the winding up are that either an inquiry has been held under Section 65 or an inspection has been made under Section 66 or an application has been made by not less than 3/4 of the members of the society that society be wound up.

17. As we have seen that the license of the bank in question was cancelled by the order of the Reserve Bank of India and further on its directions the Registrar had appointed Official Liquidator for winding up, thus, the order passed by the respondent no. 5 directing for inquiry under Section 65 of the Act cannot be faulted on either of the grounds, as the Reserve Bank of India had already formed the opinion that the functioning of the bank was not proper and after the Reserve Bank of India was satisfied not to allow bank to carry on banking business any further as it would be detrimental to the interest of its present and future depositors, cancelled the license, which was granted to it.

18. It is very strange to note that the petitioner before this Court is Secretary/General Manager of the bank, which is under liquidation, who is resisting the inquiry under Section 65 of the Act, as the Reserve Bank of India had taken this drastic step to save the money of the depositors, which in the wisdom of the Reserve Bank of India not much has been left to pay its present and future depositors put a safeguard by cancelling the license, thus, the inquiry directed by the respondent no. 5 cannot be faulted.

19. From the perusal of the writ petition, we find that petitioner has failed to disclose any reason as to why he is opposing the inquiry, so initiated, under Section 65 of the Act, as he is the Secretary/General Manager of the bank and the inquiry, so conducted, would only bring to surface the irregularities committed in working and financial condition of the society by the persons concerned, who could be brought to justice.

20. We fail to understand why this petition on behest of the petitioner has been filed to stall the inquiry, so initiated, by respondent no. 5 in a bank which is under liquidation, as the same would be beneficial to the depositors and their money lying in the bank.

21. In view of the above, we are not inclined to interfere with the order

impugned and writ petition is dismissed, accordingly.

(2020)1ILR 2014

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-C No. 41899 of 2019

Harish Chand & Ors. ...Petitioners
Versus
Commissioner Varanasi Division, District Varanasi & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kalp Nath, Sri Vivekanand

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Yadav, Sri Rajendra Prasad Yadav

A. Uttar Pradesh Revenue Code, 2006 - Section 66 – Inquiry into irregular allotment of abadi sites - U.P. Consolidation of Holdings Act. - Section 49 – Bar to civil courts jurisdiction - Grounds for cancellation of allotment - petitioner is in possession over the land, which was subject matter of the allotment as his Naad, Charan and Khunta etc. exists, thereon - land in dispute - recorded as naveen parti – Neither any title nor any such claim raised by petitioner during consolidation operation - Any claim of title is now clearly barred by Section 49 of the U.P. Consolidation of Holdings Act - the land in occupation of an unauthorized occupation is vacant for the purposes of an allotment by the Gaon Sabha. (Para 3, 11 & 12)

It is a house existing on the date of vesting, which is settled that the occupier along with the land appurtenant thereto - The extent of the term "land appurtenant" used in the U.P. Zamindari Abolition and Land Reforms Act has been clearly spelt out by the Apex Court in the decision of Maharaj Singh Vs. State of U.P. and others, 1977 SCR (1)1072, as an area of 5 yards , surrounding a building - held - no relevant pleadings in the application for cancellation of the lease. Neither, the distance of land subject matter of, allotment from the house of the petitioner was spelt out therein. (Para 8 & 9)

Held: - The revisional Court has rightly dismissed the revision of the petitioner holding that he is not an aggrieved person and therefore, not competent to maintain the application for cancellation. (Para 13)

Writ Petition dismissed. (E-7)

List of cases cited: -

1. Maharaj Singh Vs. State of U.P. and others, 1977 SCR (1)1072

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard learned counsel for the petitioners, Shri Manoj Kumar Yadav for the Gaon Sabha and Shri Rajendra Prasad Yadav for the caveator respondent nos.3 and 4 as also learned Standing counsel for the State-respondents.

2. The petition arises out of proceedings under Section 66 of the U.P. Revenue Code, 2006 for cancellation of allotment of an abadi site made in favour of the respondent nos.3 and 4.

3. The proceedings were initiated and the allotment was sought to be cancelled on the ground that the petitioner is in possession over the land, which was subject matter of the allotment as his Naad, Charan and Khunta etc. exists, thereon.

4. The Upper Collector (Finance & Revenue), Jaunpur vide order dated

15.10.2018 dismissed the application finding that the land in question of plot no.520 having total area of 0.010 hectare was recorded as naveen parti and that 0.081 hectares of this land was vacant, on this plot. Consequently 0.010 hectare each, had been allotted to the respondents. It was also found that the allotment was made in accordance with law. It was additionally recorded that earlier proceedings for cancellation of the same allotment had already been dismissed vide order dated 19.09.2018.

5. The order aforesaid dated 15.10.2018 has been affirmed by the Commissioner, vide order dated 26.09.2019.

6. The contention of counsel for the petitioner assailing the impugned orders is that the house of the petitioner has been in existence for a very long time. The land appurtenant thereto is being used as a sahan and therefore, the petitioner had installed Naad, Charan and Khunta etc. The land therefore, was not vacant and could not have been subject matter of any allotment.

7. In the context of the argument raised, I have carefully examined the application filed by the petitioner for cancellation of the allotment. In this application, nothing of consequence has been pleaded.

8. It is not the case of the petitioner that his house has been existing on the spot from before the date of vesting. It is only a house existing on the date of vesting, which is settled that the occupier along with the land appurtenant thereto. The extent of the term "land appurtenant" used in the U.P. Zamindari Abolition and Land Reforms Act has been clearly spelt out by the Apex Court in the decision of ***Maharaj Singh Vs. State of U.P. and others, 1977 SCR (1)1072***, as an area of 5 years , surrounding a building.

9. In the context of the law referred to above, this Court is constrained to hold that no relevant pleadings were incorporated in the application for cancellation of the lease. Neither, the distance of land subject matter of, allotment from the house of the petitioner was spelt out therein.

10. It is now sought to be contended that the relevant details shall be brought on record by means of a supplementary affidavit and for this purpose, counsel has prayed for time.

11. However, in my considered opinion, the petitioner is not liable to be granted time to bring on record new facts which were never pleaded before the Courts below as the same would amount to carving out a new case. After, the two Courts below have rejected the application for cancellation of the allotments. Even otherwise, it is settled law that the land in occupation of an unauthorized occupation is vacant for the purposes of an allotment by the Gaon Sabha.

12. Admittedly, the land in dispute is recorded as naveen parti and therefore, the petitioner is not claiming any title to the same. Nor was any such claim raised during consolidation operations when the land in question came to be recorded as naveen parti. Any claim of title is now clearly barred by Section 49 of the U.P. Consolidation of Holdings Act.

13. In view of the foregoing discussion and since the revisional Court

has rightly dismissed the revision of the petitioner holding that he is not an aggrieved person and therefore, not competent to maintain the application for cancellation, which finding this Court is in complete agreement with, this writ petition without merit and is dismissed.

(2020)1ILR 2016

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2020

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 45595 of 2008

Mahesh Kumar Juneja & Anr. ...Petitioners
Versus
Additional Commissioner (Judicial), Muradabad Division, Muradabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri K. Ajit, Sri Arvind Srivastava III, Sri Prateek Kumar

Counsel for the Respondents:
C.S.C., Sri D.V. Jaiswal, Sri G.C. Pant, Sri Harsh Vikram

A. Land Revenue Act, 1901 - Section 34 - Mutation proceedings u/s 34 are summary in nature- do not decide title or rights - Writ Petition not maintainable against summary proceedings.

Writ Petition dismissed. (E-9)

List of cases cited: -

1. Jaipal Vs. Board of Revenue, U.P., Allahabad & Ors.AIR 1957 All 205

2. Sri Lal Bachan Vs. Board of Revenue,U.P., Lucknow & Ors.,2002 (1) AWC 169

3. Bindeshwari Vs. Board of Revenue & Ors.,2002 (1) AWC 498

4. Buddh Pal Singh Vs. State of U.P. & Ors, 2012 (5) ADJ 266

5. Bhimabai Mahadeo Kambekar Vs. Arthur Import and Export Company & Ors, (2019) 3 SCC 191

6. Sawarni Vs. Inder Kaur, (1996) 6 SCC 223

7. Balwant Singh Vs. Daulat Singh, (1997) 7 SCC 137

8. Narawamma Vs. State of Karnataka, (2009) 5 SCC 591

9. Faqruddin Vs. Tajuddin, (2008) 8 SCC 12

10.Narain Prasad Aggarwal Vs. State of Madhya Pradesh, (2007) 11 SCC 736

11. Union of India and othersVs. Vasavi Cooperative Housing Society Limited & Ors., (2014) 2 SCC 269

12.Harish Chandra Vs. Union of India &Ors., 2019 (5) ADJ 212 (DB)

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

1. Heard Sri Prateek Kumar, advocate holding brief of Sri Arvind Srivastava-III, learned counsel for the petitioners and Sri D.V. Jaiswal alongwith Sri G.C. Pant, learned counsel appearing for respondent nos.3 and 4.

2. The present petition has been filed seeking to assail the order dated 28.01.2008 passed by the Sub-Divisional Officer, Milak, Rampur/respondent no.2 and also the order dated 25.07.2008 passed by the Additional Commissioner (Judicial), Moradabad Division, Moradabad/respondent no.1 in proceedings arising out of Section 34 of the U.P. Land Revenue Act, 19011.

3. In terms of the order dated 28.01.2008 passed by respondent no.2 the

appeal filed by respondent no.4 was allowed and the matter was remitted back to the court below leaving it open to the parties to raise their contentions on merits of the case.

4. The revisional court has specifically recorded a finding that the mutation court had erred in rejecting the objections filed by the respondents without due consideration thereof and in view of the same the order passed in the appeal remitting the matter for consideration afresh did not suffer from any error. It has also been recorded that the order passed in the appeal being simply an order of remand for a fresh decision on merits after consideration of the maintainability of the objections leaving it open to the parties to place all contentions on the merits of the case there was no occasion for the revisional court to interfere in the matter.

5. Counsel for the petitioners has not been able to point out any material error or irregularity in the orders passed by the courts below so as warrant interference.

6. This apart the counsel for the petitioners has also not been able to give any satisfactory response to the preliminary objection raised by the counsel for the respondents that the proceedings under Section 34 of the Act, 1901 are summary in nature and ordinarily a writ petition against such orders is not entertained.

7. The question of the maintainability of a writ petition against orders passed in mutation proceedings has come up before this Court earlier and it has consistently been held that normally the High Court in exercise of its discretionary jurisdiction does not entertain writ petitions against such orders which arise out of summary proceedings.

8. In the case of **Jaipal Vs. Board of Revenue, U.P., Allahabad & Ors.**2 notice was taken of the consistent practice of this Court not to interfere with the orders made by the Board of Revenue in cases in which the only question at issue was whether the name of the petitioner should be entered in the record of rights. The observations made in the judgment in this regard are as follows:-

"3. ...It has however been the consistent practice of this Court not to interfere with orders made by the Board of Revenue in cases in which the only question at issue is whether the name of the petitioner should be entered in the record of rights.

That record is primarily maintained for revenue purposes and an entry therein has reference only to possession. Such an entry does not ordinarily confer upon the person in whose favour it is made any title to the property in question…"

9. The question with regard to the maintainability of a writ petition arising out of mutation proceedings fell for consideration in the case of **Sri Lal Bachan Vs. Board of Revenue, U.P., Lucknow & Ors.**3 and it was held that the High Court does not entertain a writ petition under Article 226 of the Constitution of India for the reason that mutation proceedings are only summarily drawn on the basis of possession and the parties have a right to get the title adjudicated by regular suit. The observations made in the judgment are extracted below:-

"17. This Court has consistently taken the view as is apparent from the

decisions of this Court referred above that writ petition challenging the orders passed in mutation proceedings are not to be entertained. To my mind, apart from there being remedy of getting the title adjudicated in regular suit, there is one more reason for not entertaining such writ petition. The orders passed under Section 34 of the Act are only based on possession which do not determine the title of the parties. Even if this Court entertains the writ petition and decides the writ petition on merits, the orders passed in mutation proceedings will remain orders in summary proceedings and the orders passed in the proceedings will not finally determine the title of the parties.

18. In view of the above discussions, it is clear that although the writ petition arising out of the mutation proceedings cannot be held to be non-maintainable but this Court does not entertain the writ petition under Article 226 of the Constitution due to reason that parties have right to get the title adjudicated by regular suit and the orders passed in mutation proceedings are summary in nature."

10. A similar view was reiterated in the case of **Bindeshwari Vs. Board of Revenue & Ors.**4, wherein it was stated as follows:-

"11. ...The present writ petition arising out of the summary proceeding of mutation under Section 34 of U.P. Land Revenue Act, cannot be entertained under Article 226 of the Constitution of India. The mutation proceedings do not adjudicate the rights of the parties and orders passed in the mutation are always subject to adjudication by the competent court."

11. Taking note of the nature and scope of mutation proceedings which are summary in nature and also the fact that orders in such proceedings are passed on the basis of possession of the parties and no substantive rights are decided, this Court in **Buddh Pal Singh Vs. State of U.P. & Ors.**5, restated the principle that ordinarily a writ petition in respect of orders passed in mutation proceedings is not maintainable. It was observed as follows:-

"6. The law is well-settled that:

(i) mutation proceedings are summary in nature wherein title of the parties over the land involved is not decided;

(ii) mutation order or revenue entries are only for the fiscal purposes to enable the State to collect revenue from the person recorded;

(iii) they neither extinguish nor create title;

(iv) the order of mutation does not in any way effect the title of the parties over the land in dispute; and

(v) such orders or entries are not documents of title and are subject to decision of the competent court.

7. It is equally settled that the orders for mutation are passed on the basis of the possession of the parties and since no substantive rights of the parties are decided in mutation proceedings, ordinarily a writ petition is not maintainable in respect of orders passed in mutation proceedings unless found to be totally without jurisdiction or contrary to the title already decided by the competent court. The parties are always free to get their rights in respect of the disputed land adjudicated by competent court."

12. The proposition that mutation entries in revenue records do not create or extinguish title over land nor such entries

have any presumptive value on title has been restated in a recent judgment in the case of **Bhimabai Mahadeo Kambekar Vs. Arthur Import and Export Company & Ors.**6 placing reliance upon earlier judgments in the case of **Sawarni Vs. Inder Kaur7, Balwant Singh Vs. Daulat Singh8** and **Narawamma Vs. State of Karnataka**9. The observations made in the judgment are as follows:-

"6. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor it has any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. (See Sawarni v. Inder Kaur, Balwant Singh v. Daulat Singh and Narasamma v. State of Karnataka)."

13. Reference may also be had to the judgment in **Faqruddin Vs. Tajuddin**10, wherein it was held that the revenue authorities cannot decide questions of title and that mutation takes place only for certain purposes. The observations made by the Supreme Court in the said order are as follows:-

"45. Revenue authorities of the State are concerned with revenue. Mutation takes place only for certain purposes. The statutory rules must be held to be operating in a limited sense... It is well-settled that an entry in the revenue records is not a document of title. Revenue authorities cannot decide a question of title."

14. A similar observation was made in **Narain Prasad Aggarwal Vs. State of Madhya Pradesh**11, wherein it was held as follows:-

"19. Record-of-right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable…"

15. In **Union of India and others Vs. Vasavi Cooperative Housing Society Limited & Ors.**12, the same legal position has again been stated in the following terms:-

"21. This Court in several judgments has held that the revenue records do not confer title. In Corpn. of the City of Bangalore v. M. Papaiah [(1989) 3 SCC 612] this Court held that: (SCC p. 615, para 5)

"5. ...It is firmly established that the revenue records are not documents of title, and the question of interpretation of a document not being a document of title is not a question of law."

In Guru Amarjit Singh v. Rattan Chand [(1993) 4 SCC 349] this Court has held that: (SCC p. 352, para 2)

"2. ...that entries in the Jamabandi are not proof of title."

In State of H.P. v. Keshav Ram [(1996) 11 SCC 257] this Court held that: (SCC p. 259, para 5)

"5. ...an entry in the revenue papers by no stretch of imagination can form the basis for declaration of title in favour of the plaintiffs."

16. The settled legal position that entries in revenue records do not confer any title has been considered and discussed in a recent judgment of this Court in **Harish Chandra Vs. Union of India & Ors.**13.

17. In view of the foregoing discussion, it may be restated that ordinarily orders passed by mutation courts are not to be interfered in writ jurisdiction as they are in summary proceedings, and as such subject to a regular suit.

18. The mutation proceedings being of a summary nature drawn on the basis of possession do not decide any question of title and the orders passed in such proceedings do not come in the way of a person in getting his rights adjudicated in a regular suit. In view thereof this Court has consistently held that such petitions are not to be entertained in exercise of powers under Article 226 of the Constitution of India.

19. The writ petition thus fails and is accordingly dismissed.
